

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

## **Summary of Activities in Calendar Year 2012**

### **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.A. § 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.A. § 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.” This report is a summary of the Board’s activities in 2012 and is submitted in fulfillment of the statutory requirement to file a report with the Legislature.

### **II. Changes to Membership in 2012**

In September 2012, Governor Paul LePage appointed Board member Robert Foley of Wells as Chair, succeeding Susan M. Lessard of Hampden. Ms. Lessard served four years as Chair, and continues to serve as a member of the Board. Board member Gary Curtis of Greenwood resigned his position on the Board in February 2012 to return to full time employment in the paper industry. In April 2012, Governor LePage appointed Thomas Eastler of Farmington to fill the vacancy created by Mr. Curtis’s resignation. Mr. Eastler is a Professor of Environmental Geology at the University of Maine Farmington.

See Attachment A for biographical information on the current Board members.

### **III. Responsibilities and Duties**

In 2011 the Legislature enacted Public Law 2011, c. 304 “An Act to Ensure Regulatory Fairness and Reform” (LD 1) which made a number of changes to the Board’s composition and duties. Over the past year, the Board has taken steps to implement these changes including the drafting of amendments to the Department’s Chapter 2 procedural rules.

The Board's responsibilities as amended by LD 1 (M.R.S.A. § 341-D) include:

- Major substantive rulemaking: The Board holds public hearings on, and provisionally adopts, major substantive rules of the Department;
- Decisions on certain permit applications: The Department's statutes specify that certain applications such as those pertaining to hazardous waste facilities must be evaluated and decided by the Board;
- Appeals of certain Commissioner licensing and enforcement actions;
- Petitions to modify a license or require corrective action that are referred to it by the Commissioner; and
- 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 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.

#### **IV. Summary of Matters before the Board in 2012**

The Board held 12 meetings in 2012. Matters considered by the Board are summarized below.

##### **A. Rulemaking**

In accordance with 38 MRSA § 341-H, subsection 1, the Board shall "adopt, amend or appeal 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 MRSA § 341-H, sub§ 2). Rules pending before the Board in 2012 are summarized below.

- Chapter 2 Rules Concerning the Processing of Applications and Other Administrative Matters, Section 1B Definition of "Aggrieved Person." Resolve 2011, chapter 144 (LD 1647) directed the Board to adopt rules to conform the standards for standing to appeal a Commissioner decision to the Board to the judicial standards for standing to appeal a decision of the Board to court. The rulemaking is major substantive. The Board held a public hearing on the proposed definition on November 1<sup>st</sup>. The Board will be forwarding a recommended rule to the Legislature for consideration this session.
- Chapter 2 Rules Concerning the Processing of Applications and Other Administrative Matters / Routine Technical Amendments. This is a joint-rulemaking by the Board and the Commissioner because it addresses procedural rules for the Department as a whole, including the Board. The proposed amendments incorporate the statutory changes to the

Board's responsibilities enacted in LD 1 (PL 2011, ch 304) and clarify other provisions of rule. A public hearing on the proposed amendments will be held on January 3, 2013.

- Chapter 3 Rules Governing the Conduct of Licensing Hearings. Proposed Chapter 3 repeals and replaces existing Chapter 20 *Regulations for Hearings on Applications* and existing Chapter 30 *Special Rules for Hearings on Applications of Significant Public Interest*. Proposed Chapter 3 consolidates and updates the Department's licensing hearing rules to comply with the requirements of the Maine Administrative Procedure Act and changes to Department statutes. It also addresses a number of issues that have arisen during adjudicatory hearings before the Department in recent years. This is a joint-rulemaking by the Board and the Commissioner because it addresses procedural rules for the Department as a whole, including the Board. A public hearing on the proposed rule was held on October 4, 2013. Action on the proposed rule is anticipated in early 2013.
- Chapter 882 Designation of Bisphenol A as a Priority Chemical and Regulation of Bisphenol A in Children's Products / Citizen Petition for Rulemaking to Require Safer Alternatives to Bisphenol A in Food and Beverage Packaging for Young Children. The petition was filed pursuant to 5 M.R.S.A. § 8055(3) which states that "whenever a petition to adopt or modify a rule is submitted by 150 or more registered voters of the State, the agency shall initiate appropriate rulemaking proceedings within 60 days after receipt of the petition."

The petition seeks to:

- Add a definition of "toddler food;"
- Extend the existing prohibition on the sale of children's products containing BPA to include containers of infant formula, baby food and toddler food; and
- Specify that BPA is intentionally added to a product or product packaging whenever a component of the product or product packaging is made from polycarbonate packaging or epoxy resin containing BPA.

Since petition proposes changes to both routine technical and major substantive provisions of Chapter 882, the Board and the Commissioner are conducting joint rulemaking. A public hearing was held on the petition in September 2012. Commissioner and Board decisions on the petitioners' proposed amendments are anticipated in early 2013. If the Board provisionally adopts a sales prohibition, the provisional rule will be forwarded to the Legislature for its consideration and action.

- Major Substantive Rules Adopted in 2012. The Board referred three major substantive rules to the Committee for its consideration in the Second Regular Session of the 125<sup>th</sup> Legislature. Each of these rules was approved by the Legislature and finally adopted by the Board on May 3, 2012. These major substantive rules were as follows:
  - Chapter 375, section 10, subsection I regarding noise from wind energy developments;
  - Chapter 305, section 20 permit by rule (PBR) for activities in moderate inland waterfowl and wading bird habitat; and
  - Chapter 378 amendments regarding the storage of diesel fuel in gravel pits and quarries.

## B. Major Applications and License Applications Requiring Board Approval

In accordance with 38 M.R.S.A. § 341-D(2), the Board shall decide each application for approval of permits and licenses that in its judgment represents a project of statewide significance. There were no projects of statewide significance referred to the Board in 2012. However, there were four licenses that other provisions of statute require be decided by the Board. The following licenses were considered by the Board:

- U.S. Department of the Navy, Portsmouth Naval Shipyard. // Commercial Hazardous Waste Storage Facility License Renewal. This license was posted for the required 45 day comment period. The license renewal was approved by the Board on September 6, 2012.
- Central Maine Power Company North Augusta Service Center // Commercial Hazardous Waste Storage Facility License Renewal. The license was posted for the required 45 day public comment period. It was approved by the Board on November 15, 2012.
- Clean Harbors Environmental Services Inc., South Portland. // Waste Oil Storage and Treatment Facility License Renewal. The renewal license was approved by the Board on November 15, 2012.
- Control Devices Inc. and GTE Operations Support Inc., Standish, Cumberland County. // Hazardous Waste Post-Closure License Modification. The proposed modification was posted for the required 45 day comment period on November 15, 2012.

## C. Appeals of Department Licensing Decisions

If an applicant or another person is aggrieved by a licensing decision of the Commissioner, the Commissioner's decision may be appealed to the Board or to Superior Court. Under provisions of 38 M.R.S.A. §341-D(4), the Board may affirm, amend, or reverse the Commissioner's decision, or remand the matter to the Commissioner for further proceedings. The Board's review on appeal is *de novo* in that 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's goal is to process appeals expeditiously 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 2012 are summarized below.

- Evergreen Wind Power II and Maine Genlead LLC (Oakfield II Wind Power Project), Aroostook and Penobscot Counties. Appeal of Site Location and Natural Resources Protection Act permits. The appellants objected to the project arguing unreasonable

adverse effect on scenic character, adverse impacts to birds and bats, adverse impacts to wetlands, and inadequate financial capacity. The Board denied the appeal and upheld the Commissioner's decision.

- State of Maine, State Planning Office. Juniper Ridge Landfill Public Benefit Determination. The Board received three appeals of the Commissioner's partial approval of the application for a public benefit determination to expand landfill capacity at Juniper Ridge. Two of the appeals were dismissed with a finding that the appellants did not have standing as aggrieved persons and therefore could not bring an appeal of the Commissioner's decision. The Board found that the third person did have standing to appeal. This appellant argued that there is no demonstrated need for expanded landfill capacity at this time and that any decision on the requested expansion should await a more comprehensive appraisal of Maine's waste disposal capacity needs. The Board dismissed the appeal and affirmed the Commissioner's decision.
- Saddleback Ridge Wind, LLC. Carthage, Canton and Dixfield, Franklin and Oxford Counties. Appeal of Site Location and Natural Resources Protection Act permits and Water Quality Certification. The appellants objected to the project on the basis of excessive noise from wind turbines and unreasonable visual impact. The Board denied the appeals and affirmed the Commissioner's decision.
- S.D. Warren Company. Appeal of Water Quality Certification for the Eel Weir Hydropower Project, Sebago Lake, Cumberland County. The Board received two appeals of the Commissioner's decision. One appellant objected to the lake level management plan citing potential for adverse impacts to recreation, navigation and aquatic habitat from what the petitioner believes will be lower lake levels. The other appellant objected to the certification arguing, in part, that the proposed operation of the facility would not provide sufficient water to the Bypass portion of the Presumpscot River to meet state water quality standards. The Board denied the appeals and affirmed the Commissioner's decision.
- Verso Bucksport LLC, Hancock County. Special Waste Landfill. Appeal of an amendment to the solid waste license permitting an increase in the final elevation of the landfill. The petition was dismissed by the Chair who found that the appellant did not have standing as an aggrieved person. The Chair's decision to dismiss the appeal was upheld by the full Board.

#### **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 in 2012.

## **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 Orders in 2012.

### Update on the status of the administrative order issued to Mallinckrodt LLC and U.S. Surgical Corporation for remediation of the HoltraChem Chlor-alkali Manufacturing Facility.

The site of the former HoltraChem chlor-alkali manufacturing facility is located on the banks of the Penobscot River in Orrington. Between 1967 and 2000, the facility used a mercury cell process to produce chlorine and other products for sale. Over the years, wastes from the manufacturing process, including elemental mercury and other hazardous substances, contaminated the soils, sediments, surface water and ground water at the site as well as sediments in the river adjacent to the site. In November 2008, the Commissioner issued an order designating the site an Uncontrolled Hazardous Substance Site and naming Mallinckrodt, LLC and United States Surgical Corporation as responsible parties and ordering them to remediate the site. The Commissioner's Order was subsequently appealed by Mallinckrodt to the Board pursuant to 38 M.R.S.A. § 1365(4).

Following an administrative stay of the appeal proceeding pending the outcome of Mallinckrodt's action against the Commissioner in U. S. District Court, the Board held a public hearing on the appeal in January and February 2010. After extensive presentation of testimony and cross-examination of witnesses, the Board upheld the Commissioner's Order with some major modifications. Mallinckrodt, LLC subsequently appealed the Board's decision to Superior Court. The Board's decision was affirmed by Superior Court in a decision dated October 31, 2012.

## **F. Informational Site Visit**

License decisions regarding wind energy developments are often appealed to the Board; the Board considered two such appeals in 2012 and another is pending. In order to familiarize new members with the nature and operation of wind energy developments, the Board visited an operational wind energy project in western Maine in 2012.

## **V. Closing**

Board members consider it a privilege to serve the people of Maine on the Board of Environmental Protection. We are dedicated to carrying out our statutory responsibilities in a fair, transparent and efficient manner that protects the due process rights of all parties and provides for credible public participation in Board proceedings. We hope that this report provides Committee members with a useful overview of our activities in 2012.

Respectfully submitted,

Robert A. Foley, Chair  
Board of Environmental Protection

Attachments:

A. Board Members: Biographical Information

