

**MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

DOCKET NO. BEP-09-467

**FRIENDS OF LINCOLN LAKES)
et al.)**

**) PETITION FOR REVIEW OF FINAL
) AGENCY ACTION UNDER
) 35-A M.R.S.A. § 3451(4), 5 M.R.S.A.
) §§ 11001, 11002, Me. R. Civ. P. 80(C)
)**

v.)

**BOARD OF)
ENVIRONMENTAL)
PROTECTION)
)**

On Appeal from the Maine Board of Environmental Protection

APPELLANT'S BRIEF

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Upon recommendations of the Governor's Task Force on Wind Energy, the legislature passed an Expedited Wind Power Ordinance in 2008. 35-A M.R.S.A. §§3451-3457. The goal of this statute is to expedite the permitting of wind power projects in certain areas of the state. The statute also directs that any appeal of a final agency action regarding an expedited wind project must bypass the Superior Court and be filed directly with the Law Court. 38 MRSA §346(2-A). The statute also takes away the authority of the Board of Environmental Protection to assume jurisdiction over expedited wind power applications. 38 MRSA §344 (2)(A-1).

On October, 30, 2008, Evergreen Wind Power LLC (Applicant) filed an Application with the Maine Department of Environmental Protection (Department), under the Site Location of Development Law (Site Law), 38 M.R.S.A. §§ 481-490, and the Natural Resources Protection Act (NRPA), 38 M.R.S.A. § 480A-HH (Application) seeking to construct the Rollins Wind Power Project (Project), in the towns of Lincoln, Winn, Lee, Burlington and Mattawamkeag, Maine. The Project would be a 60-megawatt (MW) wind energy generation facility, including 40 turbines in 2 clusters, related access roads, turbine pads, four permanent meteorological towers, a 42,200 square foot electrical substation, and extensive collector and transmission lines. Rec. at 45. The Project is considered to be an expedited wind project under 35-A M.R.S.A. §§3451 et seq.

On December 9, 2008, the Friends of Lincoln Lakes (Friends), through their attorney, submitted a letter to Cynthia Bertocci, staff for the Board, requesting the Board to assume jurisdiction of the Project. Rec. at 97. Ms. Bertocci responded to this request on December 10, 2008, noting that the Board was no longer able to assume jurisdiction of

expedited wind projects. Rec. at 101.

Following submission of the Application, members of the Friends of Lincoln Lakes (Friends), as well as other Interested Parties, requested that the Department hold a public hearing on the Project. Rec. at 55, 57-59, 60, 62-66, 68, 70, 73-76, 79-90, 92-93, 98-99, 103-106. In a letter dated January 9, 2009, the Department declined to hold a public hearing on the Project, although the Commissioner did agree to hold a public meeting. The Department held a public meeting about the project on February 11, 2009. Rec. at 167-172.

On April 7, 2009, the Department issued a Draft Order on the Application. Rec. at 299. The Department approved the Application in an Order (Dept. Order) dated April 21, 2009. App. at 3.

The Appellants filed an appeal of the Dept. Order to the Board, on May 21, 2009. App. at 4. A hearing to consider the appeal was held by the Board on August 6, 2009, and the Board reached a final decision on that date, affirming the Order approving the Application and denying Appellants' request for a public hearing. App. at 1.

Appellants filed an appeal with the Law Court, under 38 MRSA §346, on May 21, 2009. App. at 2.

STATEMENT OF ISSUES FOR REVIEW

1. Is the finding of the Board of Environmental Protection that the Applicant, Evergreen Wind Power LLC, met the noise standards pursuant to the Site Location of Development Rules, Chapter 375 §10 supported by substantial evidence in the record?

2. Is the finding of the Board of Environmental Protection that the Applicant, Evergreen Wind Power LLC, demonstrated that the project will minimize impacts to significant wildlife habitat supported by substantial evidence in the whole record?

3. Is Title 38 MRSA §346 (2-A), the statute that mandates that all appeals of expedited wind project permitting must be filed directly with the Law Court, constitutional?

4. Is Title 38 MRSA §344 (2)(A-1), the statute stripping the Board of Environmental Protection of its right to assume original jurisdiction of expedited wind project permitting, constitutional?

SUMMARY OF ARGUMENT AND STANDARDS OF REVIEW

I. **THE FINDING OF THE BOARD OF ENVIRONMENTAL PROTECTION THAT THE APPLICANT, EVERGREEN WIND POWER LLC, MET THE NOISE STANDARDS PURSUANT TO THE SITE LOCATION OF DEVELOPMENT RULES, CHAPTER 375 §10 IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.**

Applicant's sound and noise studies are flawed, given that there was scientific evidence presented that the models used by Applicant's sound experts are not appropriate models to use when assessing the sound produced by industrial-sized wind turbines. Doubts about the reliability of the models used was even expressed by the Department's own peer reviewer. Likewise, the Department failed to consider the health impacts of turbine noise.

Given the flawed nature of the sound and noise studies, the Board should have overturned the Department's Order issuing the permit to Applicant and scheduled public hearings at which time expert testimony could have been presented by the Applicant as well as by Friends, giving the Board a reliable scientific basis upon which to make a

decision.

II. THE FINDINGS OF THE BOARD OF ENVIRONMENTAL PROTECTION THAT THE APPLICANT, EVERGREEN WIND POWER LLC, DEMONSTRATED THAT THE PROJECT WILL MINIMIZE IMPACTS TO SIGNIFICANT WILDLIFE HABITAT IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE IN THE WHOLE RECORD.

It is a documented fact that there is at least one eagle's nest in the vicinity of the project. Yet, the Dept. Order only required the Applicant to use some "rapidly evolving" methodology to assess post-construction mortality of raptors. By the time such assessments are done, the project may have already harmed not only the eagles and eaglets nesting in the area, but numerous other migratory birds and bats. The Board should have demanded that the Dept. Order be amended to require valid pre-construction wildlife studies and the development of a habitat plan.

III. STANDARD OF REVIEW

Given that this is a Rule 80(C) appeal in which the Maine Supreme Judicial Court, sitting as the Law Court, has original appellate jurisdiction, it is assumed that the standard of review in this case is the same as it would be in any other Rule 80(C) appeal. The court, therefore, must review the decision of the Board of Environmental Protection directly for an abuse of discretion, error of law, or findings not supported by the evidence. *York Ins. of Me., Inc. v. Superintendent of Ins.*, 2004 ME 45, ¶ 13, 845 A.2d 1155, 1159. "An administrative decision will be sustained if, on the basis of the entire record before it, the agency could have fairly and reasonably found the facts as it did." *Seider v. Bd. of Exam'rs of Psychologists*, 2000 ME 206, ¶ 9, 762 A.2d 551, 555 (citing *CWCO, Inc. v. Superintendent of Ins.*, 1997 ME 226, ¶ 6, 703 A.2d 1258, 1261). Judicial review is limited to "determining whether the agency's conclusions are unreasonable,

unjust or unlawful in light of the record.” *Imagineering, Inc. v. Superintendent of Ins.*, 593 A.2d 1050, 1053 (Me. 1991). “Inconsistent evidence will not render an agency decision unsupported.” *Seider* 2000 ME 206, ¶ 9, 762 A.2d at 555. The burden of proof rests with the party seeking to overturn the agency's decision, and that party must prove that no competent evidence supports the Board's decision. See *Bischoff v. Bd. of Trs.*, 661 A.2d 167, 170 (Me. 1995).

IV. TITLE 38 MRSA §346 (2-A), MANDATING THAT ALL APPEALS OF EXPEDITED WIND PROJECT PERMITTING MUST BE FILED DIRECTLY WITH THE LAW COURT, IS UNCONSTITUTIONAL.

V. TITLE 38 MRSA §344 (2)(A-1), STRIPPING THE BOARD OF ENVIRONMENTAL PROTECTION OF ITS RIGHT TO ASSUME ORIGINAL JURISDICTION OF EXPEDITED WIND PROJECT PERMITTING, IS UNCONSTITUTIONAL.

The legislature has created two categories of power project appellants, since appeals of all energy projects, other than expedited wind projects, are afforded a court of intermediate appeal, the superior court, prior to their ultimate appeal to the Supreme Judicial Court. Likewise, wind power appellants are denied the right to have the Board of Environmental Protection assume jurisdiction over the permitting of an expedited wind energy project. The legislature has thereby chosen to disadvantage expedited wind power appellants, by treating them differently than appellants of other power projects. This court must determine if the bifurcated system of appeal is arbitrary, unreasonable or irrational, or whether the dissimilar treatment is rationally related to the objectives of the statute.

VI. STANDARD OF REVIEW

After a de novo review, an administrative decision can be reversed or modified “if the administrative findings, inferences, conclusions or decisions are: (1) In violation of

constitutional or statutory provisions;” 5 M.R.S.A. §11007.

ARGUMENT

I. THE FINDING OF THE BOARD OF ENVIRONMENTAL PROTECTION THAT THE APPLICANT, EVERGREEN WIND POWER LLC, MET THE NOISE STANDARDS PURSUANT TO THE SITE LOCATION OF DEVELOPMENT RULES, CHAPTER 375 §10 IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

The grant of a permit in this matter was unsupported by substantial evidence in the record, regarding the compliance of the project with the Site Law, 38 M.R.S.A. §§ 481-490, and the Maine Department of Environmental Protection Rules (Rules), Chapter 375.10, Control of Noise, and the failure to comply with the noise standards in the Rules will produce actual harm to persons living in the vicinity of the turbines.

A. The Applicant Used Flawed Models to Measure Noise

The Applicant agreed to apply quiet limits of 55 dBA for daytime and 45 dBA for nighttime noise as provided for in Chapter 375 §10(H)(3)(1) of the Rules. App. at 3, p. 5. The Department’s Findings of Fact and Order (Dept. Order) accepts the accuracy of the predictions made in the Applicant’s *Sound Level Assessment* prepared by Resource Systems Engineering (RSE) of sound levels at all of the nearby protected locations (residential receiver points R1 to R5) as complying with these limitations. App. at 7, pp. 5-6, 9.

The Dept. Order explains that the RSE prediction model for sound propagation used Cadna/A (operating in ISO 9613-2). App. at 7, pp. 7-9. The problem with this prediction model is that ISO 9613-2 was not designed for wind turbines, and it was not designed for sound sources at a height of a ridgeline, such as that proposed for the Project.

These problems were acknowledged by the Department's own peer reviewer, Dr. Warren Brown, of EnRad Consulting, in an internal conference call last March on the subject of noise in wind power applications pending before the DEP. In the *Notes of March 5, 2009 DEP conference call* between Warren Brown, Dora Mills of the Maine Center for Disease Control (MCDC), and others, Warren Brown stated that he "has issues with [the] model being used. Currently it's based on industrial noise, not wind power noise, and Brown himself noted that "[w]e haven't been able to determine whether this model is accurate for wind turbines." [Emphasis added.] App. at 10, pp. 2, 4. Later in the *Notes* Brown states that RSE predicts compliance with 45 dBA nighttime noise, "but [he] still [has] questions regarding the model – [it is] based on industrial noise." He stated that "wind turbine noise needs more investigation. 1. Need to be able to produce stable atmospheric conditions....2. Set up protocol for acoustic measurements with DEP staff member on site....Question RSE's assumption, due to the model....There is a period when turbines are loud. **Not sure how to predict this yet. Need to figure out stable atmospheric conditions.**" [Emphasis added.] App. at 9, 1; App. at 10, pp. 6-7. It should be noted that the model that was used by RSE, that so concerned Mr. Brown, is the same model that was used at Mars Hill, where it has been acknowledged that complaints are coming in and **mistakes have been made.** [Emphasis added] App. at 12, pp. 1-2.

Mr. Brown's concerns are reflected in credible scientific literature and this makes his ultimate change in position not only unexplained, but also unsupported. For example, George W. Kamperman & Richard R. James, both member of the Institute of Noise Control, in their paper entitled "Simple guidelines for siting wind turbines to prevent

health risks,” NOISE-CON 2008, Dearborn, Michigan (July 28-30, 2008), state that

“the Wind Industry recommended residential wind turbine noise levels (typically 50-55dBA) are too high for the quiet nature of the rural communities and may be unsafe for the nearest residents. An additional concern is that **some of the methods for implementing pre-construction computer models may predict sound levels that are too low.** These two factors combined can lead to post-construction complaints and health risks.” [Emphasis added].

App. at 13, p. 5.

There is no evidence in the record to explain how Mr. Brown’s numerous concerns, reflected in scientific literature, were reconciled, and how he arrived at this ultimate conclusions, presented in his report, *Rollins Wind Project Sound Level Assessment – Peer Review*, dated April 6, 2009. In his final report. Mr. Brown backtracked on all of his concerns, except for recommending a required routine operation noise assessment. App. at 8. In the EnRad report, Brown opines that the Project noise assessment is essentially reasonable and technically correct, “with a possible omission involving excessive amplitude modulation and the resulting penalty for short duration repetitive sound.” He goes on to state that the model utilized “does not account for potential excessive amplitude modulations under stable atmospheric conditions, which would invoke a 5 dB penalty for short duration repetitive sounds, potentially resulting in borderline protected locations...receiving greater than predicted sound levels, even potentially in excess of 45 dBA.” App. at 8, p. 6. The Dept. Order includes such a compliance assessment methodology, referencing the EnRad recommendations. App. at 3, pp. 7-8.

However, Mr. Brown’s statement is highly suggestive that the 5 dBA penalty to

account for short-term duration repetitive sounds (SDR)¹ should have been included, rather than substituting a post-construction compliance plan. To substitute a post-construction and post-operation test for the setback requirement that would have been imposed by the application of the 5 dB penalty, limits the options for the Applicant and the Department to remedy the problem after the fact, other than granting a variance, as was done at Mars Hills, now recognized as a mistake. *See App. at 10, p. 4.* The compliance assessment plan does not address what will happen if there is non-compliance, leaving the remedy in question. Nor does the compliance assessment plan provide for notice to interested parties so that they will have an opportunity to review and, if appropriate, challenge the adequacy of the compliance testing requirements.

An adequate compliance testing methodology should require that (1) compliance testing occur for all conditions and operating modes for which complaints, whether formal or informal, have been received; (2) during such compliance testing, the Applicant should certify that the conditions being monitored represent the conditions during the complaint period; (3) during compliance measurements, weather conditions (both at the location of a microphone and the top of the ridge as represented by weather data collected at the hub or other meteorological tower with a known height) should be documented for wind speed, direction, temperature and relative humidity at a minimum in increments no longer than 5 minutes apart; (4) during compliance measurements, the operating parameters for the wind turbines nearest the measurement site should be documented in

¹ Short-term duration repetitive sounds are a “sequence of repetitive sounds which occur more than once within an hour, each clearly discernible as an event and causing an increase in the sound level of at least 6 dBA on the fast meter response above the sound level observed immediately before and after the event, each typically less than 10 seconds in duration, and which are inherent to the process or operation of the development and are foreseeable.” Chapter 375 §10(D)(19). Chapter 375 §10.(C)(1)(d) imposes a 5 dB penalty when SDR is present for purposes of measuring sound level limits.

terms of power production, rpm of the rotor, blade settings, and power generated in increments no more than 5 minutes apart; and (5) the total power production and operating status of other turbines in the project within 3 km of the test site should be provided as totals. This information is necessary in order to determine the accuracy and validity of the compliance testing. Without requiring such information and such procedures, there is no way third parties can properly determine the validity of the compliance data submitted by the Applicant.

B. The Applicant's Noise Assessment Failed to Use Line Source Calculations

In RSE's *Sound Level Assessment*, approved by the DEP Order, wind turbines were treated as "point sources," without calculations based on "line sources." App. at 3, p. 6. The *Sound Level Assessment* states:

Sound propagation in air can be compared to ripples on the surface of a pond. The ripples spread out uniformly in all directions of the pond surface decreasing in amplitude as they move further from the source. For every doubling of distance from a stationary hemispherical point source, the sound level drops by 6 dB.

App. at 7, p. 6.

"Line source" calculations measure sound propagation perpendicular to a row (line) of wind turbines, giving effect to the combined noise from the line that radiates in a cylindrical (directed) manner as opposed to a spherical (like a ripple in a pond) manner. The decay rate of a line source is 3 dB for every doubling of distance, one half of the decay rate of a point source of 6 dBA per doubling. See App. at 14, pp. 1-5.² As the notes from the March 10, 2009 conference call show, Warren Brown stated very clearly that the "noise from turbines is line source not point source." App. at 11, p. 5.

² These documents are part of the record and were created by Rick James, a sound engineer at E-Coustics, who is also the author of the above-cited paper by Kamperman and James.

Therefore, if a line source calculation had been used by RSE, it would have resulted in nighttime noise exceeding the DEP nighttime noise limits of 45 dBA, for protected locations. Yet the Dept. Order accepted, and the Board affirmed, the likelihood that the RSE *Sound Level Assessment* was seriously flawed and failed to recognize the likelihood that the nighttime noise levels in the protection locations would violate the DEP rules in Chapter 375 §10.

C. The Health Impacts of Wind Turbine Noise Were Not Considered

As the Preamble to Chapter 375 states,

“[t]he Board recognizes that the construction, operation and maintenance of developments may cause excessive noise that could *degrade the health and welfare* of nearby neighbors. It is the intent of the Board to require adequate provision for the control of excessive environmental noise from developments proposed after the effective date of this regulation. [Emphasis added]

The Applicant’s *Sound Level Assessment* failed to address the potential health effects of the Project. In part, this is explained by RSE’s use of flawed methodologies in completing their noise assessment, as discussed above. *See*, Kamperman & James (2008). App. at 13, p. 5. (Inadequate setbacks based on flawed methodologies “can lead to post-construction complaints and health risks.”) However, it likewise attributed to the refusal of the wind power sector, as well as some medical professionals, to take the issues of health effects from wind turbine noise seriously.

The Dept. Order noted that the MCDC, whose director is Dr. Dora Mills, commented “that it found **no evidence in peer-reviewed medical and public health literature of adverse health effects from the kinds of noise and vibrations associated with wind turbines other than occasional reports of annoyances.**” [Emphasis added].

App. at 3, p. 8. Either Dr. Mills did not do a thorough search, or her definition of medical literature differs from the common definition. One such study was commented on during the March 5 conference call between Dora Mills, Warren Brown and others, when Brown noted that “Dr. Pierpont....studies in US recently done. Medical research conducted (scientific study). Science behind wind turbine noise – low-freq. energy causes a rumbling....Acoustic energy can damage hearing!” Dr. Mills’ reply to these comments by the Department’s own peer reviewer was “[j]ust because you can hear it doesn’t mean it has adverse health effects!” App. at 10, pp. 1-2. Later on in the conversation, Mills states that Dr. Pierpont’s studies are “not scientific” but are rather a “group of anecdotes” and not “scientific studies.” App. at 10, p. 3. Mills does try her best to downplay any health risks associated with wind turbines, insisting that they are only annoyances, and stating that there is “[n]ot a lot of evidence of adverse health effects, even at Mars Hill, but subjective!” App. at 10, p. 3. Even after Warren Brown notes that “45 dBA will still penetrate their houses (low frequency noise) – noise can get inside and resonate...”, Mills is insistent that there is no problem with health risks. Towards the end of the conversation, she clearly indicates why she is so insistent on ignoring any possible health risks from wind turbines – there are “[l]ots of health benefits to wind turbines!” App. at 10, p. 5.

Whether or not wind power is beneficial to neighbors’ health – a dubious claim – that is not the issue that was before the Department and ultimately before the Board. The issue was whether the turbines “could degrade the health and welfare of nearby neighbors.” Chapter 375.10. As was noted above, errors in prediction of sound levels could lead to inadequate setbacks, and ultimately health risk for neighboring families.

The Dept. Order justifies giving no weight to potential health risks from the Project on two grounds. First, it relies on Warren Brown's assertion that "[i]nfrasound, sonic frequencies <20 Hz, have been widely accepted to be of no concern below the common human perception threshold of 85-90 dBG for non-pure tone sounds. There is insufficient, broadly accepted evidence to conclude otherwise." App. at 8, p. 6. Brown, however, cites no scientific evidence for this assertion. Nor does he even attempt to explain why this statement contradicts his statement of February 25, 2009, when he commented that "[the] medical component has made into the picture now. All verifiable science + undeniable medical findings that match up w/ complaints of Mars Hill!" App. at 9, p. 1. Brown goes on to note that at a recent public meeting, there was a "[m]edical presence [that] was informed and insisted upon policy change due to creditable reasons." App. at 9, p. 2. And, he then states that he considers Pierpont's study to be "valid." App. at 9, p. 2. During the March 5, 2009 conference call, Warren Brown once again states that Dr. Pierpont's study is a scientific study. App. at 10, p. 1. As noted above, this is when Dr. Mills dismissed Dr. Pierpont's study, as well as others, as being anecdotal and not scientific.

Kemperman & James, in their above-cited paper, recommend greater setbacks than Chapter 375 §10, based on the current state of scientific evidence of the health impacts of low frequency sound. App. at 13, p. 9.

Given that there is significant conflicting scientific evidence about the health impacts of industrial wind turbines, the Department should not have summarily dismissed such impacts in the Dept. Order. Likewise, the Board should have recognized this failure to consider all credible scientific evidence and should have ordered that a hearing be held

to take appropriate testimony on this serious matter. The impacts of industrial wind farms, particularly in residential zones, where this project is sited, is an ever-evolving science of assessment. It is troubling that the Board would not wish to consider all relevant evidence.

Appellants are not asking this court to determine that one set of evidence is more credible than another. Rather we are asking this court to find that the Board should have recognized the Department's failure to seriously consider the conflicting scientific evidence, should have revoked the Department's Order and should have scheduled a public hearing to consider technical and scientific testimony.

II. IMPACTS ON WILDLIFE WERE NOT RELIABLY ASSESSED

As the Department's Order states,

“[i]n order to address concerns raised by MDIFW regarding avian, bat and raptor (including eagle) mortality associated with the Rollins Wind Project, the applicant has agreed to conduct post-construction monitoring in consultation with MDIFW and the Department. The applicant submitted a draft post-construction monitoring protocol in which they outline procedures to monitor avian and bat casualties, including raptor fatalities, in order to assess the impacts of the project on these species.”

App. at 3, p. 20.

MDIFW noted that the draft protocol is based on the “rapidly evolving methods associated with post-construction assessment.”³

“Post-construction mortality studies will help address overall mortality rates and negative impacts to the target species. The study will be designed to provide information that can be used to offset potential mortality due to project operation by implementing operational strategies.”

App. at 3, p. 20.

NRPA is clear that “the application will be denied if the activity will have an unreasonable impact on protected natural resources or the subject wildlife.” Chapter

³ It is ironic that the Board accepts the “rapidly evolving” post-construction methodology, but not the equally “rapidly evolving” science of turbine impacts on human health.

335(3)(C). The Dept. Order, upheld by the Board, underplays the fact that there is a bald eagle nest within one mile of the project.⁴ NRPA states “the department considers the area of the significant wildlife habitat affected by the activity, including areas *beyond the physical boundaries of the project* and the cumulative effects of frequent minor alterations of significant wildlife habitats.” [Emphasis added] Id.

Given the fact that there is an eagle’s nest in the vicinity of the project, it is very troubling that the Applicant is only required to use some “rapidly evolving” methodology to assess post-construction mortality of raptors. By the time such assessments are done, the project may have already harmed not only the eagles and eaglets nesting in the area, but numerous other migratory birds and bats. The Board should have at least demanded that the Order be amended to require valid pre-construction wildlife studies and the development of a pre-construction habitat plan before issuing the Order.

The U.S. Fish and Wildlife Service comments recommend that turbines not be placed within 1.5 miles of a nest, and that turbines in a given area be shut down when eagles are present in that area. The Service also recommended that no blasting or construction occur within one mile of active nests during the nesting period (February 15 to August 15) unless approved in writing from the service, and that prior to construction, preferably in Spring 2009, there be immediate surveys of Caribou, Egg. Long, Mattakeunk (Silver), Bill Green, Folsom, Madagascal, and Crooked Ponds for nesting eagles. Rec. at 312. The final Department Order, however, upheld by the Board, did not

⁴ “The eagle nest that is the closest to the project area is located on Upper Pond and has been identified by MDIFW as BE468A. This nest is located approximately one mile from the proposed turbine locations on Rollins South. This nest is situated outside the project area; however, it is located within close proximity to the project. The potential exists for negative impacts to the nest occupants, in particular, for fledging eaglets.” App. at 3, pp. 19- 20.

include any of these recommendations. App. at 3.

As with the flawed noise studies, Appellants are asking that this court find that the Board failed to uphold its duty under Chapter 335(3)(C), and that this court remand this matter back to the Board for rehearing and reconsideration.

III. TITLE 38 MRSA §346 (2-A), MANDATING THAT ALL APPEALS OF EXPEDITED WIND PROJECT PERMITTING MUST BE FILED DIRECTLY WITH THE LAW COURT, IS UNCONSTITUTIONAL.

IV. TITLE 38 MRSA §344 (2)(A-1), STRIPPING THE BOARD OF ENVIRONMENTAL PROTECTION OF ITS RIGHT TO ASSUME ORIGINAL JURISDICTION OF EXPEDITED WIND PROJECT PERMITTING, IS UNCONSTITUTIONAL.

Title 38 MRSA §346 (2-A) states that “a person aggrieved by an order or decision of the board or commissioner regarding an application for an expedited wind energy development, as defined in Title 35-A, section 3451, subsection 4, may appeal to the Supreme Judicial Court sitting as the law court.” By mandating that appellants of expedited wind projects must appeal directly to the Supreme Judicial Court, the legislature has created two categories of power project appellants, since appeals of all other energy projects are afforded a court of intermediate appeal, the superior court, prior to their ultimate appeal to the Supreme Judicial Court. The legislature has thereby chosen to disadvantage expedited wind power appellants, by treating them differently than appellants of, *inter alia*, liquefied natural gas projects, hydroelectric dams, industrial solar installations and biomass plants. In fact, all DEP licensing decisions are appealed to the superior court, with the sole exception of expedited wind projects.

While neither the Maine Constitution, nor the United States Constitution, requires the state to establish a system of appellate review, once the right to such review is granted, “it cannot be granted to some litigants and capriciously or arbitrarily denied to

others without violating the Equal Protection Clause.” See *Harrington v. Harrington*, 269 A.2d 310, 314 (Me. 1970); *M.L.B. v. S.L.J.*, 519 U.S. 102, 114 (1996) (quoting *Lindsey v. Normet*, 405 U.S. 56, 77 (1972)). The Law Court has been clear that once the state establishes an appeal process in an area of law, that process “must be kept free of unreasoned discriminatory distinctions that can only impede open and equal access to the courts.” *Harrington*, 269 A.2d at 314.

In addition to eliminating a venue for intermediate appeal, the legislature removed the right of the Board of Environmental Protection (Board) to assume original jurisdiction over an application for an expedited wind project. (“The commissioner may not request the board to assume jurisdiction of an application for any permit or other approval required for an expedited wind energy development.” 38 M.R.S.A. §344 (2)(A-1)). This statute thereby relegates the Board to considering only the record as compiled by the Commissioner, rather than allowing them to assume original jurisdiction over such projects, with the ability to hold technical hearings and compile a complete record. The Board however, is free to assume jurisdiction over all other projects requiring DEP licenses.

DEP Rules Chapter 2 §7(B) note that while “[p]ublic hearings are discretionary unless otherwise provided by law,” “[w]hen the Board assumed jurisdiction over an application, it will hold a public hearing unless it votes otherwise at the time it assumes jurisdiction.” There is therefore a presumption that a public hearing *will* be held unless the Board decides otherwise, and ostensibly the Board would make findings in the record giving the reason why they chose not to hold a hearing on any given application. Title 38 M.R.S.A. §344 (2)(A-1) effectively removes this presumption and gives both the

Commissioner, and the Board, upon appeal from the Commissioner's decision, discretion to refuse a public hearing, without making any findings of fact upon which that refusal was based. Again, these administrative procedures are only applied to expedited wind applications.

In this area, Maine has established an appellate system that treats similarly situated persons differently, i.e. appellants of expedited wind projects have less appellate opportunities than anyone who is appealing any other D.E.P. licensing decision and this court must consider whether such a dual system violates the Equal Protection Clauses of the Maine Constitution and the United State Constitution. *Town of Frye Island v. State*, 2008 ME 27, ¶ 14, 940 A.2d 1065, 1069. Appellants concede that this bifurcated appellate system does not implicate a fundamental right or a suspect class. However, this alleged equal protection violation must still be subjected to the "rational basis" test, i.e., whether there is a rational relationship between the classifications challenged and the intended goal of the legislation." *School Admin. Dist. No. 1 v. Commissioner, Dep't of Educ.*, 659 A.2d 854, 857 (Me.1995); *Lambert v. Wentworth*, 423 A.2d 527, 531 (Me.1980).

Appellants also recognize that the legislature is given broad powers to pass laws and regulations for the benefit of the people of Maine and, in doing so, to treat different classes of people differently. However, this power is not absolute. The classification must not be "arbitrary, unreasonable or irrational, in other words, that the dissimilar treatment [must] be rationally related to the objectives of the statute. *Shapiro Bros. Shoe Co., Inc. v. Lewiston-Auburn Shoeworkers Protective Association*, Me., 320 A.2d 247, 255 (1974).

When passing legislation to narrow the appellate options of expedited wind power project opponents, the legislature failed to make any findings that limiting appellants options was rationally related to advancing wind power in the state. They cited no studies that would indicate that wind power companies would not develop industrial wind projects in the state without a limited and expedited appeal process. Nor did they discuss any research that would suggest that industrial wind projects are somehow different from other energy projects and thus should be treated differently. The sole comment regarding the reasoning behind limiting appellate options for opponents of expedited wind power projects appears in the *Report of the Governor's Task Force on Wind Power Development*, which suggests “[h]aving legal appeals from decisions go directly to the Law Court rather than to Superior Court to emphasize the *importance of permitting wind projects without long legal appeals.*” App. at 15, p. 2. That is the sole justification for creating a truncated appellate system for opponents of expedited wind power and treating them differently than opponents of *all other projects* licensed by the D.E.P. And even this brief, non-substantive comment was omitted from the Legislative Findings in 35-A M.R.S.A. §3402, the Maine Wind Energy Act.

Appellants recognize that “[g]enerally speaking, a legislative classification will not be violative of equal protection if facts may be reasonably conceived to justify the distinction. *McNicholas v. York Beach Village Corp.*, 394 A.2d 264, 268 (1978) citing *Union Mutual Life Insurance Company v. Emerson*, 345 A.2d 504, 507 (1975).

Appellants also recognize, however, that the presumption of validity is not absolute. See, e. g., *Buck v. Kilgore*, 298 A.2d 107, 111 (1972).

In this matter, the legislature made no pretense of even trying to articulate a rational basis for legislatively classifying appellants of expedited wind projects as not entitled to the same appellate options available to all other appellants of D.E.P. licensed projects. This court should hold that 38 MRSA §346 (2-A), eliminating the intermediate appellate court, is unconstitutional on its face and should order its repeal. Likewise, this court should hold that 38 MRSA §344 (2)(A-1), which limits the jurisdictional authority of the Board, is unconstitutional on its face and should order its repeal.

CONCLUSION

For the reasons set forth above, Appellants respectfully request that this Court:

1. Reverse the Board Order dated August 6, 2009, which affirmed the Dept. Order dated April 21, 2009; and
2. Remand the matter to the Board of Environmental Protection for original jurisdiction and proceedings consistent with this Order, including, but not limited to, an Order that the Board hold a public hearing on all issues for which there was submitted credible conflicting technical information; and
3. Hold that 38 MRSA §346 and 38 MRSA §344 (2)(A-1) are unconstitutional under the Maine and U.S. Constitutions.

Dated: November 30, 2009

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CERTIFICATE OF SERVICE

I certify that on November 30, 2009 I caused two copies of the Brief of Appellants to be served on the following counsel of record for Appellee and Real Parties In Interest by pre-paid first class mail at the following addresses:

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