STATE OF MAINE, ss

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. KEN-14-137

FOX ISLANDS WIND NEIGHBORS, et al.,

Petitioners- Appellees/Cross-Appellants

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,

Respondents-Appellants/Cross-Appellees

and

FOX ISLANDS WIND, LLC

Party-in-Interest- Appellant/Cross Appellee

BRIEF OF APPELLEES FOX ISLANDS WIND NEIGHBORS, et al.

ON APPEAL FROM THE KENNEBEC COUNTY SUPERIOR COURT

Rufus E. Brown, Esq.
Bar No. 1898
BROWN & BURKE
152 Spring Street - P.O. Box 7530
Portland, ME 04112-7530
(207) 775-0265
rbrown@brownburkelaw.com

Attorney for Appellees
Fox Islands Wind Neighbors, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Cases **Page**

Statutes **Page**

Regulations

Rules

Misc.

It is a sad spectacle for the citizens of the State of Maine (and more than that for the Fox Islands Wind Neighbors, the "Neighbors") to see the Department of Environmental Protection (the "DEP"), the state agency charged with the responsibility to protect us from environmental harm, align itself with Fox Islands Wind, LLC ("FIW") to grant a *de facto* exemption from the Noise Rule and then responding in court with claims that it has the absolute right to do so without judicial oversight. It is even worse that the Commissioner responsible for this was in a highly compromised position, having been employed as an industry lobbyist for the very same law firm asking for such special treatment weeks before she issued the Condition Compliance Order (the "CCO") at issue in this appeal.

INTRODUCTION

The FIW wind project (the "Project") was originally licensed in June 2009, Joint Appendix ("JA" [1]) 96, under a certification statute, 35-A M.R.S.A.§3456, mandating that small scale wind project like that of FIW must comply with the Noise Rule, 06-096 C.M.R. ch. 375 §10. Under this statute, the initial certification itself is not subject to judicial review, but that limitation does not extend to post- certification actions responding to non-compliance with the wind project's license and the Noise Rule. The certification statute allows either the DEP or the municipality in which the wind project is located to enforce post-certification non-compliance. In this case, the DEP retained enforcement responsibility when it licensed the FIW project. In addition, the Town of Vinalhaven, which previously repealed a more restrictive noise ordinance at the urging of FIW to adopt the Noise Rule standards, ceded jurisdiction to the DEP to do so.

[1] All citations will be to the Joint Appendix if the administrative record document is included in the Appendix. The pin cite for a JA document will be to the page of the original record. Other citations are to the DEP's version of the administrative record ("DEP AR"), the Neighbors' additions ("Pet. AR") and Petitioners' Appendix ("Pet. App.") and Supplemental Appendix (Pet. App. Supp.") in Superior Court and to FIW's additions ("FIW AR").

In the exercise of its assumed enforcement responsibility, in September 2010, the DEP's expert found, and on November 23, 2010 the DEP formally determined that the Project was operating in excess of the noise limits and it was likely that it would do so in the future whenever there is significant vertical or directional wind shear. Having made this decision, the DEP was obligated to act in good faith to require FIW to take corrective action to address these conditions. Rather than do so, the new politically appointed Acting Commissioner and former Pierce Atwood lobbyist issued the CCO that is the subject of this appeal requiring only token corrective action, limited to the exact same weather conditions giving rise to the complaint, that is, when the wind is blowing from the SSW, without an explanation and without any support in the record for not requiring corrective action for wind shear from other wind directions.

Of greater consequence, the new Acting Commissioner rejected the strong recommendation of the DEP's professional staff to adopt "Appendix A" to the CCO, backed by the DEP's expert consultant and the Attorney General's Office, that would have mandated transparency and accountability in the future operations of FIW. Instead, she granted what amounts to a *de facto* exemption to FIW from compliance with the Noise Rule by the combined effect of two protocols: First, the complaint protocol adopted in the CCO put the burden on the Neighbors to establish non-compliance backed with data and analysis that meets the technical requirements of the Noise Rule. Second, the compliance measurement protocol adopted by the CCO failed to require FIW to record and maintain the kind of compliance assessment data on a continuous basis which would permit the DEP to assess the accuracy of compliance submissions generally, and to assess the validity of a noise complaint and necessary corrective action for the future operations of the Project. This CCO, with these two protocols working in tandem, were designed to discourage, if not prevent altogether, future noise complaints by the Neighbors in

retaliation of their repeated demands that the DEP enforce the Noise Rule, in violation of their First Amendment rights, granting FIW a *de facto* exemption from the Noise Rule.

The Superior Court understandably invalidated the CCO as being arbitrary and capricious, without support in the record and an abuse of discretion and remanded the matter back to the DEP to formulate corrective action that fairly addresses the wind shear conditions found to be the cause of non-compliance and in the process of doing so explain why "Appendix A" was not adopted. Order on Rule 80C Petition (the "Rule 80C Order"), JA 38. In its appeal, both the DEP and FIW devote most of their attention to claims that the DEP actions that were struck down should be immune from judicial review, disregarding the long recognized role of the judiciary as a forum to protect against abuse and overreaching by administrative agencies.

FACTUAL BACKGROUND

The key players in the following narrative are **James Cassida**, a longstanding member of the DEP's senior professional staff, at the time director of the Division of Land Resource Regulation, and the person responsible for all wind licensing decisions of the DEP; **Warren Brown**, Radiation Safety Officer, University of Maine, acting for Enrad Consulting as an expert consultant for the DEP on all wind project licensing; and **George Baker**, on leave from Harvard Business School, the driving force for the FIW Project and President of FIW. The key documents in the narrative are the June 30, 2011 **Condition Compliance Order**, JA 89, which mandated limited corrective action through a **revised operating protocol** in response to the November 23, 2010 **Letter of Determination of Non-Compliance**, JA 126, a **compliance measurement protocol** and a **complaint response protocol** incorporated into the CCO at FIW's request on April 11, 2011, JA 129, and the May 25, 2011 "**Appendix A**," JA 250, consisting of a **substitute compliance measurement protocol** and **a substitute complaint response protocol**.

A. Issues about Excessive Noise in Connection with the Licensing of the Project.

The Project never should have been licensed in the first place, at least not without first accommodating nearby neighbors who would experience its noise. Even before the Project was built, FIW was aware of the likelihood that it would create excessive noise affecting neighbors, even absent wind shear conditions, because the initial noise assessment warned that the site of the proposed Project was located too close to residences. JA 180 at Section 5. FIW responded to the noise assessment by replacing the sound consultant that prepared it, by assuring neighbors that noise would not be an issue, *see* N. 7 at 6 *infra*, and by persuading the Town of Vinalhaven to repeal its local sound restrictions in favor of the less restrictive Noise Rule.[2] In combination with these strategies, FIW put political pressure on the DEP to rush through the application without a public hearing.[3] The Project was licensed only after FIW agreed, under protest, *see* N.6 *6, infra*, to comply with the Noise Rule's "quiet area" nighttime noise limits of 45 dBA with the promise to deploy Noise Reduction Operations ("NRO"). Pet. AR 12-13.[4]

---

[2] The Wind Ordinance in effect as of March 27, 2007, *Exhibit L* to Petitioners' Objection to Respondent Fox Islands Wind's Motion to Dismiss, dated September 21, 2011, at B.3, pg. 12 of 20, was amended on December 15, 2008, to simply incorporate the Noise Rule. Id. at *Exhibit M* at F. 3, pg.12 of 19. *See also*, Pet.AR 263.

[3] Commissioner David Littell received a call from the President of Cianbro on April 28, 2009, explaining the need to rush the licensing review process because financing has a "drop dead date" of May 15, 2009. Pet. AR 267. *Also see*, Pet. AR 270 (James Cassida does not recommend a public hearing for the licensing of the Project, which would "hamper our ability to move through this process quickly"); Pet. AR 274 (Speaker Hannah Pingree thanks Commissioner Littell for his "quick work" as the Project is "a big deal for us."); JA 189 (George Baker letter to Commissioner David Littell dated June 25, 2009 asking for special treatment in the licensing.); JA 195 (email response of Commissioner David Littell to George Baker on June 26, 2009 denying the request and explaining that the licensing application had "received very favorable treatment," having been processed "at breakneck speed" in part based on "Speaker Pingree's strong interest" in the Project and that he had previously been involved to help resolve issues with the DEP's licensing staff "to get this permit done at the Speaker's request.").

[4] Prior to agreeing to model the Project based on the "quiet area" limits, FIW claimed that it might not be able to operate with these limits. JA 189. After the Project began operations, in early March, 2010, it was discovered that FIW's sound report had misinterpreted the Noise Rule by modeling the 45 dBA sound limit at the residence of the nearest abutting neighbor (Arthur Farnham) rather than at his property line. Pet. AR 102. As a result, FIW was required to deploy additional NRO for all 3 turbines at night in order to comply with the Noise Rule, with no margin for error for wind shear conditions anticipated when the Project was licensed. Pet. ARs 104, 296, 297(George Baker email and FIW update).

From the outset, the DEP was concerned about the ability of the Project to comply with the Noise Rule based on reports that significant vertical and directional wind shear in the Gulf of Maine causes wind turbine noise to exceed predictions, using standard assessment methods, by 10-12 dBA. Pet. AR 10. *See also*, DEP AR 2 at 5 and Pet. AR 32.[5] "Wind shear" occurs when there is a significant difference in speed or direction of wind in the atmosphere over a short distance. Wind shear causes turbulence, increasing sound as the turbine blade rotates through different wind layers. *See* Pet. AR 172 at 6-7 and *also see*, Pet. AR 32 at 6. In June 2009, Warren Brown conducted a formal Peer Review of FIW's noise report, concluding that in NRO mode the Project technically predicted compliance with the 45 dBA nighttime noise limit (with no cushion), but repeated his concern about potential sound levels in excess of those modeled in conditions of "[s]ignificant vertical and directional wind shear in the Gulf of Maine." AR 2 at 5 (Section 9). To address this issue, Warren Brown, recommended that the license for the project include compliance requirements to evaluate this phenomenon. *Id.*

The DEP issued an operating license for the Project on June 5, 2009. JA 96. The license retained jurisdiction in the DEP for enforcement of the license conditions, it incorporated provisions designed to address wind shear, and it required FIW to submit compliance measurements in the first year of operation pursuant to an operational compliance measurement assessment methodology to be approved by the DEP (Condition No. 7). *Id.* at 13of 18. The license was also conditioned on the requirement that a revised operation protocol be submitted and approved "within 60 days of a determination of non-compliance by the Department" with the noise limits applicable to the Project. (Condition No. 8). *Id.* at 14 of 18. On November 30, 2009,

---

[5] Vinalhaven is particularly susceptible to vertical wind shear from wind coming across the water and hitting land and then vectoring to higher levels. Anthony Rogers, et al., *Wind Shear Over Forested Lands.* This study can be found at *http://ceere.org/rerl/publications/published/2005/ASME2005ForestShear.pdf*, Pet. App. 227.

the DEP approved the compliance measurement protocol required by Condition No. 7 of the License. JA 117.[6] The problem with this Protocol, as later discovered by the DEP after it determined that FIW was operating in excess of the noise limits during periods of significant wind shear, was that it allowed FIW to unilaterally choose the data purporting to show compliance without any means by the DEP to determine whether the data presented was accurate or was actually representative of the "worst case" conditions for generating noise.

B. Noise Complaints Following Commencement of Operations.

Almost immediately after the Project began operations at the end of October 2009, affected neighbors filed complaints with the DEP.[7] Between March 18 and May 31, 2010, Petitioners filed 20 noise complaints with the DEP. *See* DEP AR 157 and 163, Pet. ARs 102, 106-07, 111-19, 121-25, 127, 130-33, 298 and 301. In response, the DEP requested FIW to furnish sound, operational and meteorological data for the dates of the complaints. Pet. ARs 109,

---

[6] FIW states that "[n]o one attempted to appeal the Certification." FIW Brief at 4. This is not true. After the license was issued, FIW filed an appeal to the Board of Environmental Protection (the "BEP") of the license conditions, challenging the applicability of the "quiet area" noise limits and the DEP's retention of jurisdiction to enforce the license, and alternatively, filed an application with the DEP to modify the license on the same subjects. Pet. AR 21 and 278. See also, Pt. AR 18-20, 24, 30, 32, 34, 275-77 and 279- 282 (Commissioner Littell states to George Baker that FIW's proposed amendment is a "waste of time as the department is charged with protecting abutters from unreasonable noise impacts. The interpretation that you have been advocating would affect a significant relaxation of the noise standards for all projects and we simply cannot approve of that massive relaxation.") At the same time FIW attempted to use political pressure to force Commissioner Littell to relent, which was unsuccessful. *Id. See also*, Commissioner's Littell's letter of June 26, 2009 to George Baker explaining that "the DEP is charged with [the responsibility of] applying our laws and rules ... based on the best scientific understanding and evidence." JA 195. Both the appeal and the application to modify were later withdrawn. Pet. AR 83; Pet. AR 94-95.

[7] *See*, Pet. ARs 36, 37("Local residents are very concerned about the noise levels.... [W]hat they are experiencing for noise does not coincide with what they were told."); 38, 39, 41(("neighbors were led to believe by FIW we would hear no sound outside of 1000 feet"), 42, 44 at 2 (notes of James Cassida meeting with interested parties on November 12, 2009 stating that they were "[t]old that the ambient noise would drown out wind turbines."), 86, 92 (DEP meeting notes of January 12, 2010, recording that George Baker said "Abutters [were] surprised at how noticeable the turbines are"). A peer reviewed epidemiological study confirmed that residents living near FIW and Mars Hill suffer a statistically significant degree of poor sleep, worse mental health, with diagnoses of depression or anxiety, and greater new psychotropic medications attributable to exposure to noise from the Project. M. Nissenbaum, J. Aramini, & C. Hanning, "Effects of Industrial Wind Turbine Noise on Sleep and Health," 14 *Noise & Health* 237, 239-242 (2012), Pet. App. 219.

299, 302 and 303. FIW refused, claiming that it had no obligation under the November 2009 compliance protocol to monitor operations or submit data except as part of a compliance measurement protocol. Pet. AR 109, DEP AR 5 and AR 6. FIW never did produce enough data that would allow the DEP's expert to determine whether the Project was in violation of the noise limits during the dates of these complaints. Pet. ARs 116-20, 305 and 307.

At this juncture, in June 2010, the DEP, in conjunction with Warren Brown, informally circulated a complaint response protocol called "Project Compliance and Noise Complaint Protocols," amended in July and August, 2010, DEP ARs 7, 8, 15 and Pet. AR 308, over the objections of the Neighbors,[8] requiring, inter alia, citizen complaints to be submitted through an expert and to conform to the technical requirements of the Noise Rule in order to be fully credited, as well as providing for more timely responses by FIW to complaints. The DEP responded to the Neighbors' objections by explaining that it would be in their best interests to follow the protocol because otherwise the DEP would be dependent on FIW's data alone to assess compliance. JA 209. This explanation proved to be ironically prescient because, after later experiencing FIW's belligerent refusal to furnish data that would allow analysis of the conditions that create excessive noise, the DEP agreed with the Neighbors that this protocol was unfair and inappropriate. *See infra* at 40. As shall be seen, FIW's assertion on appeal that the incorporation of the 2010 complaint response protocol into the CCO now under review was simply implementing the requirements of DEP expert Warren Brown, FIW Brief at 8, is not a fair characterization of what occurred.

C. DEP's Finding of Non-Compliance and FIW's Refusal to Cooperate.

[8] On July 16, 2010, the Neighbors' counsel complained to the DEP that the complaint protocol "sets up procedures and requirements that are unfair, burdensome and contrary to the licensing requirements in the Siting Certification for FIW" by improperly shifting the burden on citizens to establish the technical validity of their complaints. AR 9 at 2. *See also*, Pet. AR 136.

On July 27, 2010, the Neighbors' sound consultant filed a complaint for the evening of July 17-18, 2010, forwarding to the DEP data collected by one of their group. AR 11-12, Pet. ARs 137 and 140. It took FIW over a month to provide some of the data to the DEP relating to this complaint. DEP ARs 13-25 and 36-8 and Pet. ARs 147-157, 160, 314- 319.

After 10 months of operations with multiple noise complaints, Warren Brown finally determined on September 8, 2010 that FIW was in fact out of compliance with the noise limits based on a complaint for the evening of July 17- 18, 2010. JA 211. The DEP and FIW describe this compliance violation as a "single instance" during a "70 minute period"[9]only when the wind was coming from the SSW. *See*, DEP Brief at 1, 6, 19, 21, 29 and FIW Brief at 1, 9, 30, 39, 44 and 46. This is not accurate. Warren Brown's findings were not limited to that one night, nor limited to wind coming from a particular direction. JA 211. *See,* further discussion about wind direction *infra* at 31-34. He found that the "July 17 & 18 complaint conditions were very similar with regard to surface wind speeds and [wind turbine] output" as the Neighbors' "complaints previously submitted for May 1, 4, 5, & 6, all of which reported sound levels between 46-48 dBA." *Id.* [10] He explained that there "*exists a significant body of consistent meteorological and sound data indicating sound levels greater than the applicable limit.*" JA 211. [Emphasis added.] The report concluded with the statement that "[s]ubstantial changes are recommended for FIW nighttime operations, limiting [wind turbine] sound levels at [protected locations] to 45 dBA." *Id.*[11]

---

[9] Sound compliance data, because of its nature, must be analyzed in small increments of time.

[10] All but one of the May complaints involved wind direction *outside* of the SSW 200°-250° that FIW claims to be the only conditions creating non-compliance. *See infra* at N. 35 at 33.

[11] In a follow up meeting between the DEP and FIW, Warren Brown explained again, as he had from the outset, that "wind turbine sounds under wind shear conditions is known to produce an exceeding amount of sound." Pet. AR 172 at 6.

FIW disputed Warren Brown's conclusions. DEP AR 28; Pet. AR 172 at 3. It then filed a compliance report with the DEP purporting to show that under the original compliance measurement protocol approved in November 2009, the Project was in compliance on dates and with data FIW unilaterally selected for analysis in July and August, 2010. JA 217 and JA 222. FIW then took the position that such submissions relieved it of the responsibility to provide compliance assessment data to the DEP even with respect to an outstanding complaint. Pet. AR 196 (meeting notes). *Also see*, FIW Brief at 9 ("FIW disagreed that it had not been in compliance because its data [in the compliance reports] showed compliance.....") The DEP did not accept FIW's position that it had no responsibility to take corrective action because of its compliance reports. Pet. AR 196. It insisted that that FIW was not in compliance and had an obligation to fix the problem. *Id.* [12]

With the issue of non-compliance still unresolved, the DEP took affirmative steps towards formal enforcement. It first confirmed that the Town of Vinalhaven had no interest in enforcing the noise limits for the Project, JA 220 and JA 226. Then it issued a formal Determination of Non-Compliance to FIW on November 23, 2010. JA 126.[13] The letter stated that the DEP's analysis of operational, sound and meteorological data from the complaint period and other data collected for the period of May 1 to August 31, 2010 indicate that "***the facility is likely to exceed the required sound compliance level of 45 dBA [at any time] when there is significant vertical and directional wind shear.***" *Id.* [Emphasis added.] In order to resolve the

---

[12] On appeal, FIW claims that it "submitted a report showing compliance" in October and November 2010 under the Compliance Protocol after collecting data in July and August 2010." FIW Brief at 6, but the DEP never accepted the report as it had already determined by the time the reports were submitted that FIW was not operating in compliance with its license. In fact the FIW was never found in compliance with its license or the Noise Rule in the time frame leading up to and including the CCO at issue in this case on June 30, 2011.

[13] The letter was reviewed and approved by then Acting Commissioner of the Department, Beth Nagusky, the Bureau Director of the DEP Land Division, the Attorney General's Office and Warren Brown. *See,* Pet. ARs 331-32.

matter, the DEP demanded that FIW submit a revised operation protocol within 60 days "that demonstrates that the development will be in compliance at all protected locations surrounding the development *at all times*...." *Id.* [Emphasis added.]

On December 3, 2010, FIW wrote to the DEP disputing the Determination of Non-Compliance. AR 47. However, to demonstrate "good faith," FIW submitted a proposal to address the issue by implementing additional NRO, modifying its nighttime operating protocol to reduce sound levels by 2 dBA at the protected location nearest the Project, but only for the precise meteorological conditions that existed during the night of the July 17-18 (winds from the SSW between 200° and 250°) and no others. *Id.* [14]

The DEP, after consulting with Warren Brown, JA 227 and JA 236, was willing to accept FIW's proposed corrective action only if linked with a calculation of a "coefficient" (the degree of difference at the intersection) of significant wind shear that would trigger NRO mode in the future *regardless* of the direction of the wind. JA 229 (email of James Cassida to George Baker dated December 22, 2010). This point was emphasized again to FIW in an email dated January 10, 2011 from James Cassida to FIW's George Baker, JA 232, which explained further the basis of the DEP's Determination of Non-Compliance:

> While a lot of our discussions focused on the complaint period where the winds were out of the south/southwest it was always and remains the DEP determination that it is the presence of vertical and directional wind shear that caused the non-compliance determination. This is why the formal letter of determination did not reference wind direction.

Id. FIW nevertheless refused to provide data requested by the DEP for Warren Brown to calculate a wind shear coefficient. Pet. ARs 215 and 225, DEP ARs 63, 64, 68, and 70 and JA

[14] FIW linked this proposal to another proposal to allow FIW to *increase* the sound levels for the Project when ground wind speeds are above 10 mph. *Id.* The DEP stated that any such proposal would have to be made in a separate application. AR 50.

239. Eventually, on March 7, 2011, in an internal email, DEP regulators concluded it was "fruitless to continue discussions with [FIW] about submitting data to us for further analysis." JA 238.[15] With this background, it is obvious that FIW's claims on appeal that the record is "replete" with its efforts to respond to DEP requests, FIW Brief at 7 and that it submitted "voluminous sound data," *id.*, are not fair characterizations of how FIW responded to data requests to resolve the non-compliance issue.

D. Events Leading to the Challenged Condition Compliance Order.

On March 9, 2011, James Cassida, with the reluctant approval of then Commissioner Brown,[16] wrote FIW to say that it had a legal obligation to give the DEP access to the requested sound compliance assessment data from the Project, regardless of FIW's earlier compliance submissions. JA 241. The letter indicated that the DEP appreciated that FIW could demonstrate compliance under *some* conditions, but it was FIW's obligation to show compliance under *all* conditions. *Id.* The letter further stated that ultimately the DEP would need to review that data to determine the adequacy of a revised operating protocol, but in the first instance the DEP was willing to allow FIW to conduct its own analysis of the data to find the specific range of vertical and directional wind shear that should trigger additional NRO so that the Project could be brought into compliance. *Id.* Commenting on a draft of this letter, Warren Brown cautioned that "it [is] worthless [for him] to review carefully selected periods that reflect a very biased conclusion." Pet. AR 230.

---

[15] According to Cassida, FIW has "clearly demonstrated a less than cooperative stance and I see nothing further to be gained at this point in trying to convince them to work with us to resolve their compliance issues." *Id.*

[16] Commissioner Brown verbally instructed Cassida not to send the letter and that he would instead talk to George Baker and FIW's attorney with the "thrust of the message." Pet. AR 231. However, after James Cassida documented these instructions for the record, Commissioner Brown relented and authorized Cassida to send the letter. *Id.*

Rather than performing the requested analysis for a NRO trigger point based on wind shear analysis, FIW scheduled another meeting with Commissioner Brown on March 24, 2011, Pet. AR 357 and DEP AR 79, at which the Commissioner purportedly gave permission to FIW to submit a corrective operating protocol addressing only the limited conditions that existed on the night of July 17-18, 2010, without calculating wind shear conditions likely to cause excessive noise in the future, and then demonstrate compliance under a new compliance measurement protocol to be submitted. FIW AR 172; DEP AR 79.

On April 11, FIW submitted a revised operation protocol application. JA 129. It included a revised operating protocol providing for additional NRO of 2 dBA, but only when the winds come from the SSW, "with slight modifications" (FIW Brief at 11) as the one submitted by FIW on December 3, 2010, DEP AR 47, and a modified compliance measurement protocol based on the original protocol adopted in November 2009 (JA 117) under which FIW had staked out a position that it was not required to furnish the DEP all data needed to assure compliance. It also proposed that the DEP formally adopt the complaint response protocol informally circulated in the Summer of 2010. *Id.*

After back and forth communications between the DEP, Warren Brown and FIW, the details of the CCO with the limited, revised operating protocol with NRO for SSW winds, as former Commissioner Brown had allowed as an accommodation to FIW, was agreed to. *See*, DEP ARs 83-5, 87-90, 92-107 and 152. It was in this context only that James Cassida expressed that "FIW had been very responsive," FIW Brief at 12, and that Warren Brown "was satisfied," FIW Brief at 11. However, the DEP considered FIW's modified compliance measurement and complaint response protocols that were part of FIW's April 11 submission to be inadequate, which gave rise to "Appendix A", DEP AR 110 (April 28, 2011), later modified on May 25,

2011, JA 250. "Appendix A," to be addressed further herein at 34-41, *infra*, set forth provisions that the DEP, working with Assistant Attorney General Amy Mills and Warren Brown, DEP AR 107 (April 27, 2011 email from James Cassida to George Baker) and Pet. ARs 344 -46, considered necessary to ensure that the future operations of the Project would be compliant with the Noise Rule. JA 245 (June 17, 2011 email from James Cassida to Patricia Aho). *See also*, JA 266 (entry for May 2, 2011).

The substitute compliance measurement protocol in "Appendix A" was intended to assure transparency and accountability in the operation of the Project with regard to noise, modeled after another small scale wind project that the DEP was working on at Pisgah Mountain. DEP ARs 88 and 91. *See,* Addendum No. 1 attached hereto. The substitute compliance measurement protocol would have required FIW to collect and maintain compliance data on a 24 hour basis and issue compliance reports with an analysis of all operational conditions that exhibit wind shear conditions, *id.*, addressing the prior refusal of FIW to provide such data and analysis. In addition, "Appendix A" included a substitute complaint response protocol allowing noise complaints to be filed by any means, without technical data, putting the burden squarely on FIW to maintain public reporting on the status of the complaints. *Id.* In addition, it detailed requirements for technical assessments and corrective measures when necessary, in a manner that FIW previously refused to do.

FIW objected to "Appendix A" in its entirety. DEP AR 119; Pet. AR 363; JA 266. It raised a host of technical issues and claimed that adherence to the requirements of "Appendix A" would "economically cripple the project," citing six figure cost estimates never verified or even explained. *Id.* and FIW Brief at 12-14, 29-30. Included in FIW's objections, according to FIW Brief at 14, was a requirement that FIW spend $5,000 to address each and every complaint

received in writing or by telephone, regardless of its merits, whereas the actual substitute complaint response protocol in "Appendix A" only required a formal analysis by FIW when there was a "consistent pattern of complaints" suggesting ongoing non-compliance. *See* , JA 250 at 9 of 11, ¶5. Acting Commissioner Brooks, another longstanding senior regulator at the DEP, who replaced Commissioner Brown when he was forced to resign, agreed to some changes in "Appendix A" requested by FIW, JA 265 at 267; DEP AR 122, including the removal of the shutdown provisions originally drafted to prevent FIW from stalling on responses to noise complaints as it had in 2010 and 2011, and still complained about by FIW in its Brief at 29, *id.*, but did not take final action on the matter before he resigned from the DEP, replaced by Patricia Aho. Ms. Aho joined the LePage Administration a few months earlier from a position as a lobbyist by Pierce Atwood, FIW's attorneys through this case.

James Cassida urged Acting Commissioner Aho to adopt "Appendix A," sending her a draft and strongly recommending (the entire "DLRR staff strongly encourages you to authorize") it, before he left on vacation on June 17, 2011. JA 245. Cassida explained that the new compliance measurement protocol in "Appendix A" was essential to address the DEP's November 23, 2010 Letter of Non-Compliance to assure compliance with the Noise Rule, and that the complaint response protocol included in "Appendix A" was essential to remove the prior protocol that unfairly put the burden on the Neighbors to prove non-compliance. *Id.* His advice was ignored by Acting Commissioner Aho. JA 259-60.

The Condition Compliance Order that is the subject of this appeal was issued June 30, 2011. JA 89. It consists of the Order itself , requiring minimally increased NRO only for the wind direction that prevailed on the evening of July 17-18, 2010, it incorporates the protocols

earlier requested by FIW (JA 129) and which were previously rejected by the DEP in December, 2010 and April 2011, and it did not include "Appendix A".

PROCEDURAL BACKGROUND

The Neighbors do not disagree with the *chronology* of the procedural history of this case as presented by FIW in its Brief at 16-25, sans the advocacy spin. However, the Neighbors do object to the discussion by both the appellants, DEP Brief at 7 and FIW Brief at 19-20 and FIW Addendum 3, of proceedings in 2013, long after the issuance of the CCO at issue in this appeal and not part of the record on appeal, concerning modifications to FIW's wind turbine blades (the "serrated fins'). The DEP's finding that the Project was in compliance with regard to the fins was made under the same compliance protocol challenged in this appeal allowing FIW to document compliance with unverified data unilaterally selected by FIW.[17]

ISSUES PRESENTED FOR REVIEW

1. Whether this appeal should be dismissed under the Final Judgment Rule?[18]
2. Whether the Superior Court correctly reached the merits of the Neighbors' claims in this case?
3. Whether the Superior Court was correct in invalidating the CCO?

---

[17] The purported relevance of this discussion is that FIW moved to dismiss the case now, on appeal, based on the findings of the DEP on the fins. FIW's motion was denied by the Superior Court in an Order that has not been appealed. So the only logical reason for FIW to spend two pages discussing the matter is to imply that the Project is now in compliance. Indeed FIW argues in its Brief at 26, N.17 that " [a]s a practical matter ....the serrated fins have ended the possibility of any violation of the noise standards applicable to this project ..." and that there has been no noise complaint since the serrated fins were installed. The first statement is not true. FIW submitted a compliance report after the serrated fins were installed with partial data under a compliance measurement protocol that is flawed for the same reasons raised in this appeal, namely, because, among other things, it allows DFIW to cherry pick the data it submits without giving the DEP any means to determine whether the data submitted is in fact the "worst case" scenario for noise. The DEP never accepted the first attempt to show compliance under this protocol back in 2010, *see supra* at 7, see also FIW Brief at 28 ("FIW provided evidence [in 2010] that no violation occurred at all.") and should have done the same with the 2013 submission. The Neighbors have not submitted new noise complaints because of the expense and futility of doing so, not because of the absence of excessive noise.

[18] The Neighbors filed a Motion to Dismiss the appeal on April 29, 2014, based on the Final Judgment Rule out of concern about the cost of piecemeal litigation, beginning with the briefing on issues that have not been fully resolved by the Superior Court. However, with the decision by this Court on May 7, 2014 to consolidate this issue with briefing on the merits, the Neighbors no longer can achieve the efficiencies they originally sought and thus no longer press the issue.

4. Whether the Superior Court erred in dismissing the Neighbors' Section 1983 Claim and its Rule 80C Claim for First Amendment retaliation?

THE STANDARD OF REVIEW

Section 11007(4)C(2) of the Maine Administrative Procedure Act, 5 M.R.S.A. §8001, et seq. (the "Maine APA") authorizes the Superior Court to reverse or modify a decision by an administrative agency that is "in excess of the statutory authority of the agency." Section 11007(4)C(5) of the Maine APA authorizes the Superior Court to reverse or modify a decision by an administrative agency that is "[u]nsupported by substantial evidence." This standard allows the courts to "examine the entire record to determine whether, on the basis of all the testimony and exhibits before it, the agency could fairly and reasonably find the facts as it did." *Concerned Citizens to Save Roxbury Pond v. Bd. of Envtl. Prot.*, 2011 ME 39, ¶24, 15 A.3d 1263, quoting from *Friends of Lincoln Lakes v. Brd. of Envtl. Prot.*, 2011 ME 18, ¶13, 989 A.2d 1128, 1133. Section 11007(4)C(6) of the Maine APA authorizes reversals for agency actions that are "[a]rbitrary or capricious or characterized by abuse of discretion." An action is arbitrary and capricious when it is "unreasonable, has no rational factual basis justifying the conclusion or lacks substantial support in the evidence "or is "willful and unreasoning action without consideration of the facts or circumstances." *Central Maine Power Co. v. Waterville Urban Renewal Authority*, 281 A.2d 233, 242 (Me. 1971); *Carl L. Cutler Co. v State Purchasing Agent,* 472 A.2d 913, 916 (Me. 1984); *Help-U-Sell, Inc. v. Maine Real Estate Comm.*, 611 A.2d 981, 984 (Me. 1992); *Kroeger v. Bd. of Envtl. Prot.*, 2005 ME 50, ¶8, 870 A.2d 566, 569. "An abuse of discretion may be found where an appellant demonstrates that the decisionmaker exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and governing law." *Sager v. Town of Bowdoinham*, 2004 ME 40, ¶ 11, 845 A.2d

567, 570, *Forest Ecology Network v. LURC*, 2012 ME. 36, ¶28, 39 A.3d 74, 84; *Friends of Maine Mountains v. Brd. of Envtl. Prot.*, 2013 ME 25, ¶11, 61 A.3d 689, 693.

SUMMARY OF THE ARGUMENT

All the challenges to the jurisdiction of the Superior Court in this case are without merit: the plain wording of 35-A M.R.S.A. §3456(2) only precludes judicial review of the *initial* certification of a smaller scale wind project, not enforcement actions under Section 3456(3); the DEP is not required to take responsibility for enforcement of the terms of the certification under Section 3456(3), but the statute allows it to do so and in this case the DEP reserved the responsibility to do so in the certification itself; the prohibition against judicial review of agency not to enforce is not applicable to a case like this where the DEP formally found non-compliance and acted to enforce in an arbitrary manner not supported by the record; and the traditional rules of standing apply to the challenges to the DEP action in this case, which were easily met. The Superior Court was clearly correct when it invalidated the CCO in this case because it limited corrective action to prevent excessive noise only during certain wind directions, after formal findings that excessive noise occurred and is expected to incur in the future whenever there is significant vertical and directional wind shear, regardless of wind direction. The Superior Court had full authority under the Maine APA to remand the case to the DEP for findings on why "Appendix A," strongly advocated for by her professional staff with the support of the DEP's expert and the Attorney General's Office, was not adopted. The Superior Court erred when it ruled that an action under 42 U.S.C.§1983 is unavailable to assert a First Amendment retaliation claim because of the alleged adequacy of state court remedies where the Supreme Court has clearly ruled to the contrary. Finally, the Superior Court erred as a matter of law when it held that the Neighbors dismissed the Neighbors' First Amendment retaliation case under Rule 80C

because of their inability to show that their rights were chilled" because in this kind of case, where they have suffered from concrete adverse action by the DEP in granting FIW a *de facto* exemption from the noise rule, there is no requirement to show "chill" and where, in any event, they did so.

ARGUMENT

1. THE SUPERIOR COURT CORRECTLY RULED THAT IT HAD JURISDICTION OVER THE PETITION FOR REVIEW AND THAT THE NEIGHBORS HAVE STANDING.

The primary focus in this appeal by DEP in its Brief at 18-29 and FIW in its Brief at 31-38 is on arguments that the Superior Court should never have reached the merits of the challenged CCO. Four separate arguments were presented, all of which were properly rejected by the Superior Court.

A. 35-A M.R.S.A. §3456 does not Prevent Judicial Review of the CCO.

FIW claims in this appeal that the CCO is non-reviewable as a "certification decision", FIW Brief at 31-2. The DEP agrees, characterizing the CCO as a non-reviewable "licensing decision." DEP Brief at 18-23. Both jurisdictional objections rely on 35-A M.R.S.A. §3456(2), which states that the DEP's "certification pursuant to this section ... is not *itself* subject to judicial review...." [Emphasis added.] [19]

---

[19] The Certification Statute provides, in relevant part, as follows:

§ 3456. Siting considerations for smaller-scale wind energy development in organized areas

1. **Construction and operation requirements.** A person may not construct or operate a wind energy development, other than a grid-scale wind energy development, that is located in the State's organized area without first obtaining a certification from the department that the generating facilities: A. Will meet the requirements of the noise control rules adopted by the Board of Environmental Protection pursuant to Title 38, chapter 3, subchapter 1, article 6.....

2. **Fees; outside review; approval process..** ****** Notwithstanding any other provision of law, the department's certification pursuant to this section regarding a development that does not otherwise require the department's approval pursuant to this Title is not itself subject to judicial review as final agency action or otherwise, except as an aspect of an appeal of a pertinent municipal land use decision.

The Superior Court flatly rejected this argument. In doing so it applied well- known rules of statutory construction that look first to the plain meaning of the statute at issue, *Tenants Harbor General Store v. Dept. of Envtl. Prot.*, 2011 ME 6, ¶9, 10 A.3d 722, 726; *Hanson v. S.D. Warren*, 2010 ME 51, ¶12, 997 A.2d 730, 733, and then examine the statute in the context of the statutory scheme as a whole. *Allied Resources, Inc. v. Dept. of Public Safety*, 2010 ME 64, ¶15, 999 A.2d 940, 944; *State Farm Mut. Auto. Ins. Co. v. Koshy*, 2010 ME 44, ¶29, 995 A.2d 651, 662; *Schaefer v. State Tax Assessor*, 2008 ME 148, ¶7, 956 A.2d 710, 711-12, quoting *Wilson v. Bath Iron Works*, 2008 ME 47, ¶11, 942 A.2d 1237, 1240.

Looking to the plain meaning of Section 3456, the Superior Court ruled that the "certification ... itself" in subsection 2 meant the initial certification and that the CCO requiring corrective action did not fall within the scope of such a certification "by virtue of the fact that it consists of an entirely separate document issued over two years after the initial Certification." Order on Motion to Dismiss, JA 11, at 9-10. The lower court's interpretation of Section 3456(2) was informed by the structure of the statutory scheme which "differentiates between the certification itself [in subsection 2] and post-certification action ... [in] [s]ubsection 3, [which] specifies that enforcement may be undertaken '[f]ollowing certification ... and during the construction and operation'" of the Project. *Id.* at 10. When subsection 2 of Section 3456 refers to "certification *pursuant to this section*" as not being subject to judicial review, it could only mean the requirement set forth in subsection 1 that a smaller scale wind project must first obtain

---

3. **Enforcement of standards.** Following certification under this section and during construction and operation, the standards in subsection 1 for a wind energy development subject to certification under this section may be enforced by the municipality in which the generating facilities are located at the municipality's discretion pursuant to Title 30-A, section 4452. The department is not responsible for enforcement of this section.

a certification *before* construction and operation, and not corrective actions mandated later after the initial certification under subsection 3.

Subsection 3, separately addressing enforcement by either the DEP or the municipality where the project is located after initial certification, cannot be collapsed in subsection 2 dealing with the initial certification by simply calling the corrective action in the CCO at issue in this case a "certification decision " or calling it a "licensing" decision. *See* DEP Brief at 21. The argument seems to be that if agency action relates to licensing it automatically must be licensing, which the Superior Court correctly rejected. Nor can the DEP assume the mantle of immunity by simply casting the enforcement in the form of an amendment to the initial certification, *see* DEP Brief at 18-20, where neither Section 3456 nor the initial certification, Conditions 7 and 8, JA 96 at 13 and 14 of 18, requires corrective action to be cast in terms of amendments to the original certification. The DEP's claim in its Brief at 5-6 that the original permit issued in June 2009, JA 96, "sets forth a mandatory certification process," *see also* DEP Brief at 18-19, is simply not true.

The Superior Court was thus correct in its finding that the "certification process [immune from review] ended with the issuance of the Certification on June 5, 2009," and that the CCO "fell squarely within the realm of enforcement" because "it compelled FIW to do something for purposes of bringing it into compliance with the agency regulations [the Noise Rule] and the Certification itself [prohibiting noise in excess of the Noise Rule]." JA 11 at 11. *Also see*, Order on Motions to Dismiss Independent Claims, dated November 1, 2012, JA 29, at 2 ("the CCO was functionally a form of enforcement, not certification or licensing as Respondents asserted.") and FIW Brief at 32 ("It is true that in the CCO the DEP stated ... that it found a violation of the

original terms of the Certification, and that this finding prompted that portion of the CCO requiring a change in the operating protocol.").

Both the DEP and FIW argue that the Superior Court's interpretation of the corrective measures in the CCO cannot be enforcement within the meaning of Section 3456 because no formal steps were taken to enforce such as a Notice of Violation and no penalties were assessed. DEP Brief at 19-20; FIW Brief at 41. However, the DEP's own Non-Compliance Response Guidelines, explain that the DEP uses a "variety of 'tools' to bring regulated entities into compliance." *See,* http://www.maine.gov/dep/publications/non-comp_resp_guid.html. Moreover, even if the corrective actions in the CCO were considered a certification or licensing action, the DEP still cannot take cover under the limits on judicial review under subsection 2 because that provision is applicable only to the *initial* certification, as held by the Superior Court.

The DEP also argues that grid scale wind projects are subject to a different regulatory framework than smaller scale projects, DEP Brief at 3-4, *see also* FIW Brief at 34-5, but this is not so for the Noise Rule, which smaller scale projects must adhere to as mandated in subsection 1 of Section 3546, without any qualifications. Citizens living near a smaller scale wind project are deserving of no less protection than those living next to grid scale projects under a Noise Rule designed to protect the health and welfare of all the citizens of this state. It would be absurd for the Legislature to mandate that smaller scale wind projects must comply with the Noise Rule, and then immunize the DEP from judicial oversight when it grants a company like FIW a *de facto* exemption from the Rule. Established rules of statutory construction warn against absurd interpretations. *See, Tenants Harbor General Store v. Dept. of Envtl. Prot., supra,* 2011 ME at ¶ 9, 10 A.3d at 726; *Morrill v. Maine Turnpike Authority,* 2009 ME 116, ¶ 5, 983 A.2d 1065, 1067; *Schaefer v. State Tax Assessor, supra,* 2008 ME at ¶7, 956 A.2d at 711.

Finally, the interpretation given to subsection 2 of Section 3456 argued for by the DEP and FIW is contrary to the "strong judicial tradition holding that there is a presumption of reviewability of agency action," J. Stein, G. Mitchell & J. Mezines, *Administrative Law*, §44.01 at 41-2 -5; *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967). *See also, Heckler v. Channey,* 470 U.S. 821, 826 (1985) *and Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) ("We begin with the strong presumption that Congress intends judicial review of administrative action."). [20]

B. Section 3456 does not Limit Enforcement over Smaller-Scale Wind Projects to Municipalities.

FIW, without the support of the DEP, [21] FIW Brief at 33, claims that under Section 3456(3) only municipalities may enforce compliance with the Noise Rule and the noise limitations in its Project. FIW Brief at 32-36. FIW looks to subsection 3 of Section 3456 for support on this position, which states that the noise limits "may be enforced by the municipality in which the generating facilities are located and that the "department is not responsible for enforcement of this section." The lower court gave little credit to this argument, agreeing with the DEP that the wording relied upon by FIW "confers discretionary power on municipalities,

---

[20] This presumption arises from federal cases, but is logically applicable to review under state law as well. The presumption is also in *Heckler v. Channey*, a case which is heavily relied upon by the DEP in its prosecutorial arguments. *See infra* at 22-25. To overcome such a presumption, there must be "a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner, supra,* 387 U.S. at 141, *quoting Rusk v. Cort*, 369 U.S. 367, 379-80 (1962), *Bowen, supra*, 476 U.S. at 671, which neither FIW nor the DEP have done.

[21] The DEP expressly disagreed with this argument of FIW in the proceedings below, *see* the DEP's Memorandum in Response to Motion to Dismiss, dated September 23, 2011("The Department retains that enforcement authority if, in its discretion, it chooses to exercise it") and does not argue the issue on appeal. In fact during the course of the DEP's dealing with FIW non- compliance, the Attorney General's Office opined that the DEP had enforcement authority under Section 3456. Pet. AR 107. Yet now on appeal, the very same attorney in the Attorney General's office states in the DEP's Final Judgment Rule argument that the Superior Court violated Section 3456(3) by ordering the DEP to take additional enforcement authority "in direct[ ] conflict[ ] with the governing statute." DEP Brief at 16. *See also*, DEP Brief at 4, stating that the law leaves responsibility for enforcement to the municipalities.

while not precluding the DEP from undertaking enforcement," JA 11 at 11.[22] FIW in its Brief at 34 argues that the legislative history supports its interpretation, *also see* DEP Brief at 3-4, but in reality the precise opposite is true. [23] *See* JA 11at 11 ("On this point, FIW overstates the legislative history....")

C. The CCO is not Immune from Review as an Exercise of Prosecutorial Discretion not to Enforce.

A third challenge to the jurisdiction of the court below made by both the DEP and FIW is that the CCO is the exercise of non-reviewable prosecutorial discretion not to enforce. DEP Brief at 15-16, 26-29; FIW Brief at 36-7. The DEP's entire argument is premised on a line of cases beginning with *Heckler v. Channey, supra,* and including *Ass'n of Irritated Citizens v. EPA*, 494 F.3d 1027 (D.C.Cir. 2007) and *Baltimore Gas & Electric Co. v. FERC,* 252 F.3d 456 (D.C.Cir. 2001) holding that decisions not to prosecute or to reach settlements without findings of noncompliance are immune from review as prosecutorial discretion.

The Superior Court correctly rejected this argument based on the obvious fact that the CCO was an act of enforcement, not a decision not to enforce. JA 11 at 11-12. In this case, there was an express finding of non-compliance in the DEP's November 23 Determination of Noncompliance, JA 127, followed by an affirmative decision by "Commissioner Aho [who] was, in fact, purporting to enforce the Certification." Order on Motion to Dismiss, JA 11, at 12. The

---

[22] This lower court ruling is buttressed by the fact that the DEP retained jurisdiction over enforcement of the license conditions in the initial certification, over the objection of FIW which initially appealed the retention of jurisdiction, but later abandoned the appeal. *See supra,* N.6 at 6. It is also supported by the Town of Vinalhaven's decision to cede enforcement authority to the DEP. *See* JA 226 (the Town "does not want to enforce the [noise] standards" and the DEP should "continue with enforcement," responding to the DEP inquiry to the Town., A 220).

[23] Section 3456 was originally worded to grant exclusive enforcement power to municipalities, but was later reworked to provide that municipalities would be "permitted but not required to enforce the standards." "Summary," Committee Amendment A to LD 2283. *See* Addendum No. 2 at 12 (SUMMARY) ¶4. FIW 's argument based on the legislative history expressing the goal to expedite the permitting process makes no sense on the subject of who has enforcement powers. Giving enforcement powers only to a municipality does nothing to expedite the permitting of the facility.

DEP argues in its Brief at 26-27 that the cases it relies on reject the distinction that the Superior Court drew between review of decisions not to enforce and review of decisions to enforce. However, the DEP is dead wrong. The courts, including *Heckler, supra* 470 U.S. at 831-2, are unanimous in holding that an enforcement decision is subject to judicial review.[24] *See, N.Y. State Dep't of Law v. FCC*, 984 F.2d 1209, 1214 (D.C. Cir. 1993) quoting from *MCI Telephone Corp. v. FCC*, 917 F.2d 30, 41-2 (1993):

> It is one thing for the FCC to decline to investigate a tariff in the first place; that decision is entrusted to its unreviewable discretion. It is quite another for it to note the importance of a question concerning a tariff, request and take evidence on the matter, and then 'at that point change its mind, wiping out the hearing as though it had never occurred, and in effect decide that it will not enter upon a hearing.' [*MCI, supra*, 917 F.2d at 41-12] We did not consider the FCC's actions in MCI a good faith exercise of the agency's enforcement discretion.

See also, Port of Seattle v. FERC, 499 F. 3d 1016, 1027 (9th Cir. 2007)(*Heckler* limited the presumption of unreviewablility to refusals to investigate or prosecute, and that presumption does not exist when the agency has exercised its power in some manner); *Nalco Co. v. USEPA*, 786 F. Supp.2d 177, 184 (D.D.C. 2011) ("*Heckler* and *Association of Irritated Citizens* do not apply to affirmative enforcement action.... In cases where an agency decides to take

[24] Even if the CCO were considered a decision not to enforce, it would not necessarily be exempt from review. As explained in *Heckler v. Chaney, supra*, 470 U.S. at 832, when Congress enacted the APA, it did not "set agencies free to disregard legislative direction in the statutory scheme that the agency administers." An agency decision not to enforce is reviewable when the governing statute sets forth standards to which the agency must adhere to in exercising its discretion, *id.* at 832-4, as the DEP acknowledged in its Motion for Reconsideration of the Superior Court's Order of Motion to Dismiss, at 3, n. 3. In this case there are very specific guidelines that the certification statute incorporates, namely the Noise Rule, which must be adhered to by a smaller scale wind energy developer as provided for in Section 3456(1). In fact the Superior Court expressly found in its Order on Motion for Reconsideration, JA 23 at 5, that the Noise Rule and the license of FIW provide sufficient guidelines to allow the court to review the adequacy of the DEP's corrective action. *Id.* at 5. *See also, Robbins v. Reagan,* 780 F.2d 37, 45 (D.C.Cir. 1985) ("Once the agency has declared that a given course is the effective way of implementing a statutory scheme, the courts are entitled to closely examine agency action that departs from this stated policy."); *Delta Airlines v. Export-Import Bank*, 718 F.3d 974 (D.C.Cir. 2013)

enforcement action, 'that action itself provides a focus for judicial review.' *Robbins v. Reagan, supra*, 780 F.2d at 47, citing *Heckler*." [25] [26]

D. The Neighbors have Standing to Challenge the CCO.

The fourth and final challenge to judicial review of the CCO comes from the arguments of the DEP and FIW that the Neighbors lack standing to challenge the sufficiency of enforcement actions directed at third parties based on the case of *Great Hill Fill & Gravel v. Board of Envtl. Prot.*, 641 A.2d 184 (Me. 1994). DEP Brief at 12, 23-26; FIW Brief at 37-8. The DEP claims in its Brief at 23 that "*Great Hill* holds that third parties lack standing to challenge the terms of these types of enforcement actions." As shall be shown below, this is not the holding of *Great Hill.*

The Superior Court rejected the DEP's standing challenge on several grounds, all of which are correct. The bottom line, according to the Superior Court, is that the Neighbors have standing by application of general principles on standing because they participated in the proceedings before the DEP and had sufficiently demonstrated particularized injury. Order on Motion for Reconsideration, JA 23 at 5. *See also*, Order on Rule 80C Petition, JA 38 at 3.[27] This ruling clearly is correct and there is nothing in *Great Hill* that casts any doubt on this ruling.

---

[25] For the same reasons FIW's reliance in its Brief at 36 on *Herrle v Town of Waterboro*, 2001 ME 1, 763 A.2d 1159, which addresses the discretion of local authorities not to enforce an ordinance, is irrelevant to the case at hand.

[26] The DEP raises several other prosecutorial discretion arguments when addressing the Final Judgment Rule, DEP Brief at 13-17 that are not incorporated into its discussion of the prosecutorial discretion portion of its Brief. So it is unclear whether these other arguments are intended to be considered on the merits of the appeal. In any event these arguments are all premised on a fundamental misconstruction of *Heckler* and therefore are without any merit.

[27] The Superior Court also reasoned that the position advocated by the DEP and FIW amounted to an unreasonable proposition that only wind developers have the right to seek judicial review of DEP or municipal decisions related to smaller scale wind projects and that no abutters may seek redress in court. JA 23 at 4. The lower court commented that the legislature knew how to write a law precluding judicial review when it enacted subsection 2 of Section 3456, and chose not to do so for post-certification actions. *Id.* at 5. FIW inappropriately demeans this part of the Superior Court's ruling as "result-driven." FIW at 37.

Great Hill is a one page ruling involving a challenge by Great Hill & Gravel, Inc. to a consent decree between the DEP and Merritt Shapleigh, who had operated a sand and gravel pit without a permit on land that adjoined property owned by Great Hill, on the grounds that the decree did not impose any reclamation responsibilities on Shapleigh. The sole basis for the opinion of this Court that Great Hill had failed to prove "particularized injury" under general principles of standing was that its rights and responsibilities were unchanged by the consent agreement. The principal case cited in *Great Hill* for its ruling was *Anderson v. Swanson*, 534 A.2d 1286 (Me. 1987), where this Court explained that the requirements for a showing of particularized injury to establish standing does "not require a high degree of proof," quoting from *Grand Beach Ass'n v. Old Orchard Beach*, 516 A.2d 551, 553 (Me. 1986). This low threshold is especially applicable to abutting property owners. *Anderson* explained that "[w]hile we have not as yet declared that any abutting property owner has a potential for injury sufficient to confer standing, we have on many occasions found such a relationship sufficient in combination with an additional allegation of injury." *Id.* at 1288, citing, inter alia, *Singal v. City of Bangor*, 440 A.2d 1048, 1051 (Me. 1982) (neighborhood resident had standing because of potential noise and depreciation of property value). *Id. See also, Nergaard v. Town of Westport Island*, 2009 ME 56, ¶18, 973 A.2d 735, 740-41, stating that "we have held that in the context of disputes involving an abutting landowner, the threshold for demonstrating a particularized injury is minimal," citing *Roop v. City of Belfast*, 2007 ME 32, ¶8, 915 A.2d 966, 968. All that is required is that the abutter claims an injury or harm distinct from the public at large. *Nergaard, supra*, 2009 ME at ¶18, 973 A.2d at 740. *Accord, Nelson v. Bayroot*, 2008 ME 91, ¶10, 953 A.2d 378, 382; *Proctor v. County of Penobscot*, 651 A.2d 355, 357 (Me. 1994).

Great Hill could not satisfy these standing requirements because it could "not demonstrate *any* particularized injury." *Great Hill*, *supra* at 184-85. [Emphasis added.][28] As revealed by the briefing to this Court, the basis for standing as argued by Great Hill was not that consent decree affected it as an abutting landowner. Rather it was based on contract rights asserted by Great Hill's with a landowner where the pit was located in an agreement that was never a part of the administrative record. *See,* Addendum No. 3, consisting of an excerpt of the BEP's brief in the case. Anyone inquiring into the complicated background of the one page *Great Hill* case can see immediately that the DEP's claim at 23 of its Brief, *see also* FIW Brief at 37, that the decision stands for the proposition that third parties never have standing to challenge an enforcement action is not remotely accurate. The case had nothing to do with Great Hill's rights as an abutting landowner.

Here, in contrast to *Great Hill*, the Neighbors seek redress from excessive noise in violation of the Noise Rule and FIW's license, both of which are designed for their protection as neighbors to the wind project. *See,* Preamble to the Noise Rule, FIW Brief Addendum 2 at 5, which states that it is designed to protect against "excessive noise that could degrade the health and welfare of nearby neighbors." [29] As alleged by the Neighbors, the CCO not only directly impacts the Neighbors by unlawfully allowing FIW to continue operations without corrective action under all conditions, but the CCO also adopted a complaint response protocol specifically

---

[28] The complex background to the *Great Hill* case is also addressed in an opinion in Superior Court in civil proceedings following this Court's decision. *See, Great Hill Fill & Gravel, Inc. v. Shapleigh*, 1995 Me. Super. LEXIS 408 (York Cty. Nov. 14, 1995).

[29] Acting on these health considerations, the BEP provisionally adopted Noise Rule Amendments in September 2011 (finalized in 2012 without change after legislative review) lowering nighttime sound levels to 42 dBA for all future wind projects, based on the rulemaking record, including testimony of the Petitioners. Pet. App. 151, 152, Section I(2)(b). The *Supplemental Basis Statement* for the Noise Rule Amendments states that the record before the Board "demonstrates that persons living near existing wind energy developments with actual sound level measurements near the 45 dBA limit as at Vinalhaven are experiencing adverse effects." *Supplemental Basis Statement* at 6-7, Pet. App. 163, 168-9.

targeting the Neighbors with the imposition of burdensome requirements for filing noise complaints, as noted by the Superior Court. JA23 at 3-4.[30]

Finally, there is no merit whatsoever in the DEP's claim at 25-26 of its Brief that this case represents an attempt to assert a "private cause of action" contrary to *In re Wage Payment Litigation*, 2000 ME 162, 759 A.2d 215, an argument not raised below. The Neighbors sought review of agency action under the Maine APA; it did not bring suit against FIW as a private cause of action. For all of these reasons, this Court should affirm the ruling of lower court that the Neighbors have standing to seek the relief they request.

II. THE SUPERIOR COURT CORRECTLY RULED THAT THE CCO IS UNLAWFUL.

In the Superior Court, the Neighbors presented two reasons for invalidating the CCO. First, they argued that the CCO on its face is unlawful because it allows FIW to continue operating under conditions that are likely to cause excessive noise in violation of the Noise Rule and its license because it limits the requirement for modified operations only when the wind is coming from the SSW. The Superior Court agreed with this contention in its Order on Rule 80C Petition, JA 385 at 14-19, and its ruling is fully supported by the record. Second, the Neighbors argued that the compliance measurement and complaint response protocols incorporated into the CCO at the request of FIW, without "Appendix A" recommended by professional staff, combined to create a *de facto* exemption for FIW from the Noise Rule because it failed to put in place procedures that would require FIW to collect and maintain compliance assessment data that would assure the DEP and third parties access to data to independently assess compliance

[30] In addition, as noted by the Superior Court, *id* at 2, the DEP represented in earlier filings that, but for the limitations in the small-scale certification statute, 35-A M.R.S.A. §3456, the CCO at issue here would be subject to judicial review, citing *Friends of Lincoln Lakes v. Dept. of Envtl. Prot.*, Maine Supreme Judicial Court, Mem. Dec. Docket No. BEP-10-655 (June 6, 2001). DEP's Memorandum in Response to Motion to Dismiss, dated September 23, 2011, at N. 6 at 6 and N.7 at 7.

and failed to require FIW to analyze operating conditions that exhibit wind shear conditions so as to curb future noise issues, while at the same time putting the burden on the Neighbors to accompany noise complaints with technical data and analysis before the DEP would take the complaint seriously. The effect (and presumably the purpose) of the CCO as it stood before being invalidated by the Superior Court was to put the Neighbors in a "Catch 22." To obtain relief from the DEP, the Neighbors are required to prove what they should not be required to prove and cannot possibly prove without reliable data, analysis and cooperation from FIW. On this issue the Superior Court reserved judgment until the DEP provides a rationale of refusing to adopt "Appendix A" on remand. *Id.* at JA 38 at 18-19 and 21-23.

A. The Superior Court Correctly Ruled that the CCO is Unlawful.

The Neighbors' argument that the CCO is unlawful on its face is premised on three simple propositions. First, as a smaller- scale wind project, FIW must as a matter of law operate in compliance with the Noise Rule, and the DEP has no discretion to allow otherwise. The CCO challenged in this suit, JA 90 at 1, ¶2, explicitly states that "the certification requires the facility to comply with the Department's noise standards under all conditions and at all times." The DEP does not argue otherwise. Second, the formal Letter of Determination of Non-Compliance issued by the DEP on November 23, 2010, JA 127, clearly stated the DEP's position, based on a complaint in July 2010, as well as other data collected in the period from May 1 to August 31, 2010, that that non-compliance was likely whenever there is "significant vertical and directional wind shear," without any reference to wind direction. JA 90 at 1, ¶3. This finding is expressly incorporated into the CCO and also cannot be disputed by the DEP. Third, the CCO, without any explanation, limited corrective operating procedures for the Project, consisting of additional NRO, only when the wind is coming from the SSW. *Id.* at 2-3, ¶s4 and 5. The Attorney

General's Office tried to warn Acting Commissioner Aho about the CCO as worded, but this advice was ignored.[31]

These three propositions establish that the CCO, on its face, is unlawful because it allows FIW to operate under conditions (significant wind shear during non-SSW winds) that are likely to cause excessive noise. The Superior Court ruled that the limitation in the CCO for mandated NRO to certain wind directions was "irration[al]" because it mandated corrective action based on the "speculative factor of wind direction" rather than "the one clear, relevant and uncontested causative factor: wind shear of a certain coefficient." JA 38 at 18. "[T]he Court finds that Commissioner Aho had no rational basis or relevant evidence before her which justified the issuance of this CCO" limited to certain wind directions when "the cause of the violation was significant vertical and directional wind shear." *Id.* at 21. The lower court invalidated the CCO and remanded the matter back to the DEP for issuance of a CCO that requires modification of FIW's operations to prevent excessive noise as a result of "significant vertical and directional wind shear" regardless of wind direction. *Id.* at 18, 21 and 22. [32] To the extent that the

---

[31] Assistant Attorney General Amy Mills tried to warn Commissioner Aho about the illegality of the CCO before it was issued. She advocated for the inclusion of a provision in the CCO that the corrective action mandated was only a "partial" response to conditions leading to non-compliance by inserting two sentences in paragraph 5 of the draft Order explaining why. JA 273 at 3. First she added language in paragraph 5 of the draft Order that the revised operation protocol approved by the DEP "satisfactorily modifies operations of the facility [by an additional 2 dBA NRO] when there are wind shear conditions and the wind is blowing in the south southwesterly direction (200°-250°)." Second, she added a statement in paragraph 5 of the draft Order that the "revised operating protocol

Commissioner had any discretion in the matter,[33] she abused it given the health issues at stake. *See, Friends of Maine Mountains v. Brd. of Envtl. Prot., supra*, 2013 ME at ¶s12-18, 61 A.3d at 693-6.

On appeal, the DEP seeks to justify the limitations in the CCO by saying that in the CCO the Commissioner was exercising her right to "resolve differences of opinion" between her staff and FIW as to the significance of wind direction in the cause of excess noise. DEP Brief at 30. Putting aside the issue of whether this position was ever preserved for appeal, it is wholly without merit. The Acting Commissioner did not herself give this as a reason for her decision. Moreover, the record is clear that the official position of the DEP, as a department, was that the cause of non-compliance of FIW is significant vertical and directional wind shear, regardless of wind direction. Thus, it is immaterial whether there is a statement in the record by Warren Brown at a meeting that he was more concerned about the frequency of significant wind shear from one direction or another, *see* FIW Brief at 39-40, because the DEP determined that it was wind shear, not wind direction, that caused excessive noise. This was the position of the DEP when issuing the formal November 23, 2010 Letter of Determination of Non-Compliance, JA 127, with the express authority of the then Acting Commissioner Nagusky, *see supra* at 9, N.13,

[33] The DEP also relies on cases that say, in some circumstances, a regulator may be allowed to address a problem in an "incremental way." DEP Brief at 34-35. The cases the DEP cites and the principles they articulate concern legislation or regulations addressing economic issues, *see Rhode Island Hospitality Ass'n v. City of Providence,* 667 F.3d 17, 40-1 (1st Cir. 2011*)* and *Medeiros v. Vincent*, 431 F.3d 25, 31-2 (1st Cir. 2005), citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), not regulations designed to protect the health of citizens. The decision by the Acting Commissioner in this case not to protect the citizens of Vinalhaven from excessive noise from significant wind shear regardless of wind direction cannot be justified on any discretion to approach the problem in an incremental way when the DEP has already acknowledged that the Commissioner has no discretion to allow a wind project to operate out of compliance with the Noise Rules, DEP Brief at 8, and where the only reason for not mandating full mitigation arises out of FIW's refusal to release data to the DEP. .

in reliance on the original finding of its expert on September 8, 2010. JA 211.[34] This was the position of the DEP when, on January 10, 2011, JA 232, it explained to FIW that:

> While a lot of discussion focused on the complaint period where the winds were out of the south/southwest *"it was always and remains the DEP determination that it is the presence of vertical and directional wind shear that caused the non-compliance determination. This is why the formal letter of notification did not reference wind direction.*

This was the position of the DEP when it wrote FIW on March 9, 2011, JA 241, with the express authority of Commissioner Brown, *see infra* at 11, JA 241, again demanding cooperation from FIW in fixing a trigger point for NRO based on wind shear conditions, regardless of wind direction. This was the position of Acting Commissioner Aho herself when she issued the CCO under review, JA 90, incorporating the earlier findings of Warren Brown and the Letter of Determination of Non-Compliance identifying wind shear as the cause of excess noise, without reference to wind direction. This was the finding of the lower court, JA 38 at 14-17, which did not reach its finding by "weighing the evidence," as argued by the DEP in its Brief at 31-2. The finding of the lower court, is clearly the only way to read the administrative record.

Next, the DEP argues that "the only documented instance of the Project exceeding noise standards occurred with SSW winds." DEP Brief at 32, *also see,* DEP Brief at 29-30, 34 and FIW Brief at 39-40. This is simply not true, as the DEP knows full well from the briefing below. Much of the evidence evaluated by Warren Brown in the course of reaching the conclusion that attributed non-compliance to significant wind shear involved winds from directions other than

[34] This formal finding officially rejected FIW's disingenuous claims that "(1) no violation occurred at all; and (2) in any event, violation would not occur if wind was blowing from other directions." FIW Brief at 39. So FIW is off the mark by claiming that the evidence that it submitted as part of its regulatory posturing in 2010, never accepted by the DEP itself, can now form the basis for overturning the Superior Court's decision that there was no substantial evidence that shows that wind direction is a factor in creating excessive noise.

the SSW, as the lower court ruled. JA 38 at 14-15.[35] [36] Indeed in its reports to the DEP purporting to show evidence of compliance in the Fall of 2010, JA 217 and JA 222, *FIW itself* identifies winds other than the SWW as being the "worst case scenario" for excess noise.[37] The lower court properly held that there was no evidence, other than speculative conjecture, that wind direction has any influence as a factor in causing excessive noise from significant wind shear.

Next, DEP argues that the CCO's limitations on NRO to SSW winds is justified because of the "uncertainties" and "ambiguities" as to the causes of excessive noise from when the wind comes from directions other than the SSW, that Warren Brown never reached any firm conclusions about the cause of excessive noise, and that he expressed his views in "tentative and

---

[35] For the most part, the wind direction in the May complaints of the Neighbors was not from the SSW. The Neighbors made two complaints about excessive noise on May 1, 2010 (Complaint No. 5 and 8). The wind direction for the first May 1 complaint was from 188° to 198° (more southerly than the 200° to 250° SSW that the CCO is limited to) except for one ten minute period. The first May 1 complaint was made for the period 9:14 PM to 10:40 PM. DEP AR 163, Pet. App. (Supp.) 266. FIW's records show that during this complaint period the wind was blowing from 188° to 198° except for 1 ten minute period. Pet. AR 305, Pet. App. (Supp.) 276, at pg. 1045, from 21:00 to 22:50. The wind direction for the second May 1 complaint was from 253° to 262° (more northerly than the SSW parameters of the CCO). The second May 1 complaint was made for 2AM. DEP AR 163, Pet. App. (Supp.) 269. FIW's data shows that the wind direction at this time was from 253° to 262°. Pet. AR 305, Pet. App.(Supp.) 276 at pg. 1043, 2:00 to 2:50. The wind direction for the May 5, 2010 complaint (Complaint No. 14) was SSE 169° to 171°, again outside of the SSW parameters. The May 5 complaint was made for the period 9:44 PM to 10:56 PM. Pet. AR 115, Pet. App. (Supp.) 270. FIW's data shows the wind during this period was from the SSE 169° to 171°. Pet. AR 305, Pet. App. (Supp.) 276 at pg. 1057, 21:40 to 23:00. The wind direction for May 6, 2010 (Complaint No. 15) was 251° to 280,° more northerly of the SSW parameters of the CCO. The May 6 complaint was for the period 6:59-9:19 PM. DEP AR 131, Pet. App. (Supp.) 272. FIW's data shows the wind from 251° to 280° during this period, , except for 1 ten minute period. Pet. AR 305, Pet. App. (Supp.) 276, at pg. 1060, 19:00 to 21:20. The wind direction for the complaint made for May 10, 2010 (Complaint No. 17) was NNW. FIW AR 118, Pet. App. (Supp.) 274. No FIW data was furnished for this complaint.

[36] The DEP argues, based on a June 2010 document, DEP AR 7, that Warren Brown found the May data to be "unusable." DEP Brief at 34, N.9. *See also,* FIW Brief at 40. But this claim does not square with what Warren Brown actually said in his September 8, 2010 finding on non-compliance. JA 211.

[37] FIW submitted reports to the DEP in October and November 2010, purporting to show compliance under the original compliance measurement protocol, JA 117, which required measurements to be taken "during weather conditions when wind turbine sound is most clearly noticeable, JA 121 at ¶b., in other words, under worst-case wind conditions. FIW submitted data showing winds from various directions but none from the SSW (200° to 250°.) By these submissions, FIW represented that noise from the Project should be loudest during winds from directions *other than* the SSW. Incredibly, FIW argues on appeal that this data, which FIW unilaterally chose without any means by third parties to assess why particular data was chosen, shows "that no violation occurred at all" and that FIW submitted data showing no violations from winds from directions other than SSW. FIW Brief at 28.

preliminary terms." DEP Brief at 32-34. FIW makes similar arguments. FIW Brief at 39-40.[38] These assertions inexcusably mischaracterize the record. What the record clearly reveals, and what the Superior Court found, JA 38 at 17-18, is that any uncertainty about the conditions leading to non-compliance related to the *extent of the wind shear,* not to wind direction, as evidenced by the very document the DEP cites in its Brief at 33 and noted by the Superior Court, JA 38 at 15, namely, Warren Brown's December 2010 email. JA 227. In this document, Warren Brown states that the data he was reviewing showed consistent wind shear from winds coming from the SSE to NW, but he needed more data from FIW so he could evaluate in accordance with a formula he attached, the trigger point (the wind shear "coefficient") for NRO. *See* discussion at 8-12, *supra.* It is truly incredible that the DEP seeks to justify a bad faith enforcement decision on the refusal of the violator to cooperate. In any event, the Superior Court understandably rejected this position, adding that the Commissioner gave no explanation for choosing not to require NRO under all conditions of significant wind shear. JA 38, at 17-18. The "uncertainty" argument, like the argument that the Commissioner was "resolving" disputes between her staff and FIW, was not made on the record. These arguments are her attorney's post hoc rationale for the agency decision which the courts may not accept. *Id. Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). *See also, Christopher v. Smithkline Beecham, Corp.*, 132 S. Ct. 2156, 2166 (2012). [39]

B. There is No Error in the Superior Court's Remand to the DEP for an Explanation why it did not adopt "Appendix A.'"

[38] FIW refers to internal comments by DEP staff member Teco Brown to Acting Commissioner Aho that winds from the SSW are "the only area where we, based on today's information, think there will be a potential problem." FIW Brief at 11, citing Pet. AR 355. This comment is plainly inaccurate, which is not surprising given that Teco Brown had nothing to do with the long and complicated proceedings leading up to the CCO, and is squarely contradicted by the DEP's official position as outlined above.

[39] Finally the DEP argues that the courts should defer to the DEP's technical expertise, DEP Brief at 35-36. This is truly ironic because in this case the Acting Commissioner, who must rely on her professional staff's technical expertise, rejected the staff's strongly worded recommendation as to the need for "Appendix A."

The Superior Court correctly understood the relationship between the CCO, which it invalidated, and the decision by the DEP not to adopt "Appendix A." The nexus between the two decisions is obvious: the Superior Court found that the CCO was invalid for allowing operations to continue without addressing significant wind shear; "Appendix A" was designed by professional staff, with input from Warren Brown and the Attorney General's office, to place the burden on FIW to provide data and analysis that would address excess noise caused by significant wind shear conditions and remove that burden on the Neighbors to prove non-compliance without the means to do so. Accordingly, the lower court rightfully concluded that the CCO "does not even attempt to explain the reasoning behind Commissioner Aho's decision ... as to ... why she declined the recommendation of DEP staff that Appendix A was essential, in the wake of the violations, to maintain ongoing compliance with the noise rule." JA 38 at 17-18. The court correctly remanded the proceedings back to the DEP with instructions to issue a "CCO consistent with the findings of the Department's expert that the violation occurred as a result of 'significant vertical and directional wind shear,'" and to "require an operational protocol which would prevent further violations of the noise rule" and to provide further rationale for the complaint response protocol. JA 38 at 22-23.

Given that the Superior Court reserved judgment about the decision not to adopt "Appendix A" until after a remand, strictly speaking, the only directly relevant issue on this appeal is whether a remand for further findings concerning "Appendix A" is called for under the circumstances. Both the DEP and FIW argue that the DEP has no duty to explain to the lower court why it rejected "Appendix A" and that the lower court has no right to inquire into her reasoning because it would invade into the deliberative process of the DEP. DEP Brief at 36-38 and FIW Brief at 41-45. Again both the DEP and FIW are far off the mark. Section 11007(4)

(B) of the Maine APA specifically authorizes the Superior Court to "[r]emand the case for further proceedings, findings of fact or conclusions of law" and over thirty years of precedence, beginning with *Gashgai v. Bd. of Registration. in Med.*, 390 A.2d 1080, 1085-7 (Me. 1978) explain why:

> [I]t is an indispensable prerequisite to effective judicial review that an agency's decision set forth the findings of basic fact as well as the conclusions of ultimate fact and conclusions of law derived therefrom. *** The practical reasons for requiring administrative findings are several. Such findings of fact facilitate judicial review, avoid judicial usurpation of administrative functions, assure more careful administrative consideration, help parties plan their cases for rehearing and judicial review, and keep agencies within their jurisdiction.

See also, Comeau v. Town of Kittery, 2007 ME 76,¶¶s 9-13, 926 A.2d 189, 192-3; *Carroll v. Town of Rockport*, 2003 ME 135, ¶¶27-31, 837 A.2d 148, 156-7; *Christian Fellowship and Renewal Center v. Town of Limington*, 2001 ME 16, ¶¶16-19, 769 A.2d 834, 839-40; *Maine AFL-CIO v. Super. of Ins.,* 595 A.2d 424, 428-429 (1991).

The analysis could stop at this point. However, given the prospect that this Court will decide this appeal on the existing record prior to review by the Superior Court after a remand, notwithstanding the final judgment rule, we urge the Court, if it does proceed, to give further guidance to the parties and the lower court as to the remand so as to avoid or at least narrow the grounds for another round of appeals to this Court following a remand.

As compared to the CCO's limit on the scope of remedial action in response to the July 2010 complaint, the Acting Commissioner's decision not to adopt some version of "Appendix A" going forward but instead to adopt the compliance and complaint response protocols requested by FIW in its April 11, 2011 filing, JA 129, is much more pernicious and far reaching in its impact on the Neighbors. The willingness of the then Acting Commissioner, only weeks

after leaving the employment of FIW's attorneys, to accept "FIW's recalcitrance" (FIW's Brief at 46) and not require protocols that would assure future compliance with the Noise Rule for the protection of the health and welfare of the Neighbors, evidences a compelling need for a fundamental change in how the DEP views its responsibility with regard to this Project.

The protocols proposed by FIW in its April 11, 2011 filing, and adopted by the flawed CCO, JA 89 at ¶4, were designed to silence the scrutiny and accountability "ceaselessly demanded" by the Neighbors. *See*, FIW Brief at 47. The protocols do this because of the way they interact with each other. The compliance measurement protocol adopted in the CCO is nothing more than a reincarnation of the original compliance protocol adopted in November 2009. JA 117. Under this protocol there is no requirement that FIW collect and maintain compliance assessment data (meteorological, sound, and operational data) for independent verification of compliance submission reports. Under this protocol, FIW can submit any data it chooses and say look, this shows compliance in the worst case conditions, with no way for the DEP to assess whether these claims are accurate. Under this protocol, FIW claimed it had already proven compliance, even in the face of a finding by the DEP and its expert of non-compliance. Under this protocol FIW claimed it was not obligated to analyze the trigger points for NRO after the cause of non-compliance was determined to be wind shear. Under this protocol FIW argued that its unilaterally documented compliance reports relieved it of any responsibility of furnishing compliance assessment data to the DEP. The lack of transparency and absence of accountability made possible with this protocol readopted in the CCO is the first step in silencing the Neighbors.

The second step was to formally adopt the complaint response protocol in the Summer of 2010 that requires the Neighbors to accompany a noise complaint with data and analysis that

complies with the technical requirements for developers under the Noise Rule, failing which the DEP may have no means of assessing a complaint because FIW is not required under the compliance assessment protocol to collect and retain assessment data. So the effect of the complaint response protocol is to put the whole burden on the Neighbors, at their expense, to prove non-compliance, but not give them access to data to do so, or for the DEP to do so. So when the daughter of a named Petitioner made a complaint to the DEP in February 2012, after the flawed CCO was in effect, she was informed by the DEP Project Manager that "[i]n order for the Department to open an investigation into the sound levels being produced from the wind turbines, a complaint must be accompanied by data in accordance with the noise complaint protocol (attached). JA 281. This is how the Neighbors have been silenced and FIW has been granted a *de facto* exemption by the DEP.

FIW protests that the two protocols that it urged the DEP to accept in its April 11 filing cannot be questioned because they originated with the DEP's expert. FIW Brief at 8. This is disingenuous. At the time that the original compliance measurement protocol was adopted in November 2009 and when the complaint response protocol was informally circulated in the Summer of 2010, the DEP assumed that FIW would cooperate in good faith to respond to noise complaints. That expectation of good faith cooperation proved to be illusory, causing the same professional staff, with the assistance of its expert consultant and the Attorney General's Office, to draft "Appendix A" to address the gross inadequacies and unfairness of the prior protocols revealed by their history. Thus FIW is complexity off base when it argues that the protocols in "Appendix A" were "not the product of any finding of a violation." FIW Brief at 45. They were absolutely the direct product of FIW's obstructive and recalcitrant postures, partially acknowledged in its Brief at 46, following a finding of non-compliance.

The purpose of the substitute compliance assessment plan in "Appendix A," appearing at JA 250-253, was to require FIW to "monitor and report the noise generated by the facility in such a manner as to accurately and consistently measure wind turbine sound levels under all operational and meteorological conditions." JA 250 (introduction). To achieve this goal, the new compliance measurement protocol in "Appendix A" repealed the original compliance assessment plan adopted in November 2009, JA 117, and replaced it with one containing the following core requirements: (1) the designation of a compliance measurement period does not absolve FIW from responsibility for maintaining compliance at all times, *id.*, ¶3; (2) the collection and maintenance of sound assessment data on a continuous basis so that it can be accessed to verify compliance reports and be available to assessment noise complaints, *id.* ¶6.a; (3) the issuance of regular compliance reports, id at ¶5; (4) that provide analysis of operating conditions that exhibit wind shear condition, so that the proper wind shear coefficient can be calculated so as to trigger NRO to prevent excessive noise in the future, *id.* at ¶6.d; and (5) a requirement that FIW take all reasonable and necessary measures to temporarily mitigate excessive noise after a determination of non-compliance until revised protocols are approved . *id.* at ¶10. As explained by James Cassida, who was the DEP manager at the center of the regulatory storm, the new compliance protocol drafted into "Appendix A" was absolutely necessary: "[i]n order to determine if the facility is operating in compliance with Chapter 375.10 regulations ... [after the November 23, 2010 letter of non-compliance] the license must be required to document compliance" in a "satisfactorily" documented manner. JA 245.[40]

[40] Earlier, James Cassida summarized the behavior "Appendix A" was designed to prevent in a description of a meeting with FIW at the DEP on June 9, 2011, days before the CCO was issued. JA 244. In the meeting

> we hit the same old wall with Fox Islands that we have hit so many times before. They do not believe they are in violation, do not like the analysis methods nor determination of compliance that we have made, do not want to give us more data

The substitute complaint response protocol proposed in "Appendix A," set forth in JA 253-254, was intended at its core to: (1) remove the burden on the Neighbors to accompany noise complaints with technical data; (2) replace the prior informal protocol with a requirement that FIW maintain a 24 hour telephone "hotline," email or website to receive complaints, *id.* at ¶1; (3) require FIW to maintain a log of complaints and their status, *id.* at ¶ 3; and (4) require FIW to undertake a formal compliance assessment in accordance with the new compliance assessment protocol when the DEP determines that there is a "consistent pattern of complaints suggesting non-compliance." *Id.* at ¶5. As explained by Cassida: "given the complaint history of this facility, it is absolutely necessary that the Department revise the complaint response protocol originally agreed to by the licensee. The existing complaint protocol puts all the burden to document potential violations on the neighbors to the project which is patently unfair and inappropriate. The revised Appendix A simply requires the licensee to receive and resolve complaints, a responsibility that is routinely accepted by EVERY other wind project in the State of Maine." JA 245.

The DEP argues that it was justified in rejecting "Appendix A" because of the expense FIW would have to incur and because these costs outweigh the regulatory benefit of the proposed protocols. DEP Brief at 38. *See also*, FIW Brief at 12-13 and 30. The implications of this litigation position are astounding. First, it shows the willingness of the DEP to accept FIW's claim of excessive cost without any detail or verification. Far worse is the DEP's assertion on behalf of FIW that it is too expensive for FIW to be accountable for excess noise. A cost benefit analysis might make sense for assessing compliance and complaint protocols for the original

---

to take a more in depth look at compliance, do not want to be required to demonstrate compliance in the future and do not want to in any way be responsible for responding to citizen complaints.

licensing of a responsible wind project. But in this case, the Project was known to be problematic even before licensing and those problems materialized with a finding of non-compliance and then were met with combative refusal on the part of FIW to cooperate in addressing them. To excuse all this and allow it to continue is irresponsible. Who would tolerate a refusal of a car manufacturer to recall and fix faulty brakes on the claim that it is too expensive? If it is too expensive for FIW to be transparent and accountable with regard to noise, even after an unresolved compliance issue, what does that say about the cost to the Neighbors in pursuing future noise complaints in compliance with the technical requirements of the Noise Rule? The subtext of the DEP's position in this appeal is that the Noise Rule will never again be a factor in the future operation of FIW's wind project.

III. THE SUPERIOR COURT ERRED BY DISMISSING THE NEIGHBORS' FIRST AMENDMENT RETALIATION CLAIM

The Neighbors cross appeal on two, related, issues. First, the Neighbors appeal the decision by the Superior Court on November 1, 2012 to dismiss their Section 1983 claim for First Amendment retaliation because of the adequacy of state court remedies. *See*, Order on Motion to Dismiss Independent Claims, JA 29. Second, the Neighbors appeal the portion of the Order on Rule 80C Petition which dismisses their First Amendment retaliation claim pursued as part of their Rule 80C claims. JA 38 at 9-11.

A. As a Matter of Federal Law, a Section 1983 Action is not Precluded Even if Relief is Available under State Law Procedures.

In its ruling that a Section 1983 claim is not available to the Neighbors because of the adequacy of state law remedies, JA 29 at 3-9, the Superior Court made a fundamental error of law. The general rule that Rule 80C is the exclusive means of review of governmental action

when the state law remedy provides adequate relief, *see Fisher v. Dane*, 433 A.2d 366, 372 (Me. 1981) and its progeny, does not apply to a claim under the First Amendment. This is so for two reasons. First, under federal precedence a Section 1983 claim under the Bill of Rights cannot be denied in state court even if it is duplicative or supplementary to state law remedies, and second because federal law is backed by the Supremacy Clause and therefore precludes any rule to the contrary in state law.

The Supreme Court has repeatedly ruled that access to State court to litigate Section 1983 claims is guaranteed by the Supremacy Clause and has consistently struck down state laws, rules and procedures that create obstacles to such access. This principle was recognized as long ago as 1961, in *Monroe v. Pape,* 365 U.S. 167 (1961), when the Supreme Court stated that "[i]t is no answer that the State has a law which if enforced would give relief. *The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Id.* at 183. [Emphasis added.] A few years later, the Supreme Court ruled more broadly that state law administrative remedies do not have to be exhausted before a Section 1983 claim can be initiated. *Accord, Patsy v. Board of Regents*, 457 U.S. 496 (1982), dispensing with any state law requirement of exhaustion, and *Felder v. Casey*, 487 U.S. 131, 138-9 (1988), invalidating as contrary to the Supremacy Clause a Wisconsin notice of claim statute that was applied to deny access to a Section 1983 claim in state court. Quoting from prior precedence, the Court in *Felder* explained that Section 1983 provides a "uniquely federal remedy against incursions upon rights secured by the Constitution" and is to be accorded "a sweep as broad as its language." *Id.* at 139. [Citations omitted.] The Court explained that where a litigant brings a Section 1983 case in state court, the federal claims cannot be deterred by local practices (such as the *Fisher v. Dane* line of cases cited by the Court in our case). *Id.* at 138. Under the

Supremacy Clause of the Federal Constitution, "[t]he relative importance of the State of its own law is not material where there is a conflict with a valid federal law," *Id.*, quoting *Free v. Bland*, 369 U.S. 663, 666 (1962). *Also see, Howett v. Rose*, 496 U.S. 356 (1990) and *Haywood v. Drown*, 129 S.Ct. 2108 (2009).

There are occasions when the availability of state law remedies informs the validity of the underlying cause of action itself. This is the case for procedural Due Process claims that can be defeated as a claim when post-deprivation process is afforded under state law. *Daniels v. Williams*, 474 U.S. 327 (1986). In so holding the Court in *Daniels* differentiated between procedural Due Process claims and claims for protections guaranteed by the Bill of Rights, which "a plaintiff may invoke [through] §1983 regardless of the availability of a state remedy," citing *Monroe v. Pape* and other cases discussed above. *Id.* at 337-8. In the case of claims under the Bill of Rights, Justice Stevens wrote, the constitutional violation is complete as soon as prohibited action is taken and thus an "independent federal remedy is then authorized" regardless of state law remedies. *Id.* In contrast, a claim under the procedural Due Process Clause is "fundamentally different" because the constitutional violation is not complete until it is determined whether the procedures afforded by the state are fair enough to satisfy Due Process. *Id. See also, Zinermon v. Burch*, 494 U.S. 113, 124-5 (1990), agreeing with the reasoning of Justice Stevens. "[O]verlapping state remedies are generally irrelevant to the question of the existence of a cause of action under §1983" and this is specifically true when a plaintiff "bring[s] suit under §1983 for state officials' violation of his rights to, e.g., freedom of speech...." *Id.* at 124-5.

This Court has never ruled that a Section 1983 claim for violation of the First Amendment claim is precluded because of the adequacy of state law remedies. To the contrary,

in the case of *Wyman v. Secretary of State*, 625 A.2d 307 (Me.1993), the Law Court affirmed the validity of a First Amendment claim under Section 1983 and awarded attorney's fees under Section 1988 of the Civil Rights Act because of the refusal of the Secretary of State to issue a petition needed to invoke a voter initiative even though the Superior Court had granted full relief under state law. [41]

B. The Superior Court Erred in Ruling that Neighbors Failed to Establish a First Amendment Retaliation Claim under Rule 80C.

The heart of the Neighbors' Section 1983 First Amendment retaliation claim lies in the right to petition one's government for redress of grievances. This Court has described this right as a "fundamental right protected by the First Amendment," indeed "'one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *Nader v. The Democratic Party*, 2012 ME 57, ¶21, 41 A.3d 551, 558, citing *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). Any restriction on this right is "subject to exacting scrutiny, must be justified by a compelling state interest and be narrowly tailored to serve that interest." *Wyman v. Secretary of State*, *supra*, 625 A.2d at 311. Where, as here, there is a substantial limitation on protected conduct, the burden on the DEP is "well-nigh insurmountable." *Id.*, citing *Meyer v. Grant*, 486 U.S. 414, 425 (1988). To be clear, the Neighbors' First Amendment claims are about retaliation for the exercise of their right to petition the DEP with grievances about excessive noise, not about political speech or criticism of government, or party affiliation or resentments.

The parties agree and the Superior Court ruled below, JA 38 at 9, that the elements of a First Amendment Retaliation case are that plaintiffs must show (1) that their conduct, here

---

[41] Moreover, relief under Rule 80C is not "adequate" to vindicate rights available under Section 1983 because a Section 1983 action, judicial review is not limited to the administrative record, discovery is available and the lower court exercises plenary jurisdiction, not appellate, s*ee, Baker's Table v. City of Portland*, 2000 ME 7, ¶¶s 9-12, 43 A.2d 237, 240-42, *Salisbury v. Town of Bar Harbor*, 2002 ME 13,¶16, 788 A.2d 598, 602. Also, Rule 80C is inadequate because under Section 1983 the prevailing plaintiff can be awarded attorney's fees. 42 U.S.C. §1988.

petitions to government for redress, was protected by the First Amendment (2) that a public official took adverse action against the petitioners and (3) the adverse action was motivated by or substantially caused by the exercise of the protected conduct. *Dorsett v. County of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013); *Zherka v. Amicone*, 634 F.3d 642, 644-48 (2d Cir. 2011); *Gill v. Pidlypchak*, 389 F.3d 379, 380 (2d Cir. 2004); *Gagliardi v. Village of Pawling*, 18 F.3d 188, 194 (2d Cir. 1994); *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 40-43 (1st Cir. 1992); *Puckett v. City of Glen Cove,* 631 F.Supp. 2d 226, 239-40 (E.D.N.Y. 2009).

First, the right to petition the DEP with a grievance in the form of a noise complaint seeking enforcement of the Noise Rule against FIW is clearly protected by the First Amendment. *Gagliardi v. Village of Pawling, supra,* 18 F.3d at 194 ("The rights to complain to public officials and to seek administrative and judicial relief are protected by the First Amendment."); *Dougherty v. Town of North Hempstead Board of Zoning Appeals*, 282 F.3d 83, 91 (2d Cir. 2002); *see also, Schubert v. City of Rye*, 775 F.Supp.2d 689, 711 (S.D.N.Y. 2011); *Puckett v. City of Glen Cover, supra*, 631 F. Supp. 2d at 240. The DEP freely acknowledged below that this element of the claim is satisfied in this case, as the Superior Court ruled below. JA 38 at 9.

. Second, the Neighbors have clearly proved that the DEP took adverse action against them when in the CCO it (1) refused to require FIW to take corrective action under all conditions known by the Department to create excessive noise in violation of FIW's license conditions and the Noise Rule, (2) formalized a complaint response protocol imposing burdensome requirements on the Neighbors for filing future noise complaints, not applicable to those living near any other wind project in the state and (3) retained with only minor changes a compliance assessment protocol that allows FIW to continue operations without affirmatively and effectively demonstrating compliance under conditions expected by the DEP. Because of these three forms

of adverse actions, the Neighbors are suffering from the effects of excessive noise that the Noise Rule was designed to prevent, including adverse health effects, sleep deprivation and secondary effects from sleep deprivation, the inability to enjoy the use of their property, the loss of value to their property, and a sense of betrayal at the hands of the DEP. [42]

These forms of adverse actions are precisely the kind that the Second Circuit in *Gagliardi* ruled satisfy the elements of a First Amendment retaliation claim. *Id.* at 195. *Gagliardi* was a case where residents living in a residential zone abutting a plastics factory in an industrial zone complained that that they suffered First Amendment retaliation by reason of the refusal of local officials to enforce a noise ordinance following their numerous complaints that the factory was producing excessive noise. The Second Circuit ruled that the failure to enforce satisfied the requirement of adverse action for purposes of a First Amendment retaliation claim. The Neighbors in this appeal have demonstrated an even more compelling case of adverse action because they have demonstrated, not only that the DEP failed to fully enforce the Noise Rule for an existing complaint, but that it has put in place protocols that render it unlikely that the Noise Rule will ever be enforced in the future.

The Superior Court was in error when it dismissed the Neighbors' Rule 80C retaliation claim based on the failure to prove that the DEP's action "chilled" their right to petition for relief. JA 38 at 10-11. This ruling reflects a misunderstanding of the scope of the protection of the First Amendment retaliation where, as here, the First Amendment issues do not relate to political speech. As recently explained by the Second Circuit, courts have on occasion "given the impression that silencing of the plaintiff's speech is the only injury sufficient to give a First Amendment plaintiff standing. "*Dorsett, supra*, 732 F.3d at 160. This is not true, said the court.

[42] FIW's statement, without citation, that the DEP has been most responsive to the complaints of the Neighbors because it "has continually followed up and required responses from FIW, which has continually provided data showing no violations," FIW Brief at 38, is both self-serving and false based on this record.

"Chilled speech is not the sine qua non of a First Amendment claim. A plaintiff has standing if he can show either that his speech has been adversely affected by the government retaliation or that he has suffered some other concrete harm." *Id.*, citing *Gagliardi* as an example of concrete harm through refusal to enforce zoning laws. *Accord, Zherka, supra*, 634 F.3d at 645; *Gill, supra*, 389 F.3d at 383; *Tretola v D'Amico*, 2014 U.S. Dist. LEXIS 89601 (E.D. N.Y. July 1, 2014) at *13; *Schubert, supra*, 775 F.Supp.2d at 711.The adverse action here, as in *Gagliardi*, is the refusal to fully enforce the Noise rule. Moreover, going beyond what *Gagliardi* held was enough for a retaliation claim, the Neighbors in this appeal have also suffered e greater adverse harm by reason of the protocols incorporated into the CCO specifically targeting them, which make it impossible, from a practical standpoint, for the Neighbors to file a noise complaint which will be investigated and acted upon in good faith.

Moreover, the Neighbors *have* demonstrated chill. Under the complaint response protocol incorporated into the flawed CCO, the Neighbors would have to make a substantial investment to file a noise complaint without access to compliance assessment data that FIW is not required to collect, that investment would not only be unfairly expensive but would be fruitless, and in any event the DEP's positions in this case demonstrate that it has no intention of pursuing noise complaints from Vinalhaven in the future. These facts demonstrate chill. [43]

Third, the "ultimate question" in First Amendment retaliation cases like this one, where there is no question that the Neighbors' conduct is protected activity and that the Neighbors have suffered concrete, adverse action, is the "requisite nexus between the exercise of their First

[43] The Superior Court commented that at oral argument the DEP "clarified" that "unsubstantiated complaints" (meaning complaints that failed to comply with the technical requirements of the Noise Rule even though the Neighbors have no access to FIW assessment data) are "acknowledged." JA 38 at 10. That was true for the Britta Lindgren complaint, JA 281, but simply acknowledging a complaint does nothing for protecting the Neighbors from excessive noise. The Superior Court also noted that the DEP clarified that unsubstantiated claims would be "monitored" to "develop a pattern." *Id.* There is absolutely no evidence in the record to support this self-serving statement if it was made at oral argument or even what it means.

Amendment rights and subsequent retaliatory conduct" of the DEP. *Gagliardi, supra,* 18 F.3d at 195. The motivations and intent of governmental officials in a case like this are "critical because otherwise constitutional government actions 'lose their legitimacy if designed to punish or deter an exercise of constitutional freedoms.'" *Welsh v. Paicos*, 66 F.Supp. 2d 138, 169 (D.Ma. 1999), quoting *Ferranti v. Moran*, 618 F.2d 888, 892 (1st Cir. 1979). The Second Circuit observed in *Gagliardi,* that motive and intent are difficult to plead with specificity, as recognized in Rule 9(b) of the Federal Rules of Civil Procedure, and therefore it is sufficient to prove motive through circumstantial facts from which retaliatory intent may be inferred. *Gagliardi, supra,* 18 F.3d at 195; s*ee also, Dougherty, supra*, 282 F.3d at 91; *Tomlin v. Village of Wappinger Falls BZA,* 812 F.Supp. 2d 357, 373 (S.D.N.Y. 2011).

Courts have found that allegations of retaliation against citizens complaining about the failure of government to enforce land use regulations have been sufficiently pleaded (1) when the complainants set forth a detailed chronology of events supportive of a causal connection between the protected activity and the claimed retaliation, (2) when allegations are made that the complainants have suffered disparate treatment at the hands of the government entity, or (3) when there has been a departure from normal procedures in connection with enforcement. *Gagliardi, supra,* 18 F.3d at 195; *Dougherty, supra,* 282 F.3d at 92; *Tomlins, supra,* 812 F.Supp. 2d at 373-76; *Nestor Colon, supra*, 964 F.2d at 41 (disparate treatment "is key because it indicates the possibility of an illegal motive"); *Schubert v. City of Rye, supra*, 775 F.Supp.2d at 712; and *Puckett v. City of Glen Cove, supra*, 631 F.Supp. 2d at 240.

There is evidence in the record of all three forms of corroborative factors. First, the chronology set forth above shows a highly compromised Acting Commissioner accepting FIW's request that protocols be put in place for its Project that would silence the Neighbors from their

ceaseless demands on the DEP for enforcement of the Noise Rule. Second, neither the DEP nor FIW are able to point to a single other wind project, grid scale or smaller scale, where adjoining property owners are subjected to the kind of unfair complaint response protocol that has been imposed on the Neighbors in this case. Third, there was a departure from normal procedures when the Commissioner of the DEP, who lacked technical skills on the subject, rejected the advice of her senior professional staff, supported by the DEP's expert and the Attorney General's Office, to give favorable treatment to a regulated entity whose attorneys she recently worked for. There is, therefore, sufficient evidence in the record to establish a First Amendment retaliation claim under Rule 80C. The case for a finding of retaliation is much stronger than in *Gagliardi*, which involved circumstantial evidence only, because in this case the complaint response protocol specifically targeting the Neighbors is *direct* evidence of illegal motive. Because a finding of a First Amendment retaliation under Rule 80C also establishes a Section 1983 claim, the Neighbors are entitled to attorney's fees under 42 U.S.C. §1988. *Wyman, supra*, 625 A.2d at 312.

Alternatively, the Neighbors should be allowed to proceed with its Section 1983 claim, which was precluded by the lower court's Order on Motion to Dismiss Independent Claims. JA 29. Additional evidence on the Section 1983 independent claims would include testimony from James Cassida and evidence of political maneuverings by FIW with the Governor's Office to put pressure on the DEP to silence the Neighbors to further establish the retaliation claim, evidence pursuant to which the Superior Court would make findings as a court of original jurisdiction. *See,* the Neighbors' Motion for the Taking of Additional Evidence, with the accompanying Detailed Statement of Evidence Intended to be Taken pursuant to M.R.Civ. P. 80C(e), as filed on September 5, 2012. Pet. App. 249.

CONCLUSION

For the reasons stated above, the Neighbors respectfully request this Court to affirm the decision of the Superior Court that the CCO is invalid as a product of arbitrary and capricious action, without substantial evidence to support it, and an abuse of discretion and hold that the Neighbors have established a valid First Amendment retaliation claim under Rule 80C, with allowance for an award of attorney's fees or, in the alternative, that they have set forth a plausible claim under Section 1983 of First Amendment retaliation that may proceed on as an independent claim. The Neighbors further request that the matter be remanded back to the Superior Court so that the matter can be remanded to the DEP with detailed instructions on the parameters of a valid CCO.

Dated: August 5, 2014

Rufus E. Brown, Esq.
State Bar No. 1898
BROWN & BURKE
152 Spring Street - P.O. Box 7530
Portland, ME 04112-7530
(207) 775-0265
rbrown@brownburkelaw.com

Attorney for the Fox Islands Wind Neighbors and the Individual Petitioners