BASIS STATEMENT
Chapter 2: Rule Concerning the Processing of Applications and Other Administrative Matters (Amendments)
August 20, 2015

The proposed amendments to the Department's Chapter 2: Rule Concerning the Processing of Applications and Other Administrative Matters will allow the submission of electronic signatures in a form acceptable to the Department, and eliminate the requirement to submit an original paper document within five working days of an electronic submission, thereby helping to modernize and better align the Department's submission requirements with current business practice.

The Department's proposal also amends the Permit By Rule provisions of Chapter 2 to provide for a 14 calendar day review period, which is consistent with the Department's Chapter 305 Natural Resources Protection Act- Permit By Rule Standards.

Although the Department proposed additional revisions to clarify the transfer of ownership definition in this rule, and allow for a more complete assessment of both the financial and technical capacity of a prospective licensee before any license for a hazardous waste facility, solid waste disposal facility, waste oil facility, and biomedical waste facility license is transferred, the Department is withdrawing those portions of the proposal from consideration at this time.

The Department's proposal was initially posted to a 30-day public comment period ending on March 20, 2015. The Department provided an additional written comment period on the proposed transfer of ownership provisions, and subsequently held a public hearing[1] on May 21, 2015. Except for the withdrawal of the proposed amendments pertaining to license transfers, there were no changes made to the proposal.

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Commenters

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[1] After receiving at least five requests for a public hearing on the revised proposal, the Department held a public hearing in accordance with 5 M.R.S.A. § 8052(1)

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General Comments

1) *Comment:* We request that the Department hold a public hearing on the proposed amendments to Chapter 2 (Commenters 3, 4, 5, 6, 8)

Response: The Department held a public hearing for this proposal on May 21, 2015.

Comments on the Permit by Rule Review Period

2) *Comment:* We strongly object to DEP's proposed change to Section 19(A), Permit by Rule. This proposal would reduce DEP's current review period of 15 working days to 14 calendar days. This would hamper DEP staff's ability to ensure that permit by rule projects do not damage Maine's environment. DEP staff would also be less able to consult with other agencies about the impacts of projects. This is not how the permit by rule process is supposed to work. We are unaware of any reason to justify reducing the review period for the permit by rule process. The current 15 working day period has worked well for decades. Given that Permits by Rule are intended to ensure that activities in, on or adjacent to protected natural resources are conducted in a such a manner as to avoid and minimize impacts to the resources, and that there is already a very short period of time the Department has to review the notice, this change is a bad idea. We ask that you reconsider this proposal. (Commenters 9 and 10)

Response: The Department's proposal aligns the Chapter 2 permit by rule review period with that contained in the Department's Chapter 305 Natural Resources Protection Act Permit By Rule Standards. Section 1(C)(1) of Chapter 305 states:

C. Effective period

(1) Beginning of period. The PBR becomes effective 14 calendar days after the DEP receives the notification form, unless the DEP approves or denies the PBR prior to that date. If the DEP does not speak with or write to the applicant within this 14 day period regarding the PBR notification, the applicant may proceed to carry out the activity.

The Department's experience in administering Chapter 305 has demonstrated that a 14 calendar day review period is adequate to thoroughly review a permit by rule application for compliance

with the relevant performance standards, and to ensure that Maine's environment is protected. It should also be noted that a 14 day review period offers greater certainty for applicants and other interested parties by eliminating any confusion associated with the calculation of "working days." No changes were made to the proposal as a result of this of this comment.

Comments on the Transfer of Ownership Proposals

3) *Comment:* The Conservation Law Foundation is very pleased to note the proposed change to Section 21(C)(2) of Chapter 2. We are aware that modern business practices have made it difficult for the Department to assess the potential impact of a change in the legal entity that owns property subject to licensure of environmentally sensitive facilities such as hazardous waste, solid waste disposal, waste oil, and biomedical waste. The longstanding procedure for transfer of licenses is critically important for assuring the technical and financial capacity of a new owner to meet its statutory responsibilities for proper environmental oversight and long-term stewardship of Maine's most sensitive disposal facilities. Modern financial conventions such as the sale or exchange of stock, or mergers, have at times allowed what are essentially new owners to evade this responsibility. We urge the Department to adopt the proposed amendment without additional changes. (Commenter 1)

4) *Comment:* A number of commenters expressed concerns regarding the proposed change to the definition of "transfer of ownership," contending that the expanded definition would be so broad that nearly any financial exchange would trigger the need for a permit transfer. These commenters believe that expanding the definition to include the sale or exchange of 50% or more of the stock, or interest in, a corporation or partnership would have significant impacts on both the Department and the regulated community. The commenters stated that these impacts would include:

A. The proposed amendment would burden the Department staff with unnecessary permit transfer applications every time 50% or more of a company's stock changes hands. The additional demands on Department staff could be exacerbated if opponents to existing projects challenge permit transfers, even though no actual change in the operation or management is contemplated and the site is operating in full compliance of its permit(s). For example, when a project is funded with new markets tax credits, the owner/investor benefitting from the tax credits is the majority owner, but does not have control of the project. When these tax credits expire, the majority ownership is transferred, even though the majority owner never had control of the project. To subject the owner with controlling interest in the project to a permit transfer process is unnecessarily burdensome and superfluous.

B. Acquisitions and mergers of business and/or a change in controlling interest in businesses or partnerships are transactions that are vitally important to Maine's economy. Although there are exceptions, these transactions usually result in stronger and more stable businesses than existed prior to the investments. Given that one of the primary concerns of any prospective purchaser of a business or interest in a business is whether the business will have all the governmental permits necessary to continue operation, the

Department's proposal would introduce significant uncertainty and additional risk that prospective investors would have to evaluate.

C. There is no practical way for either a publically-traded company or the Department to ensure to ensure compliance with the proposed language. Stock in a publicly-traded company is routinely traded on a daily basis, and it is entirely possible that 50% or more of the stock will change hands over time. If this occurs, would it constitute a "Transfer of Ownership"? What if 50% or more of the stock changed hands as a result of a single stock sale? Stock sales over the course of a year? Over the course of five years or more?

D. Although the Department has stated that the purpose of these changes is to allow for the more complete assessment of both the financial and technical capacity of a prospective licensee before any license or hazardous waste facility license is transferred, the proposed change to the definition of "Transfer of Ownership" would also apply to other DEP-issued licenses, such as minor source air emission licenses, Natural Resources Protection Act permits, and wastewater discharge licenses. Many of these licenses involve relatively minor activities, for which a change in stock ownership should not be subject to the same scrutiny as ownership of facilities having a greater potential to raise environmental concerns.

(Commenters 2, 3, 5, 6, 7, 8, 11)

5) *Comment:* We believe the 1995 state legislation (which removed the 50% control component from the definition of "Transfer of Ownership" in 38 M.R.S. § 361-A(6)) reflects Legislative intent, and that the Department's definition should be consistent with this intent. The definition of the term "Transfer of Ownership" was later amended by the Board of Environmental Protection in 2003 to include language explicitly stating that "a sale or exchange of stock, or a merger, is not a transfer of ownership for the purpose of this rule provided that the legal entity that owns the property, facility or structure remains the same." This change was made so that Chapter 2 would be consistent with Department practice and eliminated a regulatory burden that the Board concluded was not necessary. (Commenters 2, 3, 7, 8)

6) *Comment:* In the event the Department moves forward with the proposed changes to the "Transfer of Ownership" definition, it should provide for an exception from these requirements when transfers do not change the party with the control and/or management responsibilities of the licensed site. (Commenter 8)

7) *Comment:* The existing requirements governing license transfers strike an appropriate balance between protecting the environment and minimizing unnecessary regulatory burdens. There are already a number of stringent financial assurance requirements that govern solid waste disposal facilities and therefore it seems particularly unnecessary to impose a more stringent definition of transfer of ownership for such facilities. For example, solid waste disposal facilities are already required to maintain liability insurance coverage in excess of $2 million annually, and to maintain instruments of financial assurance ensuring funding for all costs associated with landfill closure and post closure. Prior to a transfer, a new owner must have in place its own adequate financial assurance instruments for post closure costs, and solid waste facilities are already

required to maintain instruments of financial assurance for "all known releases, violations, or environmental damage." As such, it is unnecessary to impose additional regulatory burdens to assure that financial capacity is maintained in the event of a transfer. (Commenter 2)

8) *Comment*: The Department's proposed changes to section 21(C)(2) are particularly onerous and may have unintended consequences. For example, for hazardous waste, solid waste disposal, waste oil and biomedical waste facilities, the proposed amendment would require Department approval prior to "any change in the legal entity that owns the property subject to the license." It is unclear what "any change" means. The language is broad enough to capture a change even as minor and unrelated to financial and technical capacity as the sale of one percent of the licensee's stock and other non-substantive organizational or a a name change. To the extent the Department concludes that the generally applicable definition of transfer of ownership should include the sale of 50 percent or more of stock or other ownership interest in the licensed entity, we request that the same requirements, not more stringent requirements, apply to solid waste disposal facilities. (Commenters 2, 3)

9) *Comment:* Brookfield Renewable Energy Group is concerned that the proposed changes to the Definition of "Transfer of Ownership" will place a heavy and unnecessary regulatory burden on common corporate transactions that do not affect the operation, oversight or management of a licensed facility. Some examples of these transactions include:

- Routine corporate reorganization pursuant to which a wholly-owned DEP-permitted operational subsidiary is moved from one parent to another affiliated parent (for tax or other reasons). In this circumstance, the entity that holds the license remains the same, its business is not changed at all, and the ultimate upstream parent company remains the same. It is unnecessary from a practical perspective for such a licensee-subsidiary to go through the transfer process, as the proposed amendment would appear to require.

- Stock sale acquisitions in which the entity that holds the license remains the same and its business is not changed at all. Even though the upstream parent may have changed in a stock sale acquisition, it is no different in substance from the merger circumstance that the proposed amendment exempts from application of the proposed rule when "the legal entity that owns the property, facility or structure remains the same." The Department should consider extending a similar exemption to stock sale acquisitions and corporate reorganizations, as the legal entity that owns the property, facility or structure remains the same in mergers, corporate reorganizations, and stock sale acquisitions.

The proposal could require all of the permit transfer process be undertaken, including sending certified letter notifications to all abutters of each of the projects, addressing public comments on the application, and participating in public meetings or hearings that might be requested. The proposed amendment would impose costs and considerable risks on permit holders, even when the operational aspects of the projects have not changed.

The Department should also consider the problems presented by the language associated with the changes to the "transfer of ownership" definition under the proposed amendment. As currently drafted, it appears that the Department's intent is to apply that definition to all existing

regulations concerning transfer of licenses. In that case, a number of issues and questions arise, such as:

- Who is the transferor and who is the transferee in the context of the change of a corporate parent of the wholly-owned licensee when the licensee and its operations are remaining the same? If they are the parent companies that are transferring the licensed entities, this provision would make entities other than the licensee jointly and severally bound to the conditions of the license. The parent company has no such obligation currently.

- If the proposed rule would result in the parent becoming the transferee, why should the transferee be responsible for making a demonstration of technical capacity if the operational licensee is not changing and the technical capacity of that existing license holder remains the same?

- Further, financial capacity would only be relevant if there were some sort of parental corporate guarantee of the licensee's financial assurance requirements. Financial assurance regulations are a more direct way to address such a concern, rather than in the permit transfer requirements.

In sum, the proposed rule as drafted raises a number of public policy issues and practical questions. The Department should consider reasonable alternatives, such as the same kind of exemption afforded mergers – where the legal entity that owns the property, facility or structure remains the same – before placing a heavy and unnecessary regulatory burden on common corporate transactions. (Commenter 5)

10) *Comment:* If the primary concern is over the waste license transfers identified in Section 21(C)(2) of the Chapter 2 Rules, perhaps the simplest way to address the concerns of the Department is to adopt the changes to Section 21(C)(2) without adopting the changes to the definition of Transfer of Ownership. This would avoid more difficult procedural matters of addressing and reviewing applications to confirm that the application does not involve a change of control. In the event that the Department wants to address a change of control requirement in connection with the Transfer of Ownership definition, then we would suggest that the Transfer of Ownership definition be revised to read as follows:

> R. Transfer of Ownership. "Transfer of Ownership" means a change in the legal entity that owns a property, facility or structure that is the subject of a license issued by the Department. A "transfer of ownership" includes sale or exchange of 50 percent or more of the stock of or interest in a corporation (including the membership interest in a limited liability company), or a change of 50 percent or more of the partnership interest in a partnership, provided that in each case, such transfer of ownership also constitutes a Change of Control. A merger is not a transfer of ownership for the purposes of this rule provided the legal entity that owns the property, facility or structure remains the same.

A proposed definition of "Change of Control" may read as follows:

> Change of Control. "Change of Control" means a transfer of more than 50% of the common voting stock of a corporation, or a transfer of more than 50% of the managing member interest or manager's interest in a limited liability company, or a transfer of more than 50% of the general partner interests in a partnership. (Commenter 12)

11) *Comment:* In section 21(C)(2), the Department proposes to eliminate the reference to "transfer of ownership," a defined term, with a general reference to "…any change in the legal entity that owns the property…" Here, the Department's proposed language would not even include the 50% threshold. Thus, the sale of a single share of stock, or a 1% membership interest could trigger the requirements in Section 21 for license transfers. These example events could be considered "any change" in the legal entity that owns the licensed facility – in fact, this result appears to be implied by the last clause of the section which makes reference to sales of stock or membership interests, which when read with the remainder of the section could be interpreted to mean any sale of stock or membership interest for the listed type of facilities would require DEP approval. For publicly traded companies in particular, there are changes in stock ownership on a constant basis. The Department's language is simply unworkable, especially for publicly-traded companies. And, consider a privately held company that offers its employees ownership interests as part of their compensation. This commenter recommends that the section maintain its reference to "transfer of ownership" regardless of how that term is defined to ensure that the events that trigger the need for license transfers are well-defined for the types of facilities listed in Section 21(C)(2). (Commenter 7)

Response to Comments 3 through 11: The Department is appreciative of the comments submitted both in support of, and in opposition to, the proposed changes to Sections 1(R) and 21(C)(2) of the proposal. The Department is withdrawing these portions of the proposal from consideration at this time, and intends on proposing amendments to these provisions in a future rulemaking.