



Board of Environmental Protection
Summary of Activities in Calendar Year 2015 and
Issues for Committee Consideration

Report to the Joint Standing
Committee on Environment and Natural Resources

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A. Board of Environmental Protection Members: Biographical Information

Board of Environmental Protection Report to the Joint Standing Committee on Environment and Natural Resources

Summary of Activities in Calendar Year 2015

I. Introduction

The Board of Environmental Protection is a citizen board whose members are appointed by the Governor and approved by the Legislature. (38 M.R.S. § 341-C). Its purpose is to “provide informed, independent and timely decisions on the interpretation, administration and enforcement of the laws relating to environmental protection and to provide for credible, fair and responsible public participation in department decisions.” (38 M.R.S. § 341-B).

Title 38 § 341-D(7) requires the Board of Environmental Protection to report to the joint standing committee having jurisdiction over natural resource matters by January 15 of the first regular session of each Legislature on the “effectiveness of the environmental laws of the State and any recommendations for amending those laws or the laws governing the board.” Although a report is not required at this time, the Board customarily reports to the Legislature on an annual basis. This report provides a summary of the Board’s activities in 2015.

II. Membership

Biographical information on the current Board members is found in Attachment A. Changes to Board membership in 2015 are summarized below. There is currently one vacancy.

Susan M. Lessard, Hampden. Susan Lessard completed her service on the Board in June 2015, having served the maximum of two terms, including four years as Chair of the Board.

Jonathan B. Mapes, Springvale. In October 2015, Governor LePage nominated Jonathan B. Mapes of Springvale to fill the seat vacated by Robert Foley in November 2014. Mr. Mapes is the President and Owner of H.A. Mapes, Inc., a petroleum distribution, operations and management company located in Springvale. Mr. Mapes’ appointment was confirmed by the Senate on November 19, 2015.

III. Responsibilities and Duties

The Board’s responsibilities as set forth in 38 M.R.S. § 341-D include:

- Major Substantive Rulemaking: The Board holds public hearings on, and provisionally adopts, major substantive rules of the Department for consideration by the Legislature.

- Appeals of Commissioner Licensing and Enforcement Actions: An aggrieved person may appeal a final license or permit decision of the Commissioner to the Board. The Board also hears appeals of emergency orders issued by the Commissioner.
- Decisions on Certain Permit Applications: The Board makes the original licensing decision on any application for approval of a permit or license that in its judgment represents a project of statewide significance. Additionally, the Department's statutes specify that certain applications such as those pertaining to commercial hazardous waste facilities must be reviewed and decided by the Board.
- License Modification or Corrective Action: At the request of the Commissioner and after written notice and opportunity for hearing, the Board may modify in whole or in part any license, or issue an order prescribing necessary corrective action, when it finds that certain criteria set forth in statute are met.
- Recommendations to the Legislature: The Board is charged with making recommendations to the Legislature on the implementation of environmental laws.

Proceedings before the Board are governed by the Maine Administrative Procedure Act, the Board's procedural statutes and rules governing the various types of proceedings (e.g., rulemaking, appeal proceeding, etc.), and by program-specific statutes and rules governing matters such as the control of air emissions, waste management, and land use. All meetings of the Board are noticed and open to the public. The Board maintains a webpage with biographical information on Board members, meeting materials, information on pending matters of broad public interest, and guidance to facilitate public participation in matters pending before the Board.

IV. Issues for Committee Consideration

A. Major Substantive Rules

As discussed in more detail in Section V below, the Board is forwarding the following major substantive rules to the Committee for consideration this session: Chapter 373 Financial Capacity Standard of the Site Location Law / Amendments, Chapter 375 No Adverse Environmental Effect Standard of the Site Location Law / Amendments, and Chapter 380 Long-Term Construction Projects (Site Law) / Repeal and Replace. These provisionally adopted rules have been submitted to the Legislative Council pursuant to 5 M.R.S. § 8072.

B. Wind Energy Developments

In our report for calendar year 2014, the Board made several observations regarding issues which have arisen in the review of grid-scale wind energy developments including identification of scenic resources of state or national significance, continuing public concern over the evaluation of impacts to scenic character and existing uses related to scenic character of scenic resources of state or national significance, financial capacity and decommissioning, and tangible benefits. Board members also noted increasing concern over the interest in, and limited oversight of, smaller-scale wind energy developments in organized areas which may be

located in environmentally sensitive areas with the potential to have significant scenic and other natural resource impacts.

The Board appreciates that the Legislature addressed a number of these concerns expressed by the Board and others in the following bills:

- LD 828 (Public Law 2015, c. 265) An Act to Improve Regulatory Consistency within the Jurisdiction of the Maine Land Use Planning Commissioner provided a mechanism and criteria for removing a specified place in the unorganized and deorganized areas of the state from the expedited permitting area.
- LD 911 (Public Law 2015, c. 190) An Act Concerning the Review of Certain Projects under the Site Location of Development Laws defined additional terms for the assessment of scenic impact and elaborated on the evaluation criteria.
- LD 1244 (Public Law 2015, c. 264) An Act to Amend Environmental Permitting Standards modified the requirements for a public hearing on a grid-scale wind energy development and enacted a new section governing smaller-scale wind energy development including permitting requirements.

The Board continues to be concerned with the law's reliance on "Maine's Finest Lakes" (1989) and the "Maine Wildlands Lakes Assessment" (1987) to designate lakes as scenic resources of state or national significance given the age of the reports and their intended use at the time of their preparation.

C. Law Court Decision in the Matter of Champlain Wind, LLC v. Board of Environmental Protection

Champlain Wind, LLC applied for a permit to construct the Bowers Wind Project, to consist of 16 turbines and associated infrastructure with a total of 48 megawatts of generation capacity, in Carroll Plantation, Penobscot County and Kossuth Township, Washington County. After a public hearing the Commissioner of the Department of Environmental Protection denied the project in a decision dated August 5, 2013. The Commissioner's decision was appealed to the Board, which upheld the Commissioner's decision finding that the proposed project would result in an unreasonable adverse effect on the scenic character and the existing uses related to scenic character of nine lakes in the Downeast region identified as scenic resources of state or national significance (SRSNS). The Board's decision was subsequently appealed to the Maine Supreme Judicial Court.

In its decision (2015 ME 156) of December 4, 2015, the Court found that the Board considered and balanced the competing statutorily defined policies applicable to wind energy projects, namely, expediting wind energy development in defined geographic areas of Maine and at the same time providing protection for specific scenic resources. The Court noted the unique circumstances of the case in which the proposed project was proposed to be located very near the geographic border of the expedited permitting area while the nine affected great ponds were specifically excluded from the expedited permitting area. The Court deferred to the Board's

interpretation of the statute, which took a holistic approach to assessing the impact on the interconnected multiple SRSNS, and affirmed the Board's decision denying the project.

In light of the Board's decision affirming the Commissioner's application of the law and the Court's decision upholding the Board's decision, it would be helpful if the Legislature clarified the Wind Energy Act to specifically state that, in assessing scenic impacts, the Department may consider the number of scenic resources of state or national significance that would be impacted by a proposed project and the overall, aggregate impact of the project on those resources, not just the severity of impact on each resource of state or national significance from an individual perspective.

V. Summary of Matters before the Board in 2015

The Board held 11 meetings in 2015. Matters considered by the Board are summarized below.

A. Rulemaking

In accordance with 38 M.R.S. § 341-H(1), the Board shall "adopt, amend or repeal only those rules of the department designated as major substantive rules pursuant to Title 5, chapter 375, subchapter 2-A. The board shall also adopt, amend and repeal routine technical rules as necessary for the conduct of the board's business, including the processing of applications, the conduct of hearings and other administrative matters." The Commissioner has the authority to adopt, amend or repeal routine technical rules (38 M.R.S. § 341-H(2)).

Major Substantive Rules. The following amendments to the Site Location of Development Act rules have been forwarded as a single rulemaking to the Legislature for consideration this session:

- Chapter 373 Financial Capacity Standard of the Site Location Law / Amendments: The amendments update the requirements for financial capacity and technical ability to reflect changes in terminology and Department practice and provide greater clarity as to how an applicant may satisfy the requirements. Provisions addressing certain environmental standards including solid waste management and provision of water supplies are relocated to Chapter 375.
- Chapter 375 No Adverse Environmental Effect Standard of the Site Location Law / Amendments. Provisions pertaining to solid waste management, control of odors, and procurement and maintenance of sufficient and healthful water supplies are relocated from Chapter 373 to Chapter 375.
- Chapter 380 Long-Term Construction Projects (Site Law) / Repeal and Replace. The rule describes requirements associated with long-term construction projects under the Site Location of Development Law. Long-term construction projects are those projects authorized by an individual permit or amendment that are not anticipated to be substantially completed, or are not substantially completed, within ten years from the date of approval. Long-term construction projects may include, by way of example, large-scale mixed-use developments, airports, and ski resorts.

A consolidated public hearing on the proposed amendments was held on September 17, 2015. The amendments were provisionally adopted on December 10, 2015.

Major Substantive Rules Finally Adopted 2015. The Board submitted the following rules to the Legislature for review and approval in 2015:

- Chapter 119: Motor Vehicle Fuel Volatility Limit / Amendments. The amendments require retailers that sell gasoline in York, Cumberland, Sagadahoc, Androscoggin, Kennebec, Knox or Lincoln counties to sell only federal reformulated gasoline referred to as RFG beginning June 1, 2015 as required by P.L. 2013, c.221 and c. 453. The amendments were finally adopted by the Board on May 21, 2015.
- Chapter 500 Stormwater Management (Amendments). This was a joint rulemaking by the Board and the Commissioner because the rule contains both major substantive and routine technical provisions. The proposed amendments to Chapter 500 were intended to encourage the use of innovative stormwater designs that will accommodate measures for addressing climate change and resiliency and adaptation in infrastructure, and provide greater flexibility for the regulated community. Amendments included a new voluntary low impact development credit, new treatment levels for redevelopment projects, updated performance standards, and additional stormwater treatment options. Provisions pertaining to compensation fees and mitigation credits (Section 6 of the existing rule) were deleted from Chapter 500 and placed in a new chapter since these provisions are routine technical. A public hearing was held on October 16, 2014. A number of changes to the draft rule were made in response to comments received. The Board provisionally adopted the rule at its meeting on December 18, 2014. The Board subsequently incorporated the changes to the rule as directed by the Legislature in Resolve 2015, Chapter 22 and finally adopted the rule on June 24, 2015.

Routine Technical Rules. The Board and Commissioner amended a routine technical procedural rule governing, among other things, the processing of applications and appeals of Commissioner licensing decisions.

- Chapter 2 Rule Concerning the Processing of Applications and Other Administrative Matters / Amendments. The amendments clarified the timeline for permit-by-rule notifications, provided for electronic filing of applications and other documents, eliminated the requirement to file an original paper copy of an electronically filed document, and proposed amendments to license transfer provisions. A public hearing was held on May 21, 2015 at the request of the regulated community. The amendments addressing permit-by-rule and electronic filing were adopted on September 17, 2015; the proposed transfer of ownership provisions were not adopted.

B. Appeals of Commissioner Licensing Decisions

If an applicant or other person is aggrieved by a licensing decision of the Commissioner, the Commissioner's decision may be appealed to the Board. Under provisions of 38 M.R.S. §341-D(4), the Board may affirm, amend, or reverse the Commissioner's decision, or remand the

matter to the Commissioner for further proceedings. In an appeal proceeding, the Board is not bound by the Commissioner's findings of fact or conclusions of law. Except in limited circumstances set forth in rule, the record for appeals heard by the Board is limited to the administrative record prepared by the Department in its review of the application. The Board processes appeals in accordance with the Department's procedural rules, the requirements of the Maine Administrative Procedure Act, and program specific statutes and rules. The Board's decision on appeal may be appealed to Superior Court (or the Law Court in the case of an expedited wind energy development). Appeals of Commissioner licensing decisions considered by the Board in 2015 are summarized below.

Appeals Decided. The following appeals were decided by the Board:

- Brunswick Layover Facility, Brunswick. On June 16, 2015, the Commissioner issued a Stormwater Management Law permit to Northern New England Passenger Rail Authority (NNEPRA) for construction of the Brunswick Layover Facility. The permit was subsequently appealed by Brunswick West Neighborhood Coalition, Charles F. Wallace, Jr., J. Maurice Bisson, and Robert Morrison. The appellants raised a number of concerns including the potential for contamination of ground and surface water and flooding on adjacent properties. Following oral argument on November 19, 2015, the Board affirmed the Commissioner's decision approving the Stormwater Management permit and denied the appeal.

Appeals Withdrawn. The following appeals were withdrawn prior to consideration by the Board:

- Bingham Wind Project. On September 8, 2014, the Department issued a permit to Blue Sky West, LLC and Blue Sky West II, LLC for a 62 turbine, 206 MW expedited wind energy development to be located in Bingham and Mayfield Twp. in Somerset County and Kingsbury Plt., Abbot, and Parkman in Piscataquis County. The permit decision was appealed to the Board by Friends of Maine's Mountains and Alice McKay Barnett. Issues on appeal included, among other things, financial capacity, provisions for decommissioning, scenic impacts, wildlife impacts, noise complaint response protocols, and the use of easements to comply with sound level limits. The appellants reached an agreement with the licensee and the appeal was withdrawn on March 4, 2015.
- Residential Pier, Freeport. The Department issued a Natural Resources Protection Act (NRPA) permit to Judy Wood for construction of a residential pier in Freeport. The permit was appealed by Charles Kitchin, who argued that the pier would impede his right of ingress and egress into navigable waters and therefore would unreasonably interfere with existing scenic, aesthetic, recreational, and navigational uses of the resource in violation of the NRPA. Consideration of the appeal was stayed by the Board at the request of the parties to provide for alternative dispute resolution. The dock was subsequently modified and the appeal was withdrawn on June 29, 2015.

Appeals Dismissed. The following appeals were dismissed by the Board:

- Unity College, Unity. The Department issued an amendment to Unity College's Site Location of Development Act permit for a new residence hall and cafeteria expansion. The permit amendment was appealed by Richard Haffner, an abutting property owner, who raised issues regarding stormwater management, adequacy of the water supply, and wastewater management. The appeal was submitted after the appeal deadline and, in accordance with Department rules, was summarily dismissed by the Board Chair as untimely filed.
- Clary Lake, Whitefield and Jefferson. On May 13, 2015, the Department returned a petition for release from dam ownership filed by Paul A. Kelley, Jr. on behalf of Pleasant Pond Mill, LLC. On June 15, 2015, Paul A. Kelley, Jr. filed an appeal of the Department's action with the Board. Following consultation with the Office of Attorney General, the Board Chair found that the return of a petition by Department staff did not constitute final agency action and was not subject to appeal to the Board.

Appeals Pending. There were no appeals pending at year's end.

C. Permit and License Applications – Projects of Statewide Significance

Statute provides that the Board shall decide each application for approval of permits and licenses that in its judgment represents a project of statewide significance. A project of statewide significance is defined as a project which meets at least three of the four following criteria:

- Will have an environmental or economic impact in more than one municipality, territory or county;
- Involves an activity not previously permitted or licensed in the State;
- Is likely to come under significant public scrutiny; and
- Is located in more than one municipality, territory or county.

The Board considered two requests for Board licensing jurisdiction in 2015.

- Searsport Navigation Maintenance and Improvement Project. The Army Corps of Engineers and Maine Department of Transportation proposed the deepening and widening of Searsport Harbor with the dredge spoils to be disposed of in Penobscot Bay at a site between Northport and Islesboro. The Commissioner received several requests for Board jurisdiction over the application and a public hearing. The Commissioner determined that the project did not meet the criteria for Board jurisdiction, but stated that she would hold a public hearing on the application. After considering the Commissioner's recommendation and hearing oral argument from persons requesting Board jurisdiction and those opposed, the Board found that the project did not meet at least three of the four criteria and did not assume licensing jurisdiction. The applicant subsequently withdrew its application for unspecified reasons.

- Juniper Ridge Landfill Expansion, Old Town. In July 2015, the Department received an application from the State of Maine, Bureau of General Services (owner of the Juniper Ridge Landfill) for a 9.35 million cubic yard expansion of the Juniper Ridge Landfill. Following review of the application, former Commissioner Aho made a preliminary determination that the project was one of statewide significance and referred the application to the Board for licensing jurisdiction. At its meeting on September 17, 2015, the Board considered the Commissioner's recommendation and heard oral argument regarding whether the project met the criteria for Board jurisdiction. The Board found that the application meets at least three of the four criteria and voted to assume licensing jurisdiction. Department technical staff has begun its review of the application. The Board will hold a public hearing in 2016.

D. Petitions to Modify a License or Order Corrective Action

The petition process is a mechanism to re-open a final license that was issued by the Department if certain conditions are found to exist. There were no such petitions referred to the Board by the Commissioner in 2015.

E. Appeal of Administrative Orders Issued by the Commissioner

A number of the Department's program-specific statutes provide for appeals to the Board of a Commissioner's Administrative Order, such as an order to remediate a site contaminated by oil or hazardous substances. These are unilateral orders through which the Commissioner seeks to correct serious environmental conditions. Due process is afforded through the right of appeal to the Board, and then Superior Court. There were no appeals of Commissioner administrative orders in 2015.

VI. Informational Sessions and Site Visits

The Board held five informational sessions for members in 2015.

Ecomaine: On June 4, 2015, the Board conducted an informational site visit at the ecomaine facility in Portland. Members reviewed facility operations with Kevin Roche (Chief Executive Officer) and Leo Maheu (Environmental Educator) and then toured the recycling facility, waste-to-energy facility, and the ash landfill area.

Lewiston-Auburn Water Pollution Control Facility. On May 7, 2015, the Board conducted an informational site visit at the Lewiston-Auburn Water Pollution Control Authority's wastewater treatment facility in Lewiston. The facility added anaerobic digestion technology to its operations in May 2013 to enhance its biosolids utilization program, thereby reducing the amount of solids to be landfilled and providing a renewable source of energy to the facility. Mac Richardson, facility superintendent, led the site visit and responded to Board members' questions regarding the operation of the facility.

Saddleback Ridge Wind Project. Board members and staff attended an informational site visit at the Saddleback Ridge Wind Project in Carthage on June 24, 2015. Members and staff discussed operations and toured the facility with Patriot Renewables staff Lauren Austin and Todd Presson, viewing both operational turbines and turbines under construction.

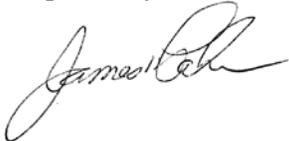
Wind Energy Act Informational Session. Assistant Attorney General Peggy Bensinger reviewed recent amendments to the Wind Energy Act including changes enacted by LD 828 (Public Law 2015 c. 265), LD 911 (Public Law 2015 c. 190), and LD 1244 (Public Law 2015 c. 264) at the Board's September 17, 2015 meeting. These amendments include, among other provisions, provisions establishing a mechanism and criteria to remove a specified place in the unorganized and deorganized areas of the state from the expedited permitting area, additional criteria for assessment of visual impact, and a permitting requirement and criteria for small-scale wind energy development.

Procedural Session. At its meeting on December 10, 2015, Board members reviewed a number of procedural matters pertaining to the conduct of Board meetings, Board consideration of staff recommendation, and the processing of requests for Board jurisdiction.

VII. Closing

The Board saw a reduction in its workload in 2015, with fewer and less complex appeals and major substantive rulemakings than in recent years. We anticipate an increase in workload in 2016 with the processing of the application for expansion of the Juniper Ridge Landfill. I would be happy to respond to any questions you may have regarding the Board's work in 2015.

Respectfully submitted,



James W. Parker, Chair
Board of Environmental Protection

Attachments:

A. Board of Environmental Protection Members: Biographical Information

Attachment A: Board of Environmental Protection Members



James W. Parker, Chair
Veazie, 1st Term

Mr. Parker is a professional engineer and former State Representative for District 18. Mr. Parker served in the 125th Legislature and was a member of the Joint Standing Committee on Environment and Natural Resources and the Special Select Committee for Regulatory Fairness and Reform. Mr. Parker graduated from the University of Maine with a degree in civil engineering. Following employment with James W. Sewall Company, he founded Civil Engineering Services, Inc. (CES, Inc.), an engineering consulting firm providing services in a variety of areas including water supply, wastewater, solid and hazardous waste management, and site development. Mr. Parker retired from the firm in 2009, and now spends summers as a charter captain for whale and sightseeing tours on the downeast coast. Mr. Parker was appointed to the Board by Governor Paul R. LePage in June 2013. Governor LePage appointed Mr. Parker Board Chair in December 2014.



Alvin K. Ahlers
North Yarmouth,
1st Term

Mr. Ahlers is a retired Registered Professional Engineer. He served as Environmental Manager for Fairchild Semiconductor Corporation in South Portland from 1993 to 2004 where he was responsible for managing environmental compliance for the facility and was an active member of Maine DEP's Environmental Leadership program for Fairchild. Prior to joining Fairchild, Mr. Ahlers was employed by ABB Environmental Services (formerly E.C. Jordan Co.) of Portland. Since retiring he has been active in town government, currently serving on the Town of North Yarmouth Budget Committee and on the town's Economic and Sustainability Committee. He was appointed to the Board by Governor Paul R. LePage in September 2011.



Thomas W. Dobbins
Scarborough, 1st Term

Mr. Dobbins began his professional career with the Coast Guard, inspecting U.S. and foreign vessels for compliance with federal environmental and safety laws and regulations. Mr. Dobbins joined Getty Petroleum in 1989 and Sprague Energy in 1995, managing their deep water petroleum storage facility in South Portland from 1989 to 2007. Mr. Dobbins continues to assist Sprague Energy managing their Port Security Grants. Mr. Dobbins holds a USCG 100 ton Masters License, and currently serves on the Maine State Pilot Commission, the Portland Harbor Commission, and the Portland Harbor Dredge Committee. He is a member of the Friends of Casco Bay and a past member and director of Clean Casco Bay. He was appointed to the Board by Governor Paul R. LePage in March 2014.



Mark C. Draper
Caribou, 1st Term

Mr. Draper is the Solid Waste Director for Tri-Community Recycling and Sanitary Landfill in Fort Fairfield, a position he has held since 2003. Before joining Tri-Community, Mr. Draper was a Senior Environmental Engineer at the Champion International Corporation/International Paper mill in Bucksport where he was responsible for oversight of the mill's landfill operation, waste reduction and recycling activities, and hazardous waste management. Mr. Draper also served as plant engineer for the mill's 290-MW co-generation power plant from 2001-2003. Mr. Draper is currently the president of the Maine Resource Recovery Association and Chairman of the Northern Maine Solid Waste Management Committee. He was appointed to the Board by Governor Paul R. LePage in October 2014.



Thomas E. Eastler
Farmington, 2nd Term

Mr. Eastler is a Professor Emeritus of Environmental Geology at the University of Maine Farmington. He obtained his undergraduate degree from Brown University and his masters and doctorate degrees in Geology from Columbia University. His research interests include terrain analysis, remote sensing, and fuel and non-fuel mineral resource depletion. Dr. Eastler has devoted much of his professional career to teaching and has mentored many aspiring geologists. Dr. Eastler has also served as a consultant to a number of entities including Lawrence Livermore Laboratories in California and Raytheon UTD in Virginia. He is a Fellow of the American Association for the Advancement of Science and the Geological Society of America (GSA). Dr. Eastler is a retired Colonel U. S. Air Force Reserves with 30 years of service. He was appointed to the Board by Governor Paul R. LePage in April 2012 and re-appointed for a second term in February 2014.



Jonathan B. Mapes
Sanford, 1st Term

Mr. Mapes is the President and Owner of H. A. Mapes Inc., a petroleum distribution and management company located in Springvale, Maine. Mr. Mapes has extensive knowledge regarding the regulation and safe handling of petroleum products and is a certified tank installer. He is a member of the Maine Energy Marketers Association and the Society of Independent Gasoline Marketers of America. Mr. Mapes has been active in his community serving on the Sanford Charter Commission, as chairman of the Sanford School Committee, member and past board of directors member of the Sanford Chamber of Commerce, member and past president of the area Kiwanis, and member and past president of the Sanford area YMCA. He was appointed to the Board by Governor Paul R. LePage in November 2015.
