

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION



JANET T. MILLS
GOVERNOR

Susan M. Lessard, Chair

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January 10, 2023

Senator Stacy Brenner
Representative Lori Gramlich
Committee on Environment and Natural Resources
c/o Legislative Information Office
100 State House Station
Augusta, Maine 04333

**Re: Board of Environmental Protection
Report to the 131st Legislature**

Dear Senator Brenner, Representative Gramlich, and Committee Members:

Pursuant to 38 M.R.S. § 341-D(7), the Board of Environmental Protection is required to report to the Joint Standing Committee on Environment and Natural Resources by January 15 of the first regular session of the Legislature on the effectiveness of the State's environmental laws and any recommendations for the amending those laws or the laws governing the Board. The enclosed report provides a summary of the Board's responsibilities and its activities in calendar year 2022, and is respectfully submitted to the First Regular Session of the 131st Maine State Legislature.

If the Committee would like to discuss this report, I am available to meet with you at your convenience. I can be reached by contacting Board Executive Analyst William Hinkel at 207-314-1458 or bill.hinkel@maine.gov.

Respectfully submitted,

A handwritten signature in blue ink that reads "Susan M. Lessard".

Susan M. Lessard, Chair
Board of Environmental Protection

Enclosure: Board Report 2022

cc: Melanie Loyzim, DEP Commissioner

Enclosure(s)

Report to the Joint Standing Committee on Environment and Natural Resources

Board of Environmental Protection Summary of Activities in Calendar Year 2022 and Recommendations for Committee Consideration

January 2023

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

Summary of Activities in Calendar Year 2022

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

Summary of Activities in Calendar Year 2022

I. INTRODUCTION

Maine law requires the Board of Environmental Protection (Board) 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. 38 M.R.S. § 341-D(7). Although not required each year, in practice, the Board reports on its activities annually to the Joint Standing Committee on Environment and Natural Resources (Committee). This report is submitted to the First Regular Session of the 131st Maine State Legislature.

Section II of this report provides an overview of the Board’s membership, duties, and responsibilities. Section III summarizes matters before the Board in 2022, including the status of any matters pending before the Board at year-end.

II. BOARD MEMBERSHIP, DUTIES, AND RESPONSIBILITIES

A. Membership. The Board is a seven-member citizen board whose members are appointed by the Governor and approved by the Legislature. 38 M.R.S. § 341-C. The purpose of the Board 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.

Board members are appointed for staggered four-year terms, and a member may not serve more than two consecutive four-year terms. The second consecutive term for former Board Chair Mark Draper ended in June 2022. In 2022, the Governor appointed, and the Legislature confirmed Robert Marvinney, Sarah Alexander, and Barbara Vickery to fill the seats vacated by former Board members Mark Draper, James Parker, and Mark Dubois, respectively. Susan Lessard was reappointment for a second term and, in June 2022, was appointed by the Governor to be the Board Chair. Board member biographies are provided as Attachment A to this report.

- B. Responsibilities. The Board's responsibilities as set forth in 38 M.R.S. § 341-D and § 341-H are summarized below. Proceedings before the Board are governed by the Maine Administrative Procedure Act, the Board's statutes and procedural rules governing the various types of proceedings (e.g., rulemaking, appeal proceedings, adjudicatory hearings, 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 member biographies, meeting materials, information on pending matters of broad public interest, and guidance to facilitate public participation in matters pending before the Board.
1. Rulemaking. The Board has authority to adopt, amend, or repeal reasonable rules and emergency rules necessary for the interpretation, implementation and enforcement of the laws administered by the Department. The Board also has authority to adopt, amend, and repeal rules as necessary for the conduct of the Department's business.
 2. Appeals of Commissioner Licensing and Enforcement Actions. An aggrieved person may appeal to the Board a final license or permit decision of the Commissioner. The Board also hears appeals of emergency orders and unilateral compliance and clean-up orders issued by the Commissioner pursuant to 38 M.R.S. § 347-A(3).
 3. Decisions on Certain Permit Applications. The Board decides each application for approval of permits and licenses that in its judgment represents a project of statewide significance based on statutory criteria. 38 M.R.S. § 341-D(2). 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.
 4. 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 whenever the Board finds that any of the criteria at 38 M.R.S. § 342(11-B) are met.
 5. Administrative Consent Agreements. Any administrative consent agreement to resolve a violation of laws administered by the Department must be approved by the Board to be valid. After negotiating a proposed resolution pursuant to 38 M.R.S. § 347-A(1), the Commissioner brings an administrative consent agreement to the Board for consideration, and the Board may approve it or send it back with instructions for further consideration or negotiations by the Department.
 6. Recommendations to the Legislature. The Board is charged with making recommendations to the Legislature regarding the environmental laws of the State and any recommendations for amending those laws or the laws governing the Board.
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7. Other Duties. The Board must carry out other duties as required by law. Other duties specified in statute include, among other things, holding hearings on and making recommendations to the classification of waters of the State it deems necessary to the Legislature.

III. SUMMARY OF MATTERS BEFORE THE BOARD IN 2022

A. Rulemaking

The Board acted on 12 rulemaking actions in calendar year 2022. A summary of the rulemaking actions follows.

1. Chapter 119, *Motor Vehicle Fuel Volatility Requirements*. The Department proposes to amend the existing Chapter 119 rule, which establishes a maximum allowable volatility for motor vehicle fuel during the period from May 1 through September 15 of each year, to remove requirements for reformulated gasoline in conformance with Maine statute and federal rules. The 129th Maine Legislature repealed the requirement to sell only reformulated gasoline (RFG) in certain counties in southern Maine as of November 1, 2020. After petitioning U.S. EPA and submitting a State Implementation Plan (SIP) revision, EPA approved Maine's petition and determined that the removal of the federal RFG program for the Southern Maine Area is consistent with the applicable provisions of the Clean Air Act and EPA's regulations. The proposed amendments to Chapter 119 would remove the RFG requirement, which is no longer required in the Southern Maine Area due to EPA's approval. The Board held a hearing on the proposed rule amendments on November 3, 2022. Further rulemaking activity on the proposed revisions to the Chapter 119 rule is anticipated in 2023.
2. Chapter 128, *Advanced Clean Trucks Program*. The Department initiated rulemaking in calendar year 2021 by proposing a new rule, Chapter 128, which if adopted by the Board, would adopt California's Advanced Clean Trucks regulation to encourage the sale of zero-emission medium- and heavy-duty vehicles as part of a comprehensive strategy to implement recommendations from the "Maine Won't Wait" Climate Action Plan. The Board held a hearing on the proposed rule on November 4, 2021, and a deliberative session on December 16, 2021. Final action to adopt the new rule was not taken within the required timeframe set forth by the Maine Administrative Procedure Act. Throughout 2022, the Department and other state agencies engaged with stakeholders and interested persons on electric and other zero-emission (hydrogen) medium- and heavy-duty vehicle and infrastructure issues. Further rulemaking activities are currently on hold as the Department awaits the release of the U.S. Environmental

Protection Agency’s “Phase 3” greenhouse gas standards for model-year 2027 heavy-duty vehicles, along with new requirements for medium-duty vehicles.

3. Chapter 143, *New Source Performance Standards (NSPS)*. In conjunction with proposed revisions to Chapter 144 discussed below, the Department proposes to amend existing rule Chapter 143, which enumerates the sections of Part 60 of the federal Clean Air Act for which enforcement authority has been delegated to the State of Maine, to incorporate the new and amended NSPS and National Emission Standards for Hazardous Air Pollutants (NESHAP) that have been added between July 1, 2013, and July 1, 2022, for which the Department has chosen to take delegation. On December 15, 2022, the Board held a hearing on the proposed amendments to Chapter 143. Further rulemaking activity on the proposed revisions to the Chapter 143 rule is anticipated in 2023.
4. Chapter 144, *National Emission Standards for Hazardous Air Pollutants (NESHAP)*. In conjunction with proposed revisions to Chapter 143 discussed above, the Department proposes to amend existing rule Chapter 144, which enumerates the sections of Part 60 of the federal Clean Air Act for which enforcement authority has been delegated to the State of Maine, to incorporate the new and amended NSPS and NESHAP that have been added between July 1, 2013, and July 1, 2022, for which the Department has chosen to take delegation. On December 15, 2022, the Board held a hearing on the proposed amendments to Chapter 144. Further rulemaking activity on the proposed revisions to the Chapter 143 rule is anticipated in 2023.
5. Chapter 169, *Stationary Generators*. A new rule, Chapter 169 establishes standards for emissions and stack height for stationary electric generators to protect public health and maintain air quality. The purpose of the rule is to ensure that the operation of new stationary generators does not negatively impact air quality or public health. The Board adopted the rule on September 1, 2022, and the rule became effective on October 9, 2022.
6. Chapter 170, *Degassing of Petroleum Storage Tanks, Marine Vessels, and Transport Vessels*. A new rule, Chapter 170 establishes requirements to minimize emissions from the degassing of certain petroleum storage tanks, marine vessels, and transport vessels, and to ensure that these operations do not negatively impact air quality or public health. The Board adopted the rule on May 5, 2022, and the rule became effective on June 27, 2022.
7. Chapter 171, *Control of Petroleum Storage Facilities*. A new major substantive rule, Chapter 171 establishes new control, operating, inspection, testing, monitoring, recordkeeping, and reporting requirements for petroleum storage facilities throughout

the State. The Board provisionally adopted Chapter 171 on May 5, 2022. In July 2022, the Board included a cover letter with the submission to the Legislature of the provisionally-adopted Chapter 171 rule, noting that the obligation imposed by the new law on the Department and the regulated community may not provide the intended outcome to members of the public seeking clear information about the potential contribution of a single facility on ambient air quality.

8. Chapter 180, *Appliance Efficiency Standards*. On July 8, 2021, the Governor signed into law L.D. 940, *An Act To Establish Appliance Energy and Water Standards*. This legislation authorizes the Department to initiate rulemaking to restrict the sale of certain appliances and plumbing fixtures listed in Public Law 2021, Chapter 433. Federal and state standards and guidelines have long been in place for most of the appliances and fixtures addressed by this rule, however they have not been enforceable. By requiring new products to meet minimum efficiency standards, resource consumption will be reduced, and emissions of greenhouse gases and other pollutants will decline. Chapter 180 allows for the sell-through of existing stocks of noncompliant products, and defers to any federal preemptions. The Board approved final adoption of major substantive rule Chapter 180 on September 1, 2022, and the rule became effective on November 3, 2022.
9. Chapter 263, *Maine Comprehensive And Limited Environmental Laboratory Accreditation Rule*. The Department, jointly with the Department of Health and Human Services, is proposing amendments to the existing Chapter 263 rule. The rule establishes standards for the accreditation of laboratories producing compliance data for programs administered by the Department and Department of Health and Human Services. The proposed amendments would update references to federal requirements, update the laboratory accreditation fee schedule, and allow the use of laboratory methods most recently approved by the U.S. Environmental Protection Agency. On November 17, 2022, the Board held a hearing on the proposed amendments to Chapter 263. Further rulemaking activity on the proposed amendments to Chapter 263 rule is anticipated in 2023.
10. Chapter 305, *Natural Resource Protection Act Permit by Rule*. Prior to 2021, certain minor expansions of structures in coastal sand dunes were exempted from the Natural Resource Protection Act (NRPA) permitting requirements, and no review or approval was required. In 2021, P.L Ch. 186 (L.D. 1635) removed that exemption and replaced it with a provision allowing these same minor expansions through a NRPA permit by rule process. The purpose of proposed revisions to Chapter 305 is to bring the Department's rules into alignment with statutory changes concerning minor expansions in coastal sand dunes and to allow some beach nourishment projects to qualify for NRPA permit by rule. The proposed changes to Chapter 305, section 16, *Activities in coastal sand*

dunes, are major substantive. The Board provisionally adopted the amendments to Section 16 of the rule on December 15, 2022.

Also proposed for revision to Chapter 305 is a new section 16-A: *Beach nourishment and dune restoration or construction activities in coastal sand dunes*. This new rule section would allow for certain non-development related activities in coastal sand dunes, namely dune restoration and dune construction, beach nourishment, and hand planting of native dune vegetation, to be completed under a NRPA permit by rule. The proposed addition of Chapter 305, section 16-A is routine technical rulemaking. The Board held hearings on the proposed rule revisions on September 1, 2022, and November 17, 2022. The Board adopted the amendments to Chapter 305 to incorporate the new Section 16-A on December 15, 2022.

11. Chapter 533, *Operations, Maintenance, and Asset Management Standards for Publicly Owned Treatment Works and Municipal Satellite Collection Systems*. Chapter 533, a proposed new major substantive rule, would establish standards for the operations, maintenance and asset management for publicly owned treatment works and municipal satellite collection systems. The purpose of the proposed rule is to promote the systematic management, operation and maintenance of wastewater infrastructure and critical assets over their life cycle, to cost-effectively ensure protection of public health and the environment, and compliance with applicable laws and rules. On December 15, 2022, the Board held a second hearing on the proposed rule. Further rulemaking activity on the proposed Chapter 533 rule is anticipated in 2023.

12. Chapter 600, *Oil Discharge Prevention and Pollution Control Rules for Marine Oil Terminals, Transportation Pipeline and Vessels*. The Department proposes to amend the existing Chapter 600 rule, which establishes standards for the siting, design, operation, and closure of marine oil terminals, transportation pipelines, and vessels, to incorporate legislative changes completed since the last rule amendment made in 1999, and new design, operation, and planning requirements for climate change. Proposed rule amendments related to climate change are derived from recommendations made by the Scientific and Technical Subcommittee of the Maine Climate Council and the subcommittee's report, *Scientific Assessment of Climate Change and Its Effects in Maine*. In *Result of Analysis Required by 2021 Public Resolve, Chapter 67, Resolve, To Analyze the Impact of Sea Level Rise*, submitted to the Joint Standing Committee on Environment and Natural Resources in January 2022, the Department identified Chapter 600 as one of the rules proposed for amendments to incorporate sea level rise in siting provisions and spill containment requirements. On December 15, 2022, the Board held a hearing on the proposed rule. Further rulemaking activity on the proposed amendments to Chapter 600 is anticipated in 2023.

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 the Commissioner's decision, amend the Commissioner's decision, reverse the Commissioner's decision, or remand the matter to the Commissioner for further proceedings. The Board may, at its discretion, also hold a hearing on an appeal. In an appeal proceeding, the Board is not bound by the Commissioner's findings of fact or conclusions of law. The Board's decision on appeal may be appealed to Superior Court (or directly to the Law Court in the case of an expedited wind energy development). In an appeal to the Board, the parties may pursue various forms of alternative dispute resolution in an effort to reach a resolution that is satisfactory to all parties.

Appeals of Commissioner licensing decisions considered by the Board in 2022 are summarized below.

1. Brookfield White Pine Hydro, LLC. The Sebago Chapter of Trout Unlimited (Trout Unlimited) filed with the Board an appeal of the March 4, 2022, Order of the Commissioner which conditionally approved the application of Brookfield White Pine Hydro, LLC (Brookfield) for a water quality certification for its Hiram Hydroelectric Project. The Board voted to deny the appeal and affirm the Department Order on December 1, 2022.
2. Central Maine Power Company and NECEC Transmission LLC. On May 11, 2020, the Commissioner issued an order conditionally approving the application of Central Maine Power Company (CMP) for a combined Site Location of Development Law and Natural Resources Protection Act permit to construct the New England Clean Energy Connect project (NECEC Order). On June 8, 2020, NextEra Energy Resources, LLC (NextEra) and, jointly, West Forks Group (appellants in the West Forks Group include: Kathy Barkley, Ed Buzzell, Carrie Carpenter, Town of Caratunk, Mandy Farrer, Noah Hale, Hawk's Nest Lodge, Kennebec River Anglers, Kim Lyman, Maine Guide Service, Mike Pilsbury, Eric Sherman, Matt Wagner, and West Forks Plantation) filed two separate petitions for judicial review of the NECEC Order pursuant to M.R. Civ. P. 80C with the Kennebec County and Somerset County Superior Courts, respectively. Those two judicial appeals were remanded back to the Board for its consideration together with a June 10, 2020, appeal to the Board of the NECEC Order that was filed by the Natural Resources Council of Maine (NRCM).

On January 4, 2021, the NRCM filed with the Board an appeal of the December 4, 2020, Order of the Commissioner approving the partial transfer of the NECEC Order (Transfer Order). The Transfer Order conditionally approved the application of CMP and NECEC Transmission LLC to partially transfer to NECEC Transmission LLC the underlying NECEC Order. For administrative economy, the Board consolidated NRCM's appeal of the Transfer Order together with the three appeals of the underlying permit approval.

On June 7, 2021, the NRCM filed with the Board an appeal of the May 7, 2021, Order of the Commissioner conditionally approving a minor revision application of CMP and NECEC Transmission LLC (Minor Revision Order). The Minor Revision Order approved specific revisions to the underlying NECEC Order. The NECEC Order and the Transfer Order, although discrete final agency actions, have intertwined issues and are based in substantial part on the same administrative record. For administrative economy and consistency, those appeals were consolidated. In its appeal of the Minor Revision Order, NRCM raises arguments not raised in the appeals of the underlying orders and will involve record evidence that is not part of the administrative record for the underlying appeals. NRCM's appeal of the Minor Revision Order was not consolidated with the other pending appeals and instead will be processed separately, on its own procedural track.

The Board decided the consolidated appeals the NECEC Order and Transfer Order on July 21, 2022. The Board voted to deny the appeals and affirm the Commissioner's Orders with additional conditions regarding compensation for habitat impacts and decommissioning of the project. Three separate judicial appeals of the Board's July 21, 2022, Order are pending with the Kennebec County Superior Court.

The Board anticipates scheduling for consideration and a decision in 2023 the appeal of the Minor Revision Order.

3. Marc de St. Maurice. West Bay Farm Trust and Nancy Crate filed with the Board separate appeals of the June 29, 2021, Order of the Commissioner which conditionally approved the Natural Resources Protection Act permit application of Marc de St. Maurice to construct a pier system with a fixed pier and seasonal ramp and float in Islesboro. The Board voted to deny the appeals and affirm the Department Order on March 3, 2022.
4. Dyer Long Pond Water Level Order. Richard Saltonstall, III filed with the Board an appeal of the March 13, 2020, Order of the Commissioner which established a water level regime and minimum flow requirements for Dyer Long Pond in Jefferson. In

January 2022, the Appellant withdrew the appeal following successful alternative dispute resolution efforts pursuant to Department rule Chapter 2, § 24(E).

5. Fallbrook Commons Development, LLC. Ian Houseal filed with the Board an appeal of the August 4, 2021, Condition Compliance Order of the Commissioner issued to Fallbrook Commons Development, LLC in which the Commissioner concluded that the licensee has complied with Conclusion 6 of the underlying June 4, 2020, Order that approved the application for a Natural Resources Protection Act permit to construct a 90-bed nursing care center in Portland. The Board voted to deny the appeal and affirm the Department Order on March 3, 2022.

6. Freeman Resources, LLC. The Performance Standards for Quarries (in 38 M.R.S. § 490-Y) provide that a person intending to create or operate a quarry under this article must file a notice of intent to comply before the total area of excavation of rock or overburden on the parcel exceeds one acre excavated since January 1, 1970. Freeman Resources, LLC, which has been operating a quarry that is less than one acre in size for gemstones, filed a Notice of Intent to Comply with the quarrying performance standards for a proposed expansion, but stated it intends to excavate for lithium-containing spodumene. The Department issued a placard for an expansion of the existing operation, but referred to an earlier letter in which the Department advised Freeman that excavation for spodumene would be regulated under the Metallic Mineral Mining Act, and that a permit would be required under that law to excavate spodumene. Freeman filed with the Board an appeal of the placard that was issued by the Department on September 23, 2022, and asked the Board to determine that spodumene is a rock, not a metallic mineral regulated by the Metallic Mineral Mining Act, and therefore approve its Notice of Intent to Comply in its entirety, including the express authorization to mine spodumene.

On November 10, 2022, the Chair dismissed the appeal for lack of Board jurisdiction to hear the appeal because (1) the appeal is not of a final agency action with regard to the applicability of the Metallic Mineral Mining Act; and (2) because Freeman simultaneously filed a judicial appeal in Maine Superior Court of the same Department action regarding the placard that seeks the same relief as the administrative appeal.

7. Juniper Ridge Landfill (State of Maine). Edward S. Spencer filed with the Board an appeal of the November 29, 2021, Order of the Commissioner which conditionally approved the application of the State of Maine, acting through the Bureau of General Services, for a minor revision to Department license #S-020700-WD-BI-N, issued on June 1, 2017. The minor revision application was filed for approval to establish a methodology and process for determining the annual Oversized Bulky Waste (OBW)

limit at the State-owned Juniper Ridge Landfill in Old Town. The Board voted to deny the appeal and affirm the Department Order on June 16, 2022.

8. KEI (Maine) Power Management (III) LLC (Lower Barker Hydroelectric Project). KEI (Maine) Power Management (III) LLC (KEI) filed with the Board an appeal of the November 22, 2019, Order of the Commissioner which approved a water quality certification issued to KEI for the Lower Barker Hydroelectric Project in Auburn. In August 2022, the Appellant withdrew the appeal following successful alternative dispute resolution efforts pursuant to Department rule Chapter 2, § 24(E).
9. Kingfish Maine (Site Law and NRPA permit). On December 13, 2021, Sierra Club Maine, Rocque Island Gardner Homestead Corporation, and Eastern Maine Conservation Initiative filed with the Board separate appeals of the November 12, 2021, Order of the Commissioner which conditionally approved the applications of Kingfish Maine for a combined Site Location of Development Law and Natural Resources Protection Act permit to construct a land-based recirculating aquaculture facility in Jonesport. The Board voted to deny the appeal and affirm the Department Order on August 4, 2022. An appeal of the Board Order is pending with the Kennebec County Superior Court.
10. Midcoast, LLC. Selby Frame filed with the Board an appeal of the May 17, 2022, Order of the Commissioner which conditionally approved the Natural Resources Protection Act permit application and related water quality certification to construct a residential pier system and stabilize 55 linear feet of coastal shoreline resulting in 448 square feet of permanent fill in a coastal wetland in Islesboro. The Board voted to deny the appeal and affirm the Department Order on December 1, 2022.
11. Nordic Aquafarms, Inc. Michael T. Lannan, P.E., on behalf of Northport Village Corporation, filed with the Board an appeal of the May 18, 2022, Minor Revision issued by the Commissioner to Nordic Aquafarms, Inc. The Minor Revision modified Nordic's underlying Air Emission License by extending the time to commence construction of the approved project. The Board Chair dismissed the Minor Revision Appeal based on lack of standing as an aggrieved person. Northport Village Corporation subsequently appealed to the full Board the Chair's dismissal of the Minor Revision Appeal. On November 17, 2022, the Board voted to uphold the Chair's dismissal of the Minor Revision Appeal.
12. John and Holly Richio. Charles Piper and Stephanie Ralph filed with the Board an appeal of the June 8, 2021, Order of the Commissioner conditionally approving the application of John and Holly Richio for a Permit-by-Rule to construct an access way to Sebago Lake in Standish. In April 2022, the Appellant withdrew the appeal following

successful alternative dispute resolution efforts pursuant to Department rule Chapter 2, § 24(E).

13. SHM Rockland, LLC. Kenneth N. Wexler, Constance M. Hayes, Rebecca Glaser, Eileen Fitzgerald, Kyle MacKenzie Swan, Laurence Coe, Penobscot Bay Watch, Virginia Noble, Avis Turner, and Paul Rosen, jointly, filed with the Board an appeal of the December 11, 2021, Order of the Commissioner conditionally approving the application of SHM Rockland, LLC for a Natural Resources Protection Act permit and related water quality certification to construct an expansion of an existing marina and to dredge approximately 138,000 square feet of coastal wetland in Rockland. The Board voted to deny the appeal and affirm the Department Order on June 16, 2022.
14. Topsham Hydro Partners Limited Partnership. The Friends of Merrymeeting Bay; Grow L+A; Downeast Salmon Federation; Native Fish Coalition, Maine Chapter; Friends of Sebago Lake; and the Maine Council of Trout Unlimited, jointly, filed with the Board an appeal of the June 8, 2022, Order of the Commissioner which conditionally approved the application of Topsham Hydro Partners Limited Partnership for a water quality certification for its Pejepscot Hydroelectric Project. Scheduling of the appeal for the Board's consideration and decision is anticipated in early 2023.
15. Waste Management Disposal Services of Maine, Inc. Conservation Law Foundation (CLF) filed with the Board an appeal of the May 11, 2021, Order of the Commissioner conditionally approving the application of Waste Management Disposal Services of Maine, Inc. to construct a 7.75-million cubic yard expansion at the site of the existing Waste Management Disposal Services of Maine, Inc. landfill in Norridgewock. The Board voted to deny the appeal and affirm the Department Order on January 20, 2022.
16. Winslow PV, LLC. Greg Cushman Robie filed with the Board an appeal of the August 10, 2022, Order of the Commissioner which conditionally approved the application of Winslow PV, LLC for a combined Site Location of Development Law and Natural Resources Protection Act permit for construction of a 4.1-megawatt ground-mounted solar facility in Winslow. Scheduling of the appeal for the Board's consideration and decision is anticipated in early 2023.

C. Appeals 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. The Board received no

new appeals of administrative orders in calendar year 2022. However, the Board did revisit a prior administrative order issued to Sultan Corporation, as discussed below.

On May 24, 2018, the Commissioner of the Department served Sultan Corp. with a Designation of Uncontrolled Hazardous Substance Site and Order (Commissioner's Order) as the responsible party for a contaminated property in Auburn known as the Beal's Linen Site. Sultan appealed the Commissioner's Order to the Board. On January 17, 2019, the Board denied the appeal and upheld the Commissioner's Order with some modifications. Sultan appealed the Board Order to the Superior Court in Androscoggin County (Docket No. AP-19-3), which upheld the Board decision. Sultan subsequently appealed the Superior Court Order to the Maine Supreme Judicial Court (*Sultan Corp. v. Dep't of Env't. Prot., et al.*, 2022 ME 21). The Law Court remanded that matter to the Superior Court for remand to the Board for further proceedings limited to the issue of the availability of the defense afforded by 38 M.R.S. § 1367(3) to other subsections within Title 38, chapter 13-B. On remand, the Board made new findings and conclusions in an Order December 15, 2022, that the defense afforded by 38 M.R.S. § 1367(3) does apply to the Commissioner's Order.

D. Permit and License Applications

Maine law provides that the Board decide each application for approval of permits and licenses that in the Board's judgment represents a project of statewide significance. 38 M.R.S. § 341-D(2). The Department's rule Chapter 2, § 17 provides that any person may request that the Board assume original jurisdiction of an application by submitting the request to the Department in writing no later than 20 days after the application is accepted as complete for processing. When the Board assumes original jurisdiction of an application, that means that the Board decides the application in the first instance instead of the Commissioner. 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.

Additionally, the Board shall decide all applications referred to it jointly by the Commissioner and the applicant. The Board may vote to assume jurisdiction of an application if it finds that at least three of the four criteria identified above have been met. An exception to this provision is that Board may not assume jurisdiction over an application for an expedited wind energy development as defined in Title 35-A § 3451, sub-§ 4, for a

certification pursuant to Title 35-A § 3456 or for a general permit pursuant to Title 38 § 480-HH or § 636-A.

A total of six requests for Board jurisdiction were made to the Department in calendar year 2022. In consideration of the Commissioner's preliminary determinations for each, the Board did not assume original jurisdiction over any applications in 2022.

Maine law provides that the Board shall decide all applications for commercial hazardous waste facilities. 38 M.R.S. § 1319-R(3). No such applications came before the Board in 2022.

E. Administrative Consent Agreements

Administrative consent agreements are voluntary, and the terms and conditions of such agreements are the product of a negotiation process between the violator, the Department, and the Office of the Maine Attorney General. The Department calculates civil monetary penalties through the evaluation of the environmental aspects of a case (such as the sensitivity of the environmental resource, size of the affected area, and potential effect to human health), the circumstances in which the violation occurred (such as the violator's knowledge of the laws, the cause of the violation, the violator's response and level of cooperation, and the compliance history of the violator), and whether civil monetary penalty is substantial enough to deter others from similar violations (taking into consideration factors such as whether the violator received a financial gain as a result of the violation, whether the violator has committed either the same or similar violations in past five years, and the violator's ability to pay the penalty). The unique circumstances surrounding the violation(s) results in the calculation of civil penalties that are site- and violator-specific. Maine law authorizes the Department to include supplemental environmental projects – an environmentally beneficial project primarily benefiting public health or the environment that a violator is not otherwise required or likely to perform – as part of an administrative consent agreement. 38 M.R.S. § 349(2-A). Whether or not a supplemental environmental project is included as a component of an administrative consent agreement, mitigation of environmental impacts created by the alleged violation(s) is typically completed during negotiation of the administrative consent agreement or may be established as a binding condition of the administrative consent agreement.

The Board approved five administrative consent agreements in 2022, a summary of each is provided below. The Department prepares monthly enforcement reports to satisfy its statutory obligation under 38 M.R.S. § 349(7) that the Department inform the public of certain enforcement resolutions. See the Department's webpage at <https://www.maine.gov/dep/enforcement/mcar/index.html>.

1. Blaisdell Farm, LLC, Fort Fairfield. This administrative consent agreement involves violations of the Natural Resource Protection Act and the Erosion and Sedimentation Control Law caused by bulldozing, removing, and displacing soil and vegetation adjacent to a great pond (Nadeau Pond) and placing fill in a freshwater wetland without a permit, and by failing to install and maintain adequate erosion and sedimentation control measures during the earthwork activity. The administrative consent agreement stipulates a monetary penalty of \$4,308. The Board approved the administrative consent agreement on November 3, 2022.
 2. Farmington Solar, LLC and Wanzek Construction, Inc., Farmington. This administrative consent agreement involves violations of the Site Location of Development Law, the Natural Resource Protection Act, the Protection and Improvement of Waters Law, the Erosion and Sedimentation Control Law, and a 2018 Department Order issued pursuant to those laws approving the construction of a 77-megawatt solar project on 490 acres of land in Farmington. Failure of Farmington Solar, LLC and Wanzek Construction, Inc. to follow appropriate erosion control measures resulted in the discharge of soil from the site into surrounding freshwater wetlands and a stream. The administrative consent agreement stipulates a monetary penalty of \$20,100. The Board approved the administrative consent agreement on September 1, 2022.
 3. Milo Water District, Milo. This administrative consent agreement involves violations of the State's waste discharge laws and rules and Milo Water District's Waste Discharge License issued in 2015. Beginning in 2018, the Milo Water District had a series of unreported sanitary sewer overflows (SSOs) and laboratory quality control issues that the Department was made aware of by whistleblower reporting. Subsequent investigation by the Department revealed consistent underreporting or non-reporting of SSOs, serious lab issues, equipment and paperwork tampering, apparent record falsification by the operator in responsible charge at the time. After the Milo Water District failed to pass its Discharge Monitoring Report Quality Assurance testing the Department required Milo Water District to use a commercial lab for biochemical oxygen demand compliance monitoring and *E. coli* analysis. As part of the notices of violation issued prior to the administrative consent agreement, the Milo Water District completed updating its operation and maintenance and wet weather plans, and its lab manual, and completed employee lab training. The administrative consent agreement addresses the Milo Water District's permit effluent limit violations from 2018 until 2022. The Milo Water District hired a new operator in responsible charge in 2021. The administrative consent agreement stipulates a monetary penalty of \$46,000, with all but \$5,000 suspended contingent upon timely completion of permit training, budget development, development of a complaint/SSO tracking system, completion of a comprehensive asset management inventory and plan, and a fiscal sustainability plan. The Board approved the administrative consent agreement on October 20, 2022.
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4. NextGrid, Inc. and NextGrid Mastic, LLC, Waterville. This administrative consent agreement involves violations of the Stormwater Management Law, the Protection and Improvement of Waters Law, and the Erosion and Sedimentation Control Law, and a 2021 Department Order issued pursuant to those laws approving the construction of a 4.6-megawatt solar project occupying 17.66 acres of land in Waterville. Failure of NextGrid, Inc. and NextGrid Mastic, LLC to follow the terms and conditions of the Department Order and appropriate erosion control measures resulted in the discharge of soil from the site into surrounding freshwater wetlands and a stream. The administrative consent agreement stipulates a monetary penalty of \$124,742, and restoration of wetland impacts not approved by the Department Order. The Board approved the administrative consent agreement on December 15, 2022.
5. Streeter & Sons Well Drilling, Inc., Island Falls. This administrative consent agreement involves violations of the Protection and Improvement of Waters Law, 38 M.R.S. § 413(1) by causing the discharge of soil into Pleasant Lake in Island Falls without a permit, and of the Erosion and Sedimentation Control Law caused by failing to install and maintain adequate erosion and sedimentation control measures during the earthwork activity. The administrative consent agreement stipulates a monetary penalty of \$1,727. The Board approved the administrative consent agreement on November 3, 2022.

F. Petitions to Modify a License or Order Corrective Action

The petition process is a mechanism to reopen 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 2022.

G. Other Duties

Another responsibility of the Board is to report to the Legislature on the effectiveness of the environmental laws of the State and any recommendations for amending those laws or the laws governing the Board. 38 M.R.S. § 341-D(7).

Based on deliberations of the Board regarding matters that came before it in 2022, the Board has identified the following topics as potentially benefitting from legislative review.

1. Oversized Bulky Waste. Solid waste management has been and continues to be an active topic at the Board and the Legislature. In deciding the appeal of a Minor Revision Order for the Juniper Ridge Landfill (see Section III(B)(7)), the Board identified that the lack of a statutory framework setting a predictable methodology for how oversized

bulky waste limits are calculated and subsequently incorporated into Department licenses can lead to contentious appeals that place the Board in a position of establishing policy for this regulated activity. The Board recommends that the Legislature consider how best to manage and regulate oversized bulky waste to make establishing limits in Department licenses more predictable.

2. Greenhouse Gas Impacts and Carbon Footprint. The issue of how and when greenhouse gas impacts from certain developments are considered in licensing decisions was raised during the Board's consideration of recent appeals. The Department interprets its Chapter 375 rule implementing the Site Location of Development Law as not being directed at issues of global climate change, but instead is exclusively concerned with the potential for highly localized climate impacts that facilities such as powerplants could have on atmospheric conditions such as rainfall, fog, and humidity. Neither the Site Law nor Natural Resources Protection Act, in their current forms, require an applicant to make any particular showing regarding a project's impact on global climate change. Consideration of greenhouse gas impacts and carbon footprint are not explicit standards of review under Site Law, 38 M.R.S. § 484 or the NRPA, 38 M.R.S. § 480-D. The Board recommends that the Legislature continue to consider statutory changes to address these concerns within the context of the Site Law and the NRPA, consistent with the carbon neutrality goals of the Maine Climate Council's Four-Year Plan for Climate Action.
3. Fenceline Air Quality Monitoring. In 2021, the Governor signed into law L.D. 163, *An Act Concerning the Regulation of Air Emissions at Petroleum Storage Facilities*. This legislation requires the Department to initiate rulemaking to amend its rules to align with the new requirements contained in 38 M.R.S. § 590(1). In July 2022, the Board included a cover letter with the submission to the Legislature of the provisionally-adopted new Chapter 171 rule, *Control of Petroleum Storage Facilities*, noting that the obligation imposed by the new law, specifically the requirement to collect site-specific air emission data, on the Department and the regulated community may not provide the intended outcome to members of the public seeking clear information about the potential contribution of a single facility on ambient air quality. The Board recommends that the Legislature consider the concerns raised regarding the recent legislation and the potential difficulty in collecting site-specific air emission test data through fenceline air quality monitoring as proposed in the provisionally-adopted Chapter 171 rule.

ATTACHMENT A

IV. CLOSING

As noted above, this report is submitted in fulfillment of the provisions of 38 M.R.S. § 341-D(7). I would be happy to meet with the Committee and respond to any questions members may have regarding the Board's work and the specific recommendations in this report.

Respectfully submitted,



Susan M. Lessard, Chair
Board of Environmental Protection

Attachment A: Board members' biographical information

Attachment A: Board of Environmental Protection Members



Susan M. Lessard
Bucksport, 2nd Term

Ms. Lessard is the Town Manager for the Town of Bucksport. She previously served as the Town Manager for the communities of Hampden, Vinalhaven, Fayette, and Livermore Falls. Over her career in municipal government, Ms. Lessard has gained extensive experience in solid waste management issues, municipal financial management, and community development. She is a past president of the Maine Municipal Association and has served on the Municipal Review Committee and the Maine Rural Development Council. Ms. Lessard has received several awards including the Governor's Environmental Excellence Award (2002), Maine Engineering Excellence Award (1998), and Maine Town and City Manager's Association Leadership Award (1999). Ms. Lessard was appointed to U.S. EPA's Local Government Advisory Committee in 2018. Ms. Lessard resides in Bucksport with her husband Dan. She was appointed to the Board by Governor Paul R. LePage in 2018, and was reappointment for a second term by Governor Janet T. Mills in 2022. In June 2022, Ms. Lessard was appointed by the Governor to be the Board Chair.



Robert Marvinney
Readfield, 1st Term

Dr. Marvinney is a Licensed Geologist with more than 40 years of experience with geological and environmental issues in Maine. While not a native of the State, he has spent most of his professional career here. He retired in July 2021 from his position as Director of the Bureau of Resource Information and Land Use Planning, and State Geologist, an appointed position that he held for 26 years. Dr. Marvinney's experience with Maine began in the early 1980s while carrying out geological projects in northern Maine for his Master's and Doctorate degrees from Syracuse University. While State Geologist at the Maine Geological Survey, he initiated, carried out, and/or directed many projects that highlight the impact Maine's geology can have on the health and well-being of Maine citizens. Most recently, he co-chaired the Science and Technical Subcommittee of the Maine Climate Council that produced the report, "Scientific Assessment of Climate Change and Its Effects in Maine," that summarizes current impacts and likely future scenarios for climate change in Maine. He has lived in Readfield with his wife Cheryl for more than 34 years and has two grown children. Dr. Marvinney was appointed to the Board by Governor Janet T. Mills in June 2022.

Attachment A: Board of Environmental Protection Members



Sarah E.W. Alexander
Easton, 1st Term

Sarah Alexander is a native Mainer with diverse work experience in a number of different industries. Currently, she is a Program Manager with the Leadership Council on Legal Diversity, a national non-profit working to diversify the legal profession through its work with some of the largest law firms and corporate legal departments in the country. Prior to that, her role helping to run her family's anaerobic digestion facility and the affiliated food waste collection company gave her a front row seat to the complicated work being done in Maine to tackle solid waste issues. Having lived in almost all corners of Maine, she is uniquely suited to understand and represent the concerns of all Mainers. She grew up in Augusta, lived in Portland for a dozen years, moved to central Maine where the family business is, and most recently moved to Easton in Aroostook County where she lives with her husband and three daughters. Mrs. Alexander holds a Bachelor of Arts degree from Smith College. Her most recent community service experience includes serving as the President of the Smith College Club of Maine and as a member of Pine Tree Search and Rescue. Ms. Alexander was appointed to the Board by Governor Janet T. Mills in January 2022.



Barbara Vickery
Richmond, 1st Term

Barbara Vickery is a Conservation Biologist who spent 33 years with The Nature Conservancy, most recently as Director of Conservation Programs. At the Conservancy she was lead scientist, oversaw the stewardship of some 80 preserves and many conservation easements, initiated programs in freshwater and marine conservation, and planned conservation actions across the state and region. Mrs. Vickery served on numerous state advisory committees, including the Ecological Reserves Science Advisory Committee, the Bureau of Public Lands Integrated Resource Plan, Maine Forest Biodiversity Project Steering Committee, and MDIFW's State Wildlife Action Plan, which gave her opportunities to work with industry, state agencies and many other environmental organizations. Mrs. Vickery received a B.A. from Harvard in early childhood education and was a teacher for 10 years. She later earned a B.S. in Biology from Bates College and served as Botanist for the State Planning Office Critical Areas Program before joining The Nature Conservancy. Since retirement five years ago Mrs. Vickery assumed the managing editor responsibility for Birds of Maine, a major book that her husband was not able to finish before he died. With the book now published, she is an active volunteer, serving on the Board of the Forest Society of Maine, as Chair of its Stewardship Committee, as Secretary to the Bates Morse Mt. Conservation Area Corporation, and on the Energy Committee of the Town of Richmond where she lives. Mrs. Vickery was appointed to the Board by Governor Janet T. Mills in January 2022.

Attachment A: Board of Environmental Protection Members



Robert S. Duchesne
Hudson, 1st Term

Robert Duchesne is a former State Legislator and radio show broadcast host. During his radio career, Mr. Duchesne was active in charity and public service organizations in the Bangor area, including Downeast Big Brothers Big Sisters, Maine Audubon, and the Maine Association of Broadcasters. He also served on several economic and business development boards. In 2005, Mr. Duchesne was elected to the Maine House of Representatives, where he served six non-consecutive terms. While in the Legislature, he chaired both the Environment and Natural Resources Committee and the Inland Fisheries and Wildlife Committee. Mr. Duchesne is owner and operator of Maine Birding Trail. Mr. Duchesne also shares his birding expertise in a weekly birding column for the Bangor Daily News and the Woods and Waters column for Bangor Metro magazine. Robert Duchesne resides at Pushaw Lake in Hudson with his wife, Sandi. He was appointed to the Board by Governor Janet T. Mills in March 2019.



Robert M. Sanford
Gorham, 1st Term

Robert Sanford is Chair of the Department of Environmental Science & Policy at the University of Southern Maine, a position he has held since 2010. Mr. Sanford obtained his M.S. and Ph.D. degrees in Environmental Science from the State University of New York College of Environmental Science and Forestry. He is the author of numerous books and journal articles on environmental planning and policy, applied archeology, instruction, and civic engagement. Prior to joining the faculty of the University of Southern Maine in 1996, Mr. Sanford served 10 years as an Environmental Board District Coordinator for the State of Vermont administering a land-use permitting program for one of Vermont's nine environmental districts. In addition to his teaching and academic research responsibilities, Mr. Sanford has served on numerous advisory committees including the Maine Water Resources Committee, the Maine Farmland Project, the Friends of the Presumpscot River, and the Town of Gorham's Municipal Recycling Committee. He lives in Gorham with his wife and son. Robert Sanford was appointed to the Board by Governor Janet T. Mills in July 2019.

Attachment A: Board of Environmental Protection Members



Steven Pelletier
Topsham, 1st Term

Mr. Pelletier is a Certified Wildlife Biologist®, Maine Licensed Forester, and Professional Wetland Scientist with over 40 years of professional natural resource experience. Earlier in his career he served as a Wildlife Biologist with the US Forest Service and as an Environmental Specialist for the Maine Department of Environmental Protection's Land Bureau, was later co-founder/ owner of Woodlot Alternatives, Inc., a Maine-based ecological consulting firm, until its acquisition by Stantec Consulting in 2007. At Stantec he served as Senior Principal and US Ecosystems Discipline Lead specializing in rare species habitats and site and landscape-level resource assessments, also serving as Principal Investigator of two federal offshore migration research projects. Mr. Pelletier also conducted and oversaw a broad variety of diverse projects ranging from highway/ rail transportation to offshore energy development. He has authored numerous publications on a variety of natural resource topics including forest biodiversity, bat migration, vernal pools, and resource mitigation and compensation planning. He has served on a variety of Federal and State advisory committees and stakeholder groups and in 1989, co-founded the Maine Association of Wetland Scientists. He currently serves on the Maine Board of Licensure of Foresters and several local community organizations including the Brunswick-Topsham Land Trust Advisory Board, Topsham Conservation Commission, and Topsham Development, Inc. Mr. Pelletier resides in Topsham with his wife Mary. He was appointed to the Board by Governor Janet T. Mills in February 2020.
