STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PAUL R. LEPAGE
GOVERNOR

Susan M. Lessard, Chair

Cynthia S. Bertocci
Executive Analyst

Terry Dawson

BOARD OF ENVIRONMENTAL PROTECTION
Meeting Minutes

January 5, 2012

A meeting of the Board of Environmental Protection was held on Thursday, January 5, 2012, at the Department of Public Safety, Florian Hall, Augusta, Maine. Susan M. Lessard, Chair, called the meeting to order at 09:00 a.m. with the following individuals present:

Board: Alvin Ahlers, Gary Curtis, Robert Foley, M. Wing Goodale, Richard Gould, and Susan M. Lessard,

Elizabeth Ehrenfeld was absent.

Staff: Mark Stebbins, Bureau of Land and Water Quality
Mike Mullen, Director Bureau of Land and Water Quality

Others: Patricia Aho, Commissioner
Cynthia S. Bertocci, BEP Executive Analyst
Peggy Bensinger, Assistant Attorney General
Terry Dawson, BEP Administrative Assistant

(Meeting adjourned at approximately 1:30 p.m.)

I. DEPARTMENTAL

A. COMMISSIONER'S COMMENTS:

Deputy Commissioner: The Department has welcomed a new Deputy Commissioner. Mr. Ken Winters recently joined our team and brings international experience in human resources management. Ken has a BA in psychology and has served as Personnel Director for the University of Maine System, Vice President of Administration at Webber Energy and two term management member of the Maine Labor Relations Board.

He currently serves as an adjunct faculty member at the University of Maine, Husson and University of Port Elizabeth in South Africa. Ken remains involved in outdoor sport activities as a Registered Maine Guide, and currently serves on the Board of Operation Game Thief. We look forward to Ken's expertise as we move forward with operational and organizational changes at the Department.

BLWQ Licensing Coordinator: The Department is also pleased to announce the addition of Mark Bergeron to our staff. Mark has been hired as the division director heading up the Department's Land Resource Regulation Unit. Mark has more than 20 years of experience navigating in state and federal permitting on behalf of clients from the private and public sectors. He brings a wealth of knowledge to the Department as a result of his skill in design and construction management in areas such as land development, highway design and construction, waste water design, stormwater and erosion control planning. Projects include the redevelopment of Pineland Farms and capital improvement projects at many of our state parks including Popham Beach, Sebago Lake and Camden Hills.

Portland Water District: The Department issued a $2,700,000 loan to the Portland Water District through the Clean Water State Revolving Loan Fund program. This loan will assist in upgrades to the Cape Elizabeth facility to eliminate the discharge of untreated wastewater through an emergency overflow at the pump station and increase the treatment capacity at the facility. This work will create / sustain an estimated 35 jobs.

DEP Programs and Initiatives 2011: Commissioner Aho provided Board members with a copy of the Department's memorandum to the Joint Standing Committee on Environment and Natural Resources. The memo focuses on developments and activities involving the Department since the close of the last legislative session.

B. COMMENTS FROM THE BEP CHAIR: None
C. EXECUTIVE ANALYST COMMENTS: None
D. BOARD CALENDAR: REVIEWED
E. DEPARTMENTAL ORDERS/ APPLICATIONS ACCEPTED FOR PROCESSING: Reviewed.
F. EXECUTIVE SESSION: None

II CONSENT AGENDA ITEMS: NONE

II. Regular Agenda

1. CHAPTER 378, VARIANCE CRITERIA FOR THE EXCAVATION OF ROCK, BORROW, TOPSOIL, CLAY OR SILT AND PERFORMANCE STANDARDS FOR THE STORAGE OF PETROLEUM PRODUCTS / AMENDMENTS (provisional adoption).
   Staff: Mark Stebbins, Bureau of Land and Water Quality

   The Board voted (6-0-0-1) on a motion to provisionally adopt amendments to Chapter 378, Variance Criteria for the Excavation of Rock, Borrow, Topsoil, Clay or Silt and Performance Standards for the Storage of Petroleum Products. Amendments allow licensed mining operations to store a small amount of diesel fuel on significant sand and gravel aquifers and also establish fuel type and storage capacity limits, update performance standards for containment and update setback requirements from drinking water wells (public and private).

   The Board voted pursuant to 38 M.R.S.A. § 341-H.
   Board members Alvin Ahlers, Gary Curtis, Robert Foley, M. Wing Goodale, Richard Gould and Susan Lessard voted to support the motion. Board member Elizabeth Ehrenfeld was absent.

2. Chapter 305 Permit by Rule, Section 20, Activities located In, On or Over High or Moderate Value Inland Waterfowl and Wading Bird Habitat, or Shorebird Nesting, Feeding, and Staging Areas // Amendments (deliberative session)
   Staff: Mike Mullen, Director Bureau of Land and Water Quality

   The Board conducted a third deliberative session at which staff reviewed the draft rule as originally proposed and the language of two options for addressing specific issues raised in testimony and written comment. In addition to reviewing the various options, the Board discussed whether activities involving the storage of significant quantities of petroleum or hazardous materials (such as gas stations) should be eligible for the proposed Permit by Rule. Due to rulemaking time constraints, the Board determined that it could not resolve this question and therefore directed Board staff to draft a letter to the Environment and Natural Resources Committee highlighting the issue and recommending that the Committee consider the issue during its review of the provisionally adopted rule.

   Chapter 305 Permit by Rule, Section 20, Activities located In, On or Over High or Moderate Value Inland Waterfowl and Wading Bird Habitat, or Shorebird Nesting, Feeding, and Staging Areas // Amendments (possible provisional adoption)
   Staff: Mike Mullen, Director Bureau of Land and Water Quality

   The Board voted (6-0-0-1) on a motion to provisionally adopt amendments to Chapter 305, Permit By Rule, Section 20, Activities located In, On, or Over High or Moderate Value Inland Waterfowl and Wading Bird Habitat, or Shorebird Nesting, Feeding, and Staging Areas with modifications clarifying delineation of the habitat, incorporating language from options 2 and 3 regarding setback from the wetland and consultation with IFW related regarding timing of construction activities, and adding a note related to impacts from exterior lighting. Specific

language changes are detailed below. Updates to the Basis Statement were made to reflect the changes to the provisionally adopted rule.

Section 20 A(4) inclusion of a note relevant to exterior lighting impacts

(4) This section applies to new activities, such as the construction of buildings, roads, and driveways, in an upland area on a ~~previously undeveloped~~ lot in moderate value inland waterfowl and wading bird habitat and that contains no development area.

NOTE: If exterior lighting is anticipated to extend into the habitat within the 150 foot setback, the Department may request a detailed lighting plan.

Section 20 B(6) new language

(6) For new activities in a moderate value inland waterfowl and wading bird habitat that take place between April 15 and July 31 of any year, notice of approval of the timing of the activity from the Department of Inland Fisheries and Wildlife must be submitted to the DEP with the notification form.

Section 20 C (6) new language (double underlined)

(6) New activities in an upland area on a ~~previously undeveloped~~ lot in a moderate value inland waterfowl and wading bird habitat and that contains no development area must meet the following standards:

(a) New structures must be located a minimum of ~~100~~150 feet landward of the upland edge or forested wetland edge of the inland wetland complex within the waterfowl and wading bird habitat;

(b) Beyond ~~100~~150 feet from the upland edge or forested wetland edge of the inland wetland complex within the waterfowl and wading bird habitat, no more than 20 % of the applicant's land within the habitat may be cleared or developed;

(c) Within ~~100~~150 feet of the upland edge or forested wetland edge of the inland wetland complex within the waterfowl and wading bird habitat, cutting and removal of vegetation is limited to those activities described in Paragraphs C(4)(a) and (b) of this section.

(d) No construction or clearing activity may take place from April 15 through July 31 of any year unless otherwise approved by the Maine Department of Inland Fisheries and Wildlife.

Changes to the Basis Statement included:

- Comment #1. Modify response changing 100 feet to 150 feet.
- Comments # 3, 4, 5, 11, 14, 15, 16, 22, and 24. Modify response incorporating Options 2 and 3 so that the last three sentences read: "To further reduce potential effects on waterfowl and wading birds, the setback has been increased from 100 feet to 150 feet in Sections C(6)(a-c). To lessen the impact during the nesting and rearing season, the rule has been changed by adding new Section 20 B(6) and Section 20 C(6)(d) to require DIFW

approval for any construction between April 15 and July 31. To address concerns regarding the impact of exterior lighting on inland waterfowl and wading birds, a note has been added to the rule at Section 20 A.(4) enabling the Department to request a lighting plan if necessary."

- Comment #12. Modify response by adding a comment in support of reliable mapping: The Board appreciates the history of the mapping and regulation of IWWHs **and <u>the need to base habitat designations on the best available data.</u>** The Board also acknowledges the legislative directive to allow for some development in these habitats under the PBR process.

The vote was taken pursuant to 38 M.R.S. Sections 341-H and 480-A through 480-HH and P.L. 2009 Chapter 460.
Board members Alvin Ahlers, Gary Curtis, Robert Foley, M. Wing Goodale, Richard Gould and Susan Lessard voted to support the motion. Board member Elizabeth Ehrenfeld was absent.

3. <u>LEGISLATIVE REPORT – SUMMARY OF ACTIVITIES (discussion)</u>
Staff: Cynthia S. Bertocci, BEP Executive Analyst

Staff noted that modifications will be made which include today's actions provisionally adopting two major substantive rules. A revised report will be circulated to Board members for review and comment. No Vote Was Taken.