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GOVERNOR

STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
LAND USE PLANNING COMMISSION
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AUGUSTA, MAINE 04333-0022

AMANDA E. BEAL
COMMISSIONER

STACIE R. BEYER
EXECUTIVE DIRECTOR

Fifth Procedural Order

In the Matter of

Zoning Petition ZP 779A

Wolfden Mt. Chase, LLC.

Application for Zone Change, Picket Mountain Mine

T6 R6 WELS, Penobscot County, Maine

Commissioner Everett Worcester, Chair and Presiding Officer

This Fifth Procedural Order responds to objections relating to the schedule for the daytime technical sessions of the public hearing on Wolfden Mt. Chase, LLC's (Wolfden or Applicant) Application for Zone Change (Application).

I. BACKGROUND

- A.** On February 24, 2023, the Maine Land Use Planning Commission (Commission or LUPC) accepted as complete for processing Wolfden's application to rezone 374 acres in T6 R6 WELS from a General Management to a Planned Development (D-PD) subdistrict. The proposed D-PD subdistrict would allow for the development and operation of the Pickett Mountain metallic mineral mine.
- B.** The application is subject to and will be reviewed under the Commission's Chapter 12 rules (Mining and Level C Mineral Exploration Activities). 06-672 C.M.R. Chapter 12, effective May 27, 2013. Chapter 12 requires a public hearing to be held by the Commission prior to a final decision on the application. The public hearing is scheduled for October 16, 17, and 18 in Millinocket and October 23 in Bangor.
- C. Fourth Procedural Order.** The Fourth Procedural Order, issued on October 10, 2023, set a schedule for the daytime technical sessions of the public hearing.

- D. Objection by Tribes and Nonprofits (Intervenor 2).** On October 11, 2023, Intervenor 2 submitted an objection to the schedule for the technical sessions. Intervenor 2 argued that the schedule allocated too much time to direct examination of their five witnesses and too little time to their cross-examination of the 16 witnesses for the Applicant and Intervenor 1. Intervenor 2 proposed a modification of Day 2 of the schedule to decrease their time for direct examination and increase their time for cross-examination of the Applicant's witnesses, allowing some additional cross-examination at the end of the Applicant's presentation.
- E. Applicant's Response.** On October 12, 2023, the Applicant responded to Intervenor 2's objection. The Applicant argued that the current schedule evenly allocates time for direct and cross to each party to facilitate the Commission's understanding of the issues. The Applicant contends that direct testimony allows an opportunity for each party to respond to the other party's pre-filed testimony, that arguments about the imbalance in the number of witnesses ignore the breadth of topics covered by each witness, and that providing one party a second chance to conduct cross-examination is fundamentally unfair.
- F. Intervenor 1's Response.** Intervenor 1 responded on October 13, 2023. Intervenor 1 adds to the Applicant's response by arguing that Intervenor 2 makes no new arguments, this is not the time to reconsider the hearing schedule, and any further time allocated to Intervenor 2 would be unfair.
- G. Criteria and Standards, Sequencing of the Hearing.** In accordance with Sections 5.08(A)(1) through (4) of the Commission's *Rules for the Conduct of Public Hearings*, the Presiding Officer may vary the order in which witnesses appear, may vary the order in which cross-examination occurs, and may limit redirect and re-cross-examination of witnesses.

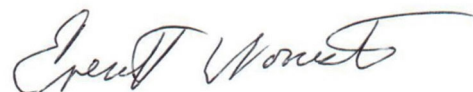
II. HEARING SCHEDULE

Having considered Intervenor 2's objection and the responses filed by the Applicant and Intervenor 1, the Presiding Officer has decided not to revise the schedule for the hearing. The hearing schedule remains as determined in the Fourth Procedural Order issued on October 10, 2023.

III. AUTHORITY AND RESERVATIONS

This Procedural Order is issued by the Presiding Officer pursuant to the Commission's Chapter 5, *Rules for the Conduct of Public Hearings*. All objections to matters contained herein should be timely filed in writing with the Commission according to the service list but are not to be further argued except by leave of the Presiding Officer. All rulings and objections will be noted in the record. The Presiding Officer may amend this Order at any time.

DONE AND DATED AT AUGUSTA, MAINE THIS 13th DAY OF October 2023



Everett Worcester, Chair and Presiding Officer

**STATE OF MAINE
LAND USE PLANNING COMMISSION**

IN RE: PICKETT MOUNTAIN MINE REZONING APPLICATION

Applicant: Wolfden Mt. Chase LLC

Location: T6R6 WELS

Commission Application Number: ZP 779A

INTERVENOR 2 OBJECTION TO SCHEDULE

Submitted by

**HOULTON BAND OF MALISEET INDIANS, PENOBSCOT NATION, NATURAL
RESOURCES COUNCIL OF MAINE, AND CONSERVATION LAW FOUNDATION**

The Penobscot Nation, Houlton Band of Maliseet Indians, Natural Resources Council of Maine, and Conservation Law Foundation (collectively Intervenor 2) object to the schedule contained in the Fourth Procedural Order. In our view, this schedule improperly allocates the time among the participants, allocates too much time to Intervenor 2's direct examination and too little to Intervenor 2's cross-examination in light of the extensive pre-filed testimony, limits the ability of Intervenor 2 to cross-examine the 16 adverse witnesses from Wolfden and Intervenor 1, grants only re-direct to Wolfden and not to Intervenor 2, and interferes with Intervenor 2's ability to determine how best to put on its case either through direct or cross examination. In our view, this violates Maine's APA, due process, and fundamental fairness.

We proposed a couple of minor compromises to Wolfden discussed below to reduce the harm from the issues above, but Wolfden rejected both of them.

The parties already have had substantial opportunity to put on their affirmative cases. Wolfden's rezoning application is 1198 pages long. Wolfden also submitted 507 pages of pre-filed testimony from 14 witnesses, including 34 pre-filed exhibits. Intervenor 1 (which is aligned with Wolfden) submitted pre-filed testimony from 2 additional witnesses. Meanwhile, Intervenor 2 submitted pre-filed testimony from only 5 witnesses, along with pre-filed exhibits. The parties should not need a total of 415 minutes of direct testimony to summarize the pre-filed testimony. More importantly, in light of the imbalance in the number of witnesses, we anticipate that much of the basis for our opposition to this application will come from the cross-examination of the proponent's 16 witnesses, and that we will not need as much time for direct examination. Where one side has 5 witnesses and the other has 16, it seems that the side with 5 witnesses would need more time for cross-examination and less for direct. The current schedule does not accomplish this.

On the disparity of time allocated between the proponents and opponents of this application that we have previously raised, we note that this schedule allocates 250% more time for openings to the proponents than the opponents. On the examination schedule, the proponents are given a total of 430 minutes, while the opponents are given only a total of 295 minutes. We continue to object to this unequal allocation.

The total amount of time allocated to cross-examination is inadequate. For the proponents' 16 witness, Intervenor 2 is given a total of 95 minutes for cross-examination. That amounts to approximately 6 minutes per witness. Just one of these witnesses, Brian LeBlanc, who is testifying for Wolfden about the Preliminary Economic Assessment (PEA) that is being used to justify the economics of this project, submitted 33 pages of pre-filed testimony and exhibits to discuss the roughly 200-page PEA and supplemental filings contained in the Rezoning Application. With only 6 minutes of cross-examination, the Commission will largely hear only Wolfden's side of the story on this and many other issues.

These issues are further compounded by Wolfden's ability to use panels to further cut back on cross-examination. If, for example, Wolfden puts numerous key witnesses on the same panel, say, 6 or 7 witness, some of whom Wolfden said might not testify at all and just be available for cross examination, and then Intervenor 2 is limited to 25 minutes for all of them, it further reduces the chance that Intervenor 2 will be able to spend the time on the witnesses and the issues we think are important.

We did want our objections noted on the record. Meanwhile, in effort to reduce this unfairness, we make two further suggestions for slight modifications within the confines of the current schedule, both of which we rejected by Wolfden:

First Alternative Modification.

Intervenor 2 needs more time for cross-examination than for its presentations, and thus we propose to shorten our presentations in favor of more cross-examination. Additionally, if we do not use all of time allocated to direct testimony, we propose to use any remaining balance for re-direct examination. We also attempt to largely preserve their proposed times as follows.

On Day 2, in the Morning Session, after the break, turn #6 (currently Intervenor 2 Panel 1 direct testimony – 50 mins) into a 50-minute period for cross examination by intervenor 2 of any Applicant witness (other than Fieler, who needs to leave) that we are unable to reach on Day 1. Then take the remaining time slots in the Day 2 morning session (number 7-10), keeping the time allocations the same, and make them into Intervenor 2 Panel 1 (So we would start with 35 mins of direct examination (item 10 on current schedule), followed by 25 minutes of Applicant cross, 20 minutes of Intervenor 1 cross, and 15 minutes of LUPC questions (Items 7-9 on current session)).

For the Afternoon Session on Day 2, all time allocations could remain the same, but with Intervenor 2's 55 minutes of direct testimony (currently split into three parts — items 1, 5, and 7, totaling 55 minutes) split instead into two parts, one 30 minutes and the other 25 minutes. The time allocations and time slots for cross examinations and LUPC questions would remain the same. The break could be taken at any appropriate time.

Here is how the revised schedule would look:

Day 1 – [unchanged]

Day 2:

MORNING SESSION

Items 1-5 [unchanged]

6. Intervenor 2 – additional remaining cross examination of any Applicant witnesses (other than Fieler) – 50 minutes

Intervenor 2 – Panel 1

7. Intervenor 2 – testimony and evidence - 35 minutes

8. Applicant Cross-exam – 25 minutes

9. Intervenor 1 Cross-exam – 20 minutes

10. LUPC questions – 15 minutes

AFTERNOON SESSION

Intervenor 2- Panel 2

1. Intervenor 2 Testimony and Evidence – 30 minutes

2. Applicant cross – 25 minutes

3. Intervenor 1 cross – 15 minutes

4. LUPC questions – 15 minutes

5. BREAK

Intervenor 2- Panel 3

6. Intervenor 2 Testimony and Evidence – 25 minutes

7. Applicant cross - 25 minutes

8. Intervenor 1 cross – 15 minutes

9. LUPC questions – 15 minutes

Day 3: [Unchanged]

Second Proposed Modification.

A second, less desirable, modification would convert the first Intervenor 2 panel on the morning of Day #2 into a further Wolfden presentation slot with Intervenor 2 getting the currently allocated cross examination time of both Wolfden and Intervenor 1. Although this further reduces the total time Intervenor 2 gets, which is objectionable, nevertheless, it does take into consideration that Intervenor 2 believes that it needs more cross-examination time for the 16 adverse witnesses, and less direct-examination time for its 5 witnesses.

At the end of the day, both the proponents and the opponents should be given an adequate opportunity to make their cases why this Rezoning Application should be granted or denied. Accordingly, the current schedule should be modified.

Dated: October 11, 2023

Respectfully Submitted,

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STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
LAND USE PLANNING COMMISSION

IN THE MATTER OF ZONING)	
PETITION ZP 779A)	
WOLFDEN MT. CHASE, LLC)	APPLICANT’S RESPONSE TO
APPLICATION FOR ZONE CHANGE,)	INTERVENOR 2 OBJECTION
PICKET MOUNTAIN MINE)	TO SCHEDULE
T6 R6 WELS,)	
PENOBSCOT COUNTY, MAINE)	

Wolfden Mt. Chase, LLC (“Wolfden”) provides the following response to Intervenor Two’s objection to the schedule set forth in the Fourth Procedural Order.

As discussed during the Second Pre-Hearing Conference, Intervenor Two objected to the topic-based schedule proposed by the Commission. Following discussions between the parties, on October 5, Intervenor Two proposed that the Commission instead adopt a panel format whereby several Wolfden witnesses would present direct testimony, followed by cross examination. This is exactly the approach the Commission adopted in the Fourth Procedural Order. Wolfden proposed that all witnesses present before the parties conduct any cross examination, which would have afforded Intervenor Two greater flexibility in allocating their time for cross-examination. Intervenor Two rejected Wolfden’s proposal during discussions between the parties. It cannot now object to a schedule that it requested and which the Commission adopted after receiving proposals from all parties.

Furthermore, it is clear that Intervenor Two misunderstands the purpose of the hearing, which is to facilitate the Commission’s understanding of the issues. To aid in this objective, the Commission has evenly allocated time between Wolfden and Intervenor Two for both direct and cross examination. Both parties have 190 minutes for direct testimony; Wolfden has 100 minutes

for cross examination and Intervenor Two has 95 minutes, a mere five minutes less. In other words, both parties have even amounts of time and equal opportunity to put on its case, tell its story, and cross-examine witnesses. Wolfden continues to strenuously object to Intervenor Two's argument that Wolfden's time should be combined with Intervenor One's. As previously asserted, there is no basis for doing so in either the Commission's rules or historic practice. As such, despite Intervenor Two's claim, the Commission has equally allocated time between Wolfden and Intervenor Two.

Intervenor Two further asserts that the parties have already had substantial opportunity to put on their affirmative case and that only limited time is needed to summarize the pre-filed testimony. However, this argument misunderstands that, where the parties have submitted pre-filed testimony, direct testimony at the public hearing is not just an opportunity to summarize the pre-filed testimony, but an opportunity to affirmatively respond to what the other party has already submitted on the record.

Intervenor Two further cites an imbalance between the number of Wolfden and Intervenor Two witnesses as justification for reallocating more of its time for cross-examination. However, this assertion entirely ignores the breadth of topics covered by their five witnesses. For example, in her pre-filed testimony, Intervenor Two's witness, Dr. Maest, submitted 36 pages of pre-filed testimony¹ (nearly twice as long as Wolfden's longest piece of pre-filed testimony), that covers multiple technical issues, financial issues, and feasibility issues. The breadth of topics covered by Intervenor Two's five witnesses is further reflected in the sheer volume of materials that Intervenor Two entered into the record. Intervenor Two submitted more than 1200 pages of pre-filed testimony, including 108 exhibits, many of which were excerpted and therefore missing

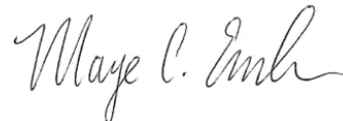
¹ The total page count excludes exhibits, references, and the notary page.

substantial portions. In other words, Intervenor Two submitted more than two times as many pages of pre-filed testimony, and more than three times as many exhibits. Just as Intervenor Two has limited time to cross examine Wolfden’s witnesses, Wolfden is afforded only limited time to conduct cross examination of the many issues and materials that may be covered by a single witness. Again, both parties are similarly constrained on cross examination by the Commission’s schedule for the public hearing.

Finally, Wolfden rejects Intervenor Two’s first proposed modification of the current schedule. Intervenor Two suggests that, in addition to cross examination following each of Wolfden’s panels, it be given a *second* opportunity to cross examine Wolfden’s witnesses for an additional 50 minutes. This is an unprecedented request. It would be fundamentally unfair for one party to have two opportunities for cross examination. Moreover, as referenced above, Wolfden proposed cross examination following presentation of all witnesses, which Intervenor Two rejected. Intervenor Two cannot now have it both ways. Wolfden similarly rejects Intervenor Two’s second proposed modification. As discussed above, the Commission has evenly allocated time on direct and cross between Wolfden and Intervenor Two and, given the already substantial record, Intervenor Two can use its time on direct to respond to pre-filed testimony.

The Commission has considered the parties proposals and has set a hearing schedule based on those proposals. Wolfden has already made adjustments consistent with that schedule and does not believe that further modifications to the schedule are necessary or warranted.

Dated: October 12, 2023



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STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
LAND USE PLANNING COMMISSION

IN THE MATTER OF) HAYNES RESPONSE TO
PETITION ZP 779A) INTERVENOR 2 10 11 23
WOLF DEN MT. CHASE, LLC) OBJECTION TO SCHEDULE
T6 R6 WELS)
PENOBSCOT COUNTY, MAINE)

H.C. Haynes, Inc., (“Haynes”) responds to Intervenor 2’s October 11, 2023, objection to the schedule established by Procedural Order 4 follows:

Haynes objects to the modifications to the schedule proposed by Intervenor 2 and joins in Wolfden’s response and, in addition, notes the following:

- 1-The Commission has considered the positions of parties and made its decision and this is not the time to reconsider the decision with the public hearing starting Monday morning;
- 2-Intervenor 2 makes no new arguments, its position has been duly considered and the schedule accommodates Intervenor 2 and allocates plenty of time for it to make its case;
- 3-The Commission has bent over backwards to accommodate Intervenor 2 to the detriment of the due process rights of Intervenor 1. The Commission has allocated time to Intervenor 2 far in excess of the time allocated to Intervenor 1 and any further allocation will be fundamentally unfair.

Dated: October 13, 2023



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