

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

In Re:

RECORD HILL WIND, LLC)	
Roxbury, Oxford County)	
RECORD HILL WIND PROJECT)	APPELLANTS' POSITION
L-24441-24-A-N (approval)	ON THE RECORD ON APPEAL
L-24441-TF-B-N (approval))	OF THE RECORD HILL WIND PROJECT

Appellants respond hereby to the October 21, 2009 Objections of Record Hill Wind, LLC (the "Licensee") to Appellant's proposed supplemental evidence, as permitted by the November 25, 2009 letter of the Board of Environmental Protection ("BEP") Chair Susan Lessard, and also correct the record as to what exhibits were previously submitted to the Department of Environmental Protection (the "DEP") in the permitting process. Appellants further submit for inclusion in the appeal record newly discovered evidence of correspondence between Dora Mills, M.D., Director of the Maine Center for Disease Control ("MCDC"), and the Department of Environmental Protection ("DEP"), suggesting that the review input from MCDC in the Record Hill permitting process was tainted with a political agenda rather than being from an objective evaluation for the protection of public health.

I. The Status of the Record on Appeal.

Based on the November 25, 2009 letter from BEP Chair Lessard, together with the Licensee's October 21, 2009 Objections, Appellants understand that Exhibits A through H, J and N submitted by Appellants on September 21, 2009 as part of the Record Relied Upon for the Appeal are considered by the BEP to be part of the appeal record without objection.

Exhibit I is the Affidavit of Michael Nissenbaum, M.D. with Exhibits. Appellants wish

to clarify that Exhibit I is intended, in part, to be the summary of Dr. Nissenbaum's testimony at the proposed public hearing. This was the intent of Exhibit L ("*Summary of Testimony of Richard A. Nissenbaum (see I supra)*") in the Record Relied Upon for the Appeal when the Affidavit was cross referenced. Appellants also request that the BEP consider the substance of Dr. Nissenbaum's Affidavit for purposes of deciding whether to have a public hearing. In accordance with the restrictions in Chair Lessard's November 25, 2009 letter, no further argument will be made about the Affidavit or its exhibits, with two exceptions. One, Exhibit B to the Nissenbaum Affidavit ("*Mars Hill Wind Turbine Project Health Effects- Preliminary Findings*") was in fact submitted as part of the licensing administrative record by Steve Thurston in an e-mail to Beth Callahan dated May 11, 2009, attached hereto as *Exhibit 1*, under the heading "References" (#2). The Thurston e-mail explained that this and other documents should be made part of the record as an "emerging phenomenon" with "the evidence ... clearly accumulating in support of Dr. Pierpont's and others' observations of a clear clinical pattern of ill effects caused by large wind turbines." The other exception relates to Exhibit D to Dr. Nissenbaum's Affidavit, the Maine Medical Association Resolution, which will be addressed in Part V below.

Appellants further understand that Exhibits K-7, K-8, K-12, K-14 and K-15 all are considered part of the appeal record. As previously noted, Appellants ask the BEP to take official notice of Exhibit K-1, WHO's 2007 "Night Noise Guidelines".

K-3 (George W. Kamperman & Richard James, "Simple Guidelines for Siting Wind Turbine to Prevent Health Risks, NOISE-CON, Dearborn, Michigan, July 28-31, 2008) should be added to this list because it too was submitted into the record by Steve Thurston to the DEP on

May 11, 2009. See *Exhibit 1*, Reference 9.

The remainder of the K Exhibits are intended to be for the convenience of the parties and the BEP as references made in filings that are part of the record and possible references in testimony at the requested public hearing.

II. Response to Licensee's Objections dated October 21, 2009

Given the limitations of BEP Chair Lessard's letter of November 25, Appellants will limit their response to the Licensee's October 21, 2009 Objections to one point. (The Maine Medical Association Resolution will be addressed separately in Part V below.)

That point concerns the Stetson Wind Project Operations Compliance Sound Level Study (the "Stetson Report"), which the Licensee claims (see October 21, 2009 Objection at 12, N.4) is part of the administrative record. The Stetson Report is attached as Exhibit G to the Licensee's Objection and cited by the Licensee at 7-8 for the proposition that it "refutes" Appellants' "theoretical concerns regarding the [sound] modeling". Appellants became aware of the Stetson Report, or at least that there was such a Report, in mid-July, 2009. See e-mail of Steve Thurston dated July 30, 2009, to Warren Brown, with a cc. to Beth Callahan dated July 30, 2009 at pg. 4, attached hereto as *Exhibit 2*. The e-mail states: "It would be best if this study was not relied upon by the DEP for its decision on RHW if it has been submitted as evidence by the applicant. *If so, we request an opportunity to review the complete study and have any questions about it answered.*" [Emphasis added.] Mr. Thurston never heard anything more about the Study, even though other reports and documents were regularly sent to him by the DEP because of his status as an interested party. Appellants question whether it is in fact part of the record because it was never identified as such in several inspections by Appellants in Augusta of the record. Nor was it

referred to in the Draft Order or the Final Order. After seeing a reference to the Stetson Report in the Licensee's Objection and the claim that it was "submitted to the Department on August 10, 2009", see Objection at 7, counsel inquired with the DEP about a cover letter for the Report and was told there was none. In these circumstances, as a matter of fairness, the DEP should clarify for sure whether (a) the Stetson Report is part of the record in these proceedings and (b) if so, it was relied upon by the DEP in issuing the Final Order. If the answer to either is "yes," then Appellants submit as *Exhibit 3* hereto the Amended Proposed Testimony of Richard James, which addresses in Part 5 the invalidity of the Licensee's claims about the Stetson Report.

III. The Licensee's Proposed Exhibits H-L

The Licensee acknowledges that the Maine Medical Association Resolution on wind power dated September 12, 2009, attached as Exhibit D to the Nissenbaum Affidavit (Appellant's Exhibit I), is evidence that came into being after the DEP Final Order and makes no argument about the Resolution in terms of the timeliness of its submittal. However, the Licensee does argue that it is not relevant to the appeal and seeks to buttress its arguments on relevance by submitting Exhibits H-J. The obvious relevance of the MMA Resolution goes to the issue of the need for a public hearing and the BEP should accept this Resolution for that purpose. It is inappropriate for the Licensee to try to persuade the BEP that somehow the Resolution was not voted upon with a full understanding of its meaning or importance by the General Assembly of the MMA, which is how Appellants interpret the purpose of the Licensee's Exhibits H-J. Therefore, the BEP should exclude the Licensee's exhibits. If the BEP disagrees, then the e-mail from Dr. Albert Aniel to Steve Thurston attached to the undersigned letter to the BEP dated November 3, 2009 should also be admitted.

IV. The August 27, 2009 Letter from Northern Trust Company on the Licensee's Financial Capacity.

Appellants understand that the their November 3, 2009 Petition for a Temporary Restraining Order on the Issue of Financial Capacity and the exhibits attached thereto will be made part of the appeal record and the issues raised in the Petition will be considered as part of the appeal. *See*, Appellants' Withdrawal of its Request for a Stay dated December 3, 2009. Under these circumstances, no further argument is made on the Northern Trust letter, except to point out that the Licensee has to this date not identified *any* commitment by *anyone* to build this project, even when directly challenged to do so at the hearing before the BEP on December 3 and that the Licensee's postponement of further construction because of the poor economics of the project cast still more doubt on anyone's willingness to commit in the future.

V. Request to Supplement the Record with Evidence Concerning the Maine Center for Disease Control.

Finally, Appellants request the BEP to accept as supplemental evidence correspondence between Dr. Dora Mills, Director of the MCDC, and the DEP on the subject of the health risks of wind turbine noise attached hereto as Exhibit 4. This request is justified for the following reasons:

Both the DEP's Final Order at 10 (*Exhibit A* to Appellants' Record Relied Upon) and the DEP's Draft Order at 10 (*Exhibit B* to Appellants' Record Relied Upon) approving the Record Hill Project heavily rely upon a review of noise issues by the MCDC to discount the Appellants' concern about the health effects from noise to be generated by the Project. However, the Appellants were unable to find any document in the record in these proceedings that states the MCDC's position on these noise issues. In an effort to find out what the MCDC's input was to

the DEP in the permitting process, Appellants made a request for documents to the DEP under the Freedom of Access Act, 1 M.R.S.A. §401 (“FOAA”) on September 30, 2009. Over 6 weeks later, on November 18, 2009, Appellants’ counsel was notified that 2 boxes of materials were available for review and inspection in Augusta and it was not until December 2 that counsel actually received copies of the documents. These documents, attached hereto as *Exhibit 4*, contain a series of e-mails between Dr. Dora Mills, Director of the MCDC, and various employees of DEP concerning the health effects of noise.

Appellants request that the record be supplemented to include these e-mails under Chapter 2, Section 24.B.5 of the DEP’s Procedural Rules. These Rules require Appellants to make three showings: (1) the person seeking to supplement the record has shown due diligence in bringing the evidence to the attention of the Department; (2) the evidence is newly discovered; and (3) the evidence is relevant and material.

The first two showings are easily met because the proposed supplemental exhibit came into the possession of the Appellants just days ago and therefore Appellants plainly have been diligent. In addition, the DEP already knew about the evidence before this request because the documents came from the files of the DEP. This evidence is newly discovered because it was not part of the record of the proceedings and it took over two months to retrieve the documents in question.

The MCDC documents are clearly material and relevant to these proceedings. The Final Order appealed from heavily relied upon the review by the MCDC of Appellants’ health concerns about the Record Hill Project in dismissing those concerns. Final Order at 10. The MCDC documents proffered by Appellants demonstrate that this reliance was unwarranted and

worse yet, suggest that the review of the Record Hill Project by the MCDC was politicized, giving still further and compelling reasons for the BEP to hold a public hearing in this appeal.

The e-mail trail begins February 10, 2009, after MCDC Director Dora Mills, M.D. received a telephone call and an e-mail from a Dr. Albert Aniel of Rumford, Maine forwarding an open letter from the medical staff of the Rumford Hospital Medical staff, together with links to articles, asking Dr. Mills for support for a moratorium on new permits for wind turbine projects until further research could be done on possible health effects of wind turbines. FOAA #1 and #12. (The attached e-mails are numbered FOAA #s 1- 60.)

Dr. Mills had three immediate responses to this communication. One was to admit that she was not familiar with the issue (“this is a new topic to me”, FOAA # 5 and #8), second she took an advocacy position against the health concerns (from the outset she was looking for help “to refute the claims made by the Rumford medical staff”, FOAA # 5 and #8) and three, she looked to DEP Commissioner David Littell and others at DEP involved in the reviewing request for wind turbine projects (Andrew Fisk, Mike Mullen, James Cassida) for assistance in refuting the health concerns of Dr. Aniel. FOAA # 11, # 15 (“[a]ttached is a vetted and edited version of your talking points on wind noise”), #s 16-30, #31, and #35-6. At the same time Dr. Mills sought to advocate *against* consideration of the public health concerns from wind turbine noise, she was concerned about the adequacy of DEP’s noise regulations to address the specific issue of wind turbine noise. FOAA #s 5-6 and # 38. In addition, Dr. Mills’ initial research revealed “two very recent articles from Canada proposing some ways to address unique features of wind turbine in measuring or setting standards for noise levels.” FOAA Response #s 7-8. One of the Canadian articles she forwarded to Commissioner Littell identified low frequency noise (“LFN”) concerns

(the same concerns that Appellants have raised in this appeal) including the statement that “[r]esidents who are impacted by LFN may suffer from sleep disturbances, headaches, and in some cases chronic fatigue.” FOAA Response # 7. Dr. Mills did not send these articles to Dr. Aniel (instead she sent him older articles questioning health issues from wind turbines FOAA Response #s 1-4), nor did she reference the very recent Canadian articles in a Q & A she began constructing for dealing with the press. FOAA #s 16-30.

As Dr. Mills frantically (“I started working on this very early (2 am) today, and have also been busy doing other things” FOAA # 11, #s 31-2) continued her research, she concluded that “[t]here are no firm statements I could find from non-industry sources stating there are no adverse health effects from wind turbines....” FOAA #s 11, 31. [Emphasis added]. She tells Commissioner Littell that she will not disclose this finding to the public, but warns the Commissioner that:

[T]here may be room for improving the noise regulations to take into account wind farms. The last time these rules were updated appear to be 1989.¹ Massachusetts has rules that take into account the change over ambient noise levels rather than a level cap [as used in the existing DEP Rules]. And, there are some proposals from Canada that take into account low frequency noise emissions.

FOAA # 11, 31. This warning was also not disclosed in the Q & A that Dr. Mills was developing. Instead she had her Q & A “vetted” and “edited” (FOAA # 15) by Commissioner Littell and others at DEP involved in reviewing wind projects as an advocacy statement against consideration of health effects, giving links to dated articles on the subject supporting her advocacy position, including an outdated reference to the 1999 WHO “Guidelines for

Community Noise” (suggesting nighttime noise limits of 45 dBA), apparently unaware that in 2007 WHO replaced these with “Night Noise Guidelines” of 30 dBA sleep time limits for children and 32 dBA sleep time limits for adults, below what is currently set by the dated DEP noise regulations. See Appellants’ Exhibit K.1.

And there is more in these emails. They recount that Dr. Aniel took his public health concerns about the need for a moratorium on new wind projects to the Maine Medical Association for support. FOAA # 40-1. In the context of this development, Dr. Mills asked Commissioner Littell for help on February 25, 2009 in refuting this effort because she was having

a hard time addressing the DEP regulations on noise levels, essentially being 45 dbl (sic.) at the property line in rural areas, and the fact that these regulations did not protect residents in Mars Hill who are perceived by some to be living too close from an annoyance perspective from the wind farm there.

FOAA # 40. In the very next e-mail , Dr. Mills anxiously asks Andrew Fisk for updates on “how the DEP is addressing noise issues” because “[t]his issue seems to be gaining traction.” FOAA #40.

The e-mail trail further reveals that Dr. Mills talked at length with Dr. Peter Rabinowitz, Associate Professor of Medicine at the Yale School of Medicine and Director of Clinical Services in Occupational and Environmental Medicine at Yale, who told Dr. Mills that “*the increasing expressed concerns about noise and health effects related to wind turbines, especially as they relate to low frequency noise, needs to be addressed with some non-biased research.*”

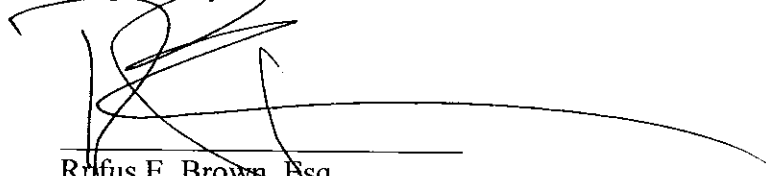
1 Actually, these regulations (06-096 CMR, Chapter 375) were promulgated in November 1979 and

FOAA #48. [Emphasis added.] Near the end of the e-mail trail there is a joint letter from Dr. Nissenbaum and Dr. Aniel to Dr. Mills (doctor to doctor) with an impassioned plea for the MCDC to take the health issues of wind power noise seriously, especially in light of the suffering of residents of Mars Hill, which Dr. Mills passes on to Commissioner Littell with a note that she will respond but give the Commissioner input in the response. FOAA #s 53-54. (The response was not included in the response to Appellants' FOAA request).

In summary the newly discovered, candid accounts of how the MCDC and the DEP worked together to advocate against an open and fair discussion of important public health issues involved by wind power siting is highly relevant and compelling evidence for the need for a public hearing on the noise issue as requested by Appellants.

Dated: December 10, 2009

Respectfully submitted.



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