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STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION

**COPY**

IN RE: CHAPTER 2 RULES CONCERNING THE  
PROCESSING OF APPLICATIONS AND OTHER  
ADMINISTRATIVE MATTERS

PRESIDING OFFICER: JAMES PARKER, CHAIRMAN

This hearing was held pursuant to Notice at the Augusta Civic Center, Augusta, Maine, on May 21, 2015, beginning at 9:00 a.m.

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the Environmental Manager for Fairchild Semiconductor in South Portland, resides in North Yarmouth. To my left is Tom Eastler, Professor of Environmental Geology at the University of Maine in Farmington, resides in Farmington, and next to him is Sue Lessard, Hampden Town Manager and resides in the Town of Hampden. State agency staff members present are Melanie Loyzim, Director of the Bureau of Remediation and Waste Management, and Jeff Crawford, Deputy Director of Policy, Office of the Commissioner.

A written transcript of today's hearing will be prepared and the proceeding is being recorded for that purpose by Joanne Alley of the Alley & Morrisette Reporting Service of Augusta. The hearing is being conducted in accordance with the rulemaking requirements of the Maine Administrative Procedures Act, Title 5, Maine Revised Statutes Annotated, Sections 8051 through 8074 and the Department's rulemaking authority as set forth in Title 38, Section 341-H.

On February 18th, 2015, the Department proposed amendments to its Chapter 2 Rules Concerning the Processing of Applications and Other Administrative Matters that will facilitate the

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(This hearing was held before the Board of Environmental Protection, Augusta Civic Center, Augusta, Maine, on May 21, 2015, beginning at 9:00 a.m.)

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CHAIRMAN PARKER: Good morning. I'd like to call this meeting to order. My name is Jim Parker, I'm the chair -- I'm going to be reading some stuff this morning, not just looking up at you, because I want it on the record so excuse me for that. I'm Jim Parker, I'm the chair of the Board of Environmental Protection. With me this morning is the DEP Commissioner Patty Aho. We are holding a joint rulemaking hearing today on the Department's proposed amendments to the Chapter 2 Rules Concerning the Processing of Applications and Other Administrative Matters. I'll be the presiding officer for today's hearing. Other Board members here today are Mark Draper, the Solid Waste Director for Tri-Community Recycling and Sanitary Landfill in Fort Fairfield. He resides in Caribou. Next to him is Tom Dobbins, formerly from Sprague Energy Corporation and currently a member of the State Pilot Commission and the Portland Harbor Commission and resides in Scarborough. Next is Alvin Ahlers, a retired chemical engineer, formerly

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electronic submission of applications, appeals and petitions and eliminate the requirement to submit an original paper document within five working days of an electronic submission. The Department subsequently 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, or biomedical waste facility license is transferred. The proposed rule would also align Chapter 2 with the Department's Chapter 305 Natural Resources Protection Act permit by rule standards.

Since the Department received at least five requests for a public hearing to be held on this proposal, pursuant to the Maine Administrative Procedures Act, Title 5, Maine Revised Statutes Annotated, Section 8052, paragraph 1, the Department has scheduled today's public hearing. Notice of today's public hearing was published on April 29, 2015, in the Bangor Daily News, the Kennebec Journal, the Lewiston Daily Sun, the Waterville Morning Sentinel and the Portland Press

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1 Herald. Notice was also sent to each person who  
2 has previously filed a written or electronic  
3 request for notice of DEP rulemaking.

Copies of the proposed rule and sign-in  
5 sheets are on the table next to the podium. If you  
6 plan to speak and you have not already done so,  
7 please sign in now on the appropriate sheet. There  
8 are separate sheets for those supporting the  
9 proposed amendments, those opposed and those  
10 testifying neither for nor against the amendments.

Following my opening statement, the  
12 Department staff will be making a presentation. We  
13 will then hear the testimony from members of the  
14 general public beginning with proponents, then  
15 opponents, then persons neither for nor against.  
16 Oral testimony today can be followed up with a  
17 written comment by the comment deadline.

To assist recording of the testimony, I ask  
19 persons testifying to stand at the podium, when you  
20 are called forward, please state your name, address  
21 and the name of the organization you represent, if  
22 any. Speakers are asked to remain at the podium  
23 for questions, if any, following the presentation.  
24 I will invite questions first from the  
25 Commissioner, then the Board members and staff.

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1 COMMISSIONER AHO: Good morning, thank you.  
2 My name is Patricia Aho, and I am the Commissioner  
3 of the Maine Department of Environmental  
4 Protection. The Board and Department are  
5 considering amendments to the Chapter 2 Rules  
6 Concerning the Processing of Applications and Other  
7 Administrative Matters. Since Chapter 2 specifies  
8 procedural rules for both the Board and the  
9 Commissioner, this will be a joint rulemaking  
10 proceeding before the Board and the Commissioner.

Present today as subject matter experts on  
12 the Department's behalf are Jeffrey Crawford,  
13 Deputy Director of Policy, and Melanie Loyzim,  
14 Director of the Bureau of Remediation and Waste  
15 Management. Jeff and Melanie will briefly describe  
16 the proposal. Thank you.

MR. CRAWFORD: Good morning, Chairman  
18 Parker, members of the Board, Commissioner Aho.  
19 I'm Jeff Crawford, and I'm here today to provide an  
20 overview of the Department's proposed amendments to  
21 its Chapter 2 Rules Concerning the Processing of  
22 Applications and Other Administrative Matters.

As you know, on February 18th, 2015, the  
24 Board and Department formally proposed amendments  
25 to these rules to facilitate the electronic

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1 Written comments on the proposed rule  
2 amendments may be submitted at today's hearing or  
3 following the hearing until 5 p.m., Monday, June  
4 1st, 2015. All written comments or testimony  
5 submitted subsequent to the hearing should be  
6 addressed to Jeff Crawford at DEP, 17 State House  
7 Station, Augusta, 04333.

Based on today's testimony and written  
9 comments submitted before the June 1 deadline, the  
10 DEP staff will prepare a recommendation for  
11 consideration by the Board and the Commissioner at  
12 a future meeting to be announced. Copies of the  
13 staff recommendations will be available upon  
14 request before the rule is presented to the Board  
15 and Commissioner for decision. If you want to  
16 receive a copy, please contact Jeff Crawford.

At this time, I ask all persons intending  
18 to testify to please stand and be sworn in. Raise  
19 your right hands. Do you swear to tell the truth,  
20 the whole truth and nothing but the truth?

**(Witnesses respond in affirmative)**

**CHAIRMAN PARKER:** Thank you. Are there any  
3 questions about the procedures I've outlined? If  
4 not, we will begin the statement by Commissioner  
25 Aho. Any questions? If not, Commissioner.

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1 submission of applications, appeals and petitions  
2 and eliminate the requirements to submit an  
3 original paper document within five working days of  
4 an electronic submission. At that time, the  
5 Department also proposed to align the Permit By  
6 Rule review requirements in Chapter 2 with those  
7 contained in our Chapter 305 Permit By Rule  
8 Standards. The Department subsequently proposed  
9 additional revisions to clarify the transfer of  
10 ownership definition in this rule and to allow for  
11 a more complete assessment of both financial and  
12 technical capacity of a prospective licensee before  
13 any license for a hazardous waste facility, solid  
14 waste disposal facility, waste oil facility and  
15 biomedical waste facility license is transferred.  
16 That comment period closed on April 8th. Since the  
17 Department received at least five requests for a  
18 public hearing to be held on this proposal, the  
19 Department and the Board scheduled today's public  
20 hearing pursuant to the Maine Administrative  
21 Procedures Act.

I would now like to take the opportunity to  
22 review each element of the proposal in more detail.  
23 The first change that we are proposing is to  
24 facilitate the electronic submission of  
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1 applications, appeals and petitions. Chapter 2  
 2 currently requires all telefax and electronic  
 3 filings of an application, appeal or petition to be  
 4 followed up by an identical original paper document  
 5 within five working days. So if you submit it  
 6 electronically, you still have to follow it up with  
 7 an identical paper document. The Department is  
 8 proposing to amend Section 3A of Chapter 2 to allow  
 9 the electronic submission of these documents in a  
 10 form that is acceptable to the Department in an  
 11 unalterable format without a paper follow-up copy.  
 12 The Department is also similarly proposing to amend  
 13 Section 11E to allow for the use of an electronic  
 14 signature in lieu of an original handwritten copy.  
 15 This is basically bringing up the Department's  
 16 submission requirements with modern day business  
 17 practice.

18 The second change that the Department is  
 19 proposing is to align Chapter 2 with the  
 20 Department's Chapter 305 Natural Resources  
 21 Protection Act Permit by Rule Standards. The  
 22 Department's Chapter 305 Natural Resources  
 23 Protection Act Permit By Rule Standards in Section  
 24 1-C-1 provide that the Permit By Rule becomes  
 25 effective 14 calendar days after the Department

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1 changing business practices, we are similarly  
 2 proposing to update both the definition of transfer  
 3 of ownership in Section 1R and the provisions  
 4 relating to the transfer of a hazardous waste,  
 5 solid waste disposal, waste oil and biomedical  
 6 waste facility license, Section 21-C-2.

7 These changes will allow the Department to  
 8 more fully assess the financial and technical  
 9 capacity of a prospective transferee. Although you  
 10 may hear that this proposal is overly restrictive  
 11 and will simply reinstate a pre-2003 regulatory  
 12 definition, it is important to bear in mind that  
 13 business practices have evolved significantly since  
 14 that time and the Department's review of a  
 15 prospective transferee's technical and financial  
 16 capacity is a critical step in protecting public  
 17 health and the environment. The Department's  
 18 concerns and the need for a more thorough review of  
 19 a transferee's technical and financial capacity are  
 20 further magnified when a license is transferred for  
 21 a hazardous waste facility, solid waste disposal  
 22 facility, waste oil facility or biomedical waste  
 23 facility. These proposed amendments will not  
 24 impose additional requirements for these license  
 25 transfers but will simply expand the number of

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1 receives a notification form unless the Department  
 2 approves or denies the Permit By Rule prior to that  
 3 date. So you submit your Permit By Rule  
 4 notification, you wait 14 days, it is effective.  
 5 Chapter 2, on the other hand, provides a 15 working  
 6 day review period for Permit By Rule notifications.  
 7 It doesn't include the weekends, doesn't include  
 8 holidays, it's a little longer but also it is less  
 9 certain for the applicant. The Department is now  
 10 proposing to amend Section 19A of Chapter 2 to  
 11 provide for the same 14 calendar day review period,  
 12 thus aligning Chapter 2 with the Department's  
 13 Chapter 305 Permit By Rule standards.

14 Finally, the third change we are proposing  
 15 is to clarify the definition of transfer of  
 16 ownership and allow for a more complete assessment  
 17 of a prospective licensee's financial capacity and  
 18 technical ability. Modern business practices have  
 19 made it increasingly difficult for the Department  
 20 to assess the potential impact of a change in  
 21 ownership as the labyrinth of corporate mergers,  
 22 sales and stock exchanges can work to obscure the  
 23 identities of regulated parties. Just as the  
 24 Department is proposing to update Chapter 2 to  
 25 facilitate electronic submissions in response to

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1 license transfers requiring prior approval from the  
 2 Department.

3 I'd now like to take the opportunity to let  
 4 Melanie Loyzim, our Director of the Department's  
 5 Bureau of Remediation and Waste Management to  
 6 provide a little more detail on these timely and  
 7 much needed revisions.

8 MS. LOYZIM: Thank you, Jeff. Good  
 9 morning. I am Melanie Loyzim, Director of the  
 10 Bureau of Remediation and Waste Management at the  
 11 Maine Department of Environmental Protection.

12 One provision of the proposed changes to  
 13 Chapter 2 applies specifically to several types of  
 14 licenses that are issued by my Bureau. That is  
 15 Section 21-C on page 16 of the proposed draft rule.  
 16 This section applies to licenses for hazardous  
 17 waste, solid waste disposal, waste oil and  
 18 biomedical waste facilities. The Department's  
 19 rules for licensing these types of facilities  
 20 include a variety of requirements to ensure that  
 21 the people who own and control the facilities are  
 22 capable of operating them properly. In order to  
 23 obtain a license from the Department to operate a  
 24 hazardous waste facility, a landfill, a waste oil  
 25 processing facility or a biomedical waste treatment

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1 facility, for instance, you must show that you can  
2 meet our regulatory requirements for properly  
3 handling the waste at your facility and that you  
4 can afford to clean up any releases to the  
5 environment. You must also provide proof that  
6 you've set enough money aside that the Department  
7 can use to clean up and close your facility if you  
8 go out of business or walk away from your  
9 responsibilities.

10 So waste facilities licensed in Maine have  
11 two requirements; one is that you have the  
12 financial capacity and technical ability to operate  
13 the facility; and the second is that you have  
14 financial assurance mechanisms in place to cover  
15 the cost to close the facility and to maintain it  
16 during a post-closure period.

17 These responsibilities are no simple matter  
18 and the messes that can be made by people who don't  
19 know what they're doing can have serious long-term  
20 consequences for public health and our natural  
21 resources. When someone first applies for a  
22 license for these types of facilities, they have to  
23 provide a lot of information to the Department and  
24 they work closely with us to establish safe,  
25 effective operations. If someone comes along later

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1 like it's the same entity while all the people  
2 involved may be different. While the corporation  
3 named on a license may not change, a new entity who  
4 controls that corporation could also take control  
5 of the facility operations and they need to do so  
6 responsibly. They can change who operates the  
7 facility, how waste streams are handled, which  
8 waste streams are accepted without understanding  
9 the ramifications of those changes. Financial  
10 ability and financial assurance requirements for a  
11 licensee can be met by a parent or an affiliate  
12 corporation. Without the changes proposed to  
13 Chapter 2, there could be a change in who controls  
14 any part of a corporate family without the  
15 Department being aware of the change. This may not  
16 matter in some cases and in others it could result  
17 in someone taking control of a waste facility in  
18 Maine who really does not understand what it is  
19 that they're responsible for and who may not have  
20 the financial ability to meet all of their  
21 requirements.

22 The requirement that the Department approve  
23 an ownership transfer for waste facilities before  
24 the property transaction occurs is not only in  
25 Chapter 2. It's also in the statutory sections

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1 and wants to take over, they need to apply to  
2 transfer the facility license and prove that now  
3 they have the capability and financial wherewithal  
4 to continue those operations safely. Strangely,  
5 however, our rules have left a gap that failed to  
6 address the wide variety of transactions that can  
7 have a significant impact on who oversees facility  
8 operations and how much funding will be available.

9 Under federal and state environmental laws,  
10 facility owners have liability for contamination at  
11 their facilities. Buyers of these facilities  
12 should be conducting environmental due diligence to  
13 assess the liability risks they could acquire from  
14 previous owners. The Department has worked with  
15 many people over the years who plan to take over  
16 facilities only to find out after contacting the  
17 Department what responsibilities and liabilities  
18 that would entail for them. It's important that  
19 those conversations happen with everyone who would  
20 have responsibility for a facility and that we  
21 aren't playing catch up with some new controlling  
22 entity after the fact.

23 There are many ways the control of or  
24 financial responsibility for a facility can change  
25 hands without a corporate name change. It may look

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1 that establish the licensing requirements for these  
2 types of facilities and in the Department's rules  
3 for licensing operation and maintenance of waste  
4 facilities. The change proposed to Chapter 2 would  
5 clarify which transactions would be considered a  
6 transfer of ownership and should be reviewed by the  
7 Department and help us ensure that we're able to  
8 engage with a new controlling entity to assist them  
9 with meeting the responsibilities that they would  
10 be acquiring.

11 We do not want to impose a requirement that  
12 is unnecessarily onerous but we have seen the  
13 importance of being engaged with people and  
14 companies when their business transactions could  
15 put them in violation of our laws and our rules.  
16 Transferring a license does not need to be a  
17 lengthy and difficult process and it can be done  
18 very simply when the ownership transfer has no  
19 effect on how the facility will be operated and  
20 what financial resources will be available to  
21 support it.

22 CHAIRMAN PARKER: Any questions from staff  
23 or Board members? If not, thank you.

24 MR. CRAWFORD: Thank you.

25 MS. LOYZIM: Thank you.

1 CHAIRMAN PARKER: Now we will accept  
2 testimony from -- there are no proponents listed on  
3 this sheet. We have one opponent which is Gary  
4 Vogel representing MREDA from the firm of Drummond  
5 Woodsum.

6 MR. VOGEL: Thank you, Commissioner Aho,  
7 members of the Board. My name is Gary Vogel. I am  
8 an attorney at Drummond Woodsum, but I'm here in my  
9 capacity as a volunteer on behalf of MREDA, the  
10 Maine Real Estate Development Association today to  
11 comment regarding the rule changes regarding  
12 transfers.

13 I indicated I'm testifying in opposition.  
14 I'm not sure whether I should have put neither for  
15 nor against, so you can take my comments, you know,  
16 as they will. Our concerns primarily are regarding  
17 the sort of overbreadth of the change. Mr.  
18 Crawford is correct that there are -- you know,  
19 that corporate transactions have become complex,  
20 that the capital structures in many -- for many  
21 projects are more involved, but those provisions  
22 are really important in order to bring investment  
23 capital into our state and we need to be very  
24 careful about taking actions that discourage  
25 bringing investment capital into the State of

1 which is known as a compliance period, typically  
2 five or seven years. After that period of time,  
3 they exit the project and they leave their capital,  
4 they usually get out with a nominal type of  
5 investment because they've received their tax  
6 credits in the form of energy credits, new market  
7 tax credits or whatever. Those investors in order  
8 to receive the full benefit of the tax credits  
9 typically own 99 percent of the project; however,  
10 they have no control over the project. The project  
11 is run by the general partner, the managing member,  
12 and that doesn't change. What happens is at the  
13 end of the tax credit compliance period, the  
14 investor exits; yes, there's a change of 99 percent  
15 ownership but typically the -- the managing member  
16 brings in an affiliate to take over their position  
17 and everything remains the same, including the  
18 investment of capital.

19 So we feel that the rule is overbroad and  
20 we don't want to see that these types of  
21 transactions and other financial transactions which  
22 may involve various different types of corporate  
23 ownership where the investor owns more than 50  
24 percent discourage that type of -- that type of  
25 ownership because the investment capital is very

1 Maine. The interest of MREDA really has to do not  
2 so much with the -- with the waste disposal  
3 products but -- rules but more with the  
4 definitional provisions to transfers which, if I'm  
5 not mistaken, would apply to any type of transfer  
6 of a license or application before that is with the  
7 Department and not merely to a -- a hazardous waste  
8 license or any type of waste license.

9 We certainly have no objection to the  
10 overall objectives of the Department in making sure  
11 that the state is protected, that the -- that the  
12 licensees have the adequate financial and technical  
13 capability; however, as I said, the -- I do feel  
14 that the -- the definition is overbroad and in many  
15 instances where there is a transfer of more than 50  
16 percent of the stock or ownership interest, it  
17 really does not reflect a change of control, a  
18 change of management or any other type of change  
19 that would necessitate a full transfer review. For  
20 example, many types of projects are financed with  
21 credits, whether they be energy tax credits, new  
22 market tax credits, historic tax credits, these  
23 types of structures involve bringing in an investor  
24 who puts investment capital into the project and  
25 they're required to stay in for a period of time

1 important to bring into the State of Maine, and so  
2 we would either encourage you not to adopt the rule  
3 as broadly to apply to all transfers of ownership  
4 or if you do, that there should be a streamlined  
5 type of process in which you can ascertain very  
6 quickly that the -- that this is not an application  
7 that involves a change of control and not require a  
8 full transfer application in those instances. For  
9 example, Maine Housing recently encountered this  
10 same situation, and they have a transfer of  
11 ownership rule for their low income housing  
12 projects that are to remain low income for many,  
13 many years. The tax credit compliance period for  
14 their projects is 15 years and at the end of 15  
15 years, the investor leaves, resulting in a change  
16 of usually 99.9 percent of the ownership in those  
17 projects. It was very burdensome to the owners of  
18 the affordable housing projects to go through the  
19 full transfer of ownership application process with  
20 Maine Housing for these types of transfers and  
21 Maine Housing recently adopted a streamlined rule  
22 that would apply to those types of transfers really  
23 just seeking verification that it was a change of  
24 the investor where the managing member or general  
25 partner remained the same. So we would encourage

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1 you to -- if the concern is over the waste  
2 facilities, then perhaps what to do at this time  
3 would be perhaps to limit it to that and also to  
4 adopt the streamlined approach, but the transfer  
5 rule that applies to all projects really could have  
6 a chilling effect on investment in Maine and that's  
7 our concern. Thank you.

8 CHAIRMAN PARKER: Any questions from any  
9 Board members?

10 MS. BERTOCCI: May I?

11 CHAIRMAN PARKER: Go ahead.

12 MS. BERTOCCI: Are there other types --  
13 other categories of transfers that are similar to  
14 this that are of concern to you, these investment  
15 tax credits, or is this the major concern?

16 MR. VOGEL: That's the easiest example that  
17 comes to mind but there are certainly many types of  
18 capital structures used in the corporate finance  
19 world and these may involve -- these may involve  
20 warrants, they may involve preferred stock. I  
21 mean, another way of addressing this would be to  
22 provide that if there wasn't a change in the voting  
23 stock of a -- of a corporation, because typically  
24 those types of capital structures where you're  
25 dealing with investors don't have -- they don't own

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1 the common stock, they may own a different class of  
2 stock, even though it might represent, you know, a  
3 majority of the equity, it doesn't represent the  
4 voting or the control. So it is broader than the  
5 tax credit type of applications.

6 MS. BERTOCCI: But that would be a defining  
7 parameter of who has voting control or who could --  
8 if they don't have voting stock, then they have no  
9 say in the management of the entity, is that  
10 correct?

11 MR. VOGEL: That's correct. They may have  
12 the right to remove the -- they might have the  
13 right to remove the managing member or the general  
14 partner in the event that there's a type of  
15 default, but typically they don't have any say in  
16 the day-to-day operation of the project or the  
17 entity.

18 CHAIRMAN PARKER: That's a complex question  
19 to answer but have you offered the Department any  
20 recommended wording or something that you think  
21 would address your concern directly?

22 MR. VOGEL: I'm not going to try to do that  
23 standing here at the podium.

24 CHAIRMAN PARKER: I understand.

25 MR. VOGEL: But certainly I could go back

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1 to my office and do that. I mean, I think the  
2 first issue would be if the concern is over the  
3 waste facility transfers, to limit this to the  
4 waste facility which certainly -- waste facilities  
5 which certainly doesn't have nearly as broad an  
6 application to the concerns of investment capital  
7 coming into the state. There may be instances in  
8 which -- you know, in which there are industrial  
9 applications which have their own waste facility  
10 which is part of it, but -- and even with that, we  
11 certainly could come up with some language dealing  
12 with change of control and voting ownership and I'd  
13 be happy to submit in the next day or two some  
14 proposed language to the rule change, if that would  
15 be helpful.

16 CHAIRMAN PARKER: Please do, and you've got  
17 until June 1st.

18 MR. VOGEL: Okay.

19 CHAIRMAN PARKER: Any further questions?

20 MS. BENSINGER: I was just going to ask if  
21 you can tell the Board, if you know, how does the  
22 Maine State Housing Authority determine control?  
23 You can see the Department's dilemma here. Each  
24 structure and business transaction is different, so  
25 how does the Maine State Housing Authority

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1 determine control?

2 MR. VOGEL: Their situation is a little bit  
3 easier because of the fact that they're dealing  
4 with one particular type of ownership in the low  
5 income housing tax credit in which there is a --  
6 there is a 15-year compliance period and the  
7 investor gets out after that period of time. So  
8 they are typically dealing in -- the vast majority  
9 of situations in which there was this overbreadth  
10 involved that situation exactly, and I believe  
11 their fix dealt with that one situation exactly.  
12 In the case of -- of the Department of  
13 Environmental Protection, you could have any myriad  
14 number of different capital structures for  
15 ownership entities so it's not quite as simple as  
16 being able to narrowly define it perhaps like Maine  
17 State Housing Authority did but we can take a look  
18 at what they did and it may be instructive and may  
19 be able to be done more -- you know, a little more  
20 broadly and still serve the same overall  
21 objectives.

22 CHAIRMAN PARKER: Any furthest questions?

23 Oh, sorry, Sue.

24 MS. LESSARD: In listening to staff, unless  
25 I've not heard this correctly, the -- the

25

1 requirement to notify to begin this doesn't  
 2 necessarily necessitate some long-winded process;  
 3 that depending on the nature of the transfer, that  
 they would not be subject to -- am I  
 5 misinterpreting that, Jeff? Because as a local  
 6 regulator, the things that you don't find out about  
 7 until later are always what are the biggest  
 8 problems and they're always most easily avoided if  
 9 there is at the very least a notification process  
 10 that allows the Department an initial evaluation  
 11 and then move on, rather than something happens  
 12 that later on becomes a liability for the state  
 13 through the law of unintended consequences; and  
 14 when I was reading this language, I was thinking  
 15 that what the Department is seeking to do is to  
 16 make sure that it is aware of any type of ownership  
 17 transfer because someone needs to do an assessment  
 18 as to whether there's liability for the state  
 19 associated with that transaction and that that is  
 20 always, with all due respect, not best left to  
 21 those doing the license transfers, that the  
 22 interests of the state are protected by those who  
 23 are overseeing that regulation. So if this -- if  
 24 the type of transfer that was being contemplated  
 25 was not one which had voting stock or changed the

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1 to follow up with some written comments and  
 2 suggestions. I think that what would be helpful as  
 3 you -- as you work on those written comments for  
 4 some suggestions to us is to think through the --  
 5 the -- the rule as it is currently worded right now  
 6 says that when the membership interest in an LLC is  
 7 transferred, that's not considered a transfer that  
 8 the Department can review, and so if you have some  
 9 thoughts, so if you have a very large integrated  
 10 facility that might have 12, 15 different permits  
 11 and licenses by the Department of Environmental  
 12 Protection and it is in an LLC form of ownership,  
 13 somebody buys that membership interest, the  
 14 Department has no ability nor does the public have  
 15 any ability to see that transfer and determine  
 16 beforehand whether or not there may be some  
 17 concerns or not. So I think if -- as you put your  
 18 comments together and recommendations on how the  
 19 Department may deal with that particular issue when  
 20 the ownership of these very large integrated  
 21 facilities are now all primarily in LLC form of  
 22 ownership would be very helpful for us.  
 23 MR. VOGEL: Okay, thank you. I'd be happy  
 24 to do that.  
 25 COMMISSIONER AHO: Thank you.

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1 ownership, it's my understanding that that wouldn't  
 2 -- that that would sort of stop the process. Jeff,  
 3 are we anywhere near close to -- I mean --  
 4 MR. CRAWFORD: Yes, Jeff Crawford, yeah, my  
 5 understanding is for an actual transfer, there is a  
 6 30-day public notice requirement in the  
 7 application, but the issue here is, first of all, a  
 8 determination of whether a transfer is actually  
 9 taking place.  
 10 MS. LESSARD: And that's what I'm --  
 11 MR. CRAWFORD: That's the key.  
 12 MS. LESSARD: But the only way you would be  
 13 able to determine that is to know it was happening.  
 14 MR. CRAWFORD: Yes.  
 15 MS. LESSARD: And the only way you can know  
 16 it's happening is if there's something in the  
 17 regulation that says we have to know.  
 18 MR. CRAWFORD: Exactly. We have the  
 19 ability to look at this and make that  
 20 determination, does this constitute a transfer or  
 21 not.  
 22 MR. LESSARD: Thank you.  
 23 CHAIRMAN PARKER: Commissioner?  
 24 COMMISSIONER AHO: Thank you, Mr. Vogel,  
 25 for your comments and I appreciate your willingness

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1 CHAIRMAN PARKER: Further comments? Thank  
 2 you.  
 3 MR. VOGEL: Thank you.  
 4 CHAIRMAN PARKER: Now we have testimony for  
 5 neither for nor against, Sharon Newman from Preti  
 6 Flaherty.  
 7 MS. NEWMAN: Good morning. I also have a  
 8 handout.  
 9 COMMISSIONER AHO: If you could speak up  
 10 just a little bit because we have the blowers right  
 11 next to us. Is that microphone actually on?  
 12 MS. NEWMAN: Well, I don't know. Okay, Mr.  
 13 Chairman, members of the Board of Environmental  
 14 Protection, Commissioner Aho, my name is Sharon  
 15 Newman, I'm with Preti Flaherty, and I'm here today  
 16 speaking on behalf of our client, Brookfield Power  
 17 US Asset Management, LLC, Brookfield for short, and  
 18 I'm providing testimony on the changes to the  
 19 definition of transfer of ownership in 1R of the  
 20 proposed amendments to the Chapter -- to the  
 21 Chapter 2 rules.  
 22 Like my colleague, Gary, I'm not sure  
 23 whether it's appropriate for me to be in the  
 24 opponent or neither for nor against category  
 25 because there are aspects of the rule that I'm not

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1 going to comment on at all. If you just looked at  
 2 the rulemaking fact sheet, you would think the  
 3 proposed change to the definition of transfer of  
 4 ownership really only regarded waste facilities,  
 5 but, in fact, the proposed amendments reach a lot  
 6 farther and they have consequences for companies  
 7 like Brookfield that don't operate and don't plan  
 8 to own or operate or acquire waste facilities. So  
 9 Brookfield's primary concern is the effect that  
 10 these proposed rule amendments are going to have on  
 11 routine corporate reorganization in which  
 12 wholly-owned DEP permitted operational subsidiaries  
 13 are moved from one parent to another affiliated  
 14 parent for tax reasons or other corporate reasons  
 15 that have nothing to do with environmental issues.  
 16 So in that circumstance, the entity that holds the  
 17 license remains the same, the business isn't  
 18 changed, the ultimate upstream parent company  
 19 remains the same and from a practical perspective,  
 20 it's just not necessary for a licensee subsidiary  
 21 to have to go through the transfer process and, in  
 22 fact, the proposed rule doesn't -- doesn't require  
 23 a transfer for a merger but would require it in  
 24 this scenario.

25 So attached to the handout that I just gave

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1 you, I've got a large form of this here --  
 2 CHAIRMAN PARKER: Could you set that right  
 3 in front of the podium so people to the left can  
 4 see it?  
 5 MS. NEWMAN: Okay.  
 6 CHAIRMAN PARKER: That's good.  
 7 MS. NEWMAN: Is that good? Okay. I may  
 8 have to scoot around in order to point to things on  
 9 it. So here you have at the top of the chart the  
 10 ultimate parent corporation. This is generic  
 11 because it's not just Brookfield, it's other  
 12 similar corporations, and so they are subsidiary  
 13 corporations A, B and C and corporation B happens  
 14 to be a parent itself and the operational permittee  
 15 corporations are the subsidiaries of the  
 16 corporation B parent. So it might be that the  
 17 ultimate parent corporation decides it wants to  
 18 move these operating permittees from corporation B  
 19 to corporation C, and my reading of the proposed  
 20 rule amendment is that this would trigger a permit  
 21 transfer. Now, if corporation B and corporation C  
 22 were being merged, it wouldn't trigger a transfer  
 23 requirement and the difference between those two  
 24 scenarios isn't really apparent to me in terms of  
 25 the DEP's legitimate concerns about the

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1 environmental impact of corporate transactions. In  
 2 any case, if it triggers a permit transfer, you  
 3 know, I think the Department regards these permit  
 4 transfers as not being terribly onerous but, in  
 5 fact, they can be quite onerous and they delay  
 6 transactions and they require a significant  
 7 investment of time and attention and resources not  
 8 only on the part of the applicant and the selling  
 9 entity but on the part of the Department itself.  
 10 So I don't want to take that lightly and I don't  
 11 think anyone here should.

12 So in addition to corporate reorganization,  
 13 like I've illustrated here, stock sale  
 14 acquisitions, equity interest purchases of limited  
 15 liability companies, that's another set of  
 16 circumstances where the entity that holds the  
 17 license can remain the same and its business isn't  
 18 changed at all, and even though the upstream parent  
 19 may have changed in the stock sale acquisition or  
 20 an equity purchase of an LLC, it's really not any  
 21 different from the merger situation that I  
 22 discussed earlier. The Department should consider  
 23 extending the same kind of exemption to all the  
 24 circumstances where the legal entity that owns the  
 25 property, the facility or the structure remains the

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1 same whether that's in the context of a merger or  
 2 corporate reorganization, a stock sale or an equity  
 3 interest purchase.

4 I should also point out that, you know, the  
 5 permit transfer process does introduce a measure of  
 6 uncertainty and uncertainty is what kills deals and  
 7 investment in Maine. So if the applicant has to  
 8 notify all the abutters, that invites public  
 9 comment, it invites a request for a public meeting  
 10 and maybe those are healthy things in the right  
 11 circumstances but it does create uncertainty where  
 12 nothing is changing but possibly the permit could  
 13 be reopened in some unpredictable way.

14 I'm puzzled by the fact that the Maine  
 15 Legislature changed the definition of transfer of  
 16 ownership back in 1995 in 38 MRSA Section 361 to  
 17 repeal the 50 percent stock sale threshold and  
 18 replace it with the current definition which the  
 19 transfer of ownership means a change in the legal  
 20 entity that owns the property, facility or  
 21 structure that's the subject of a license issued by  
 22 the Department, and since then DEP has made rule  
 23 changes to Chapter 2 to make that clearer, and now  
 24 it seems to be moving in the opposite direction and  
 25 effectively upend the Legislative intent of Section

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1 361.

2 So the other thing that I wanted to bring  
3 to your attention is in terms of how this proposed  
4 change to Chapter 2 transfer of ownership  
5 definition would work in real life is that we  
6 actually have sort of a laboratory example of this  
7 that Brookfield directly experienced in 2013 when  
8 it acquired a number of hydropower facilities in  
9 Maine. Now, hydropower facilities are not  
10 regulated under Chapter 2. If they have a Maine  
11 Waterway Conservation and Development Act Permit, a  
12 Maine hydropower permit, that is subject to Chapter  
13 450 which is its own set of administrative rules  
14 separate and apart from Chapter 2. Now, Chapter  
15 450 was never updated in the way Chapter 2 was to  
16 redefine the definition of transfer. So under  
17 Chapter 450, the definition of transfer is pretty  
18 close to what's being proposed now for Chapter 2,  
19 and it says a transfer is defined as including the  
20 sale of 50 percent or more of the stock of a  
21 corporation or a change in the general partner of a  
22 partnership that owns the property subject to the  
23 permit. So because of that what I call a  
24 regulatory artifact, Brookfield had to apply to  
25 transfer some of its Maine Waterway Conservation

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1 appropriate circumstances where the permitted  
2 entity is actually changing. So instead of  
3 rewinding the clock, my position is that the  
4 Department should retain the existing definition of  
5 transfer of ownership and although it's really not  
6 before us today, the Department really ought to  
7 consider amending the Chapter 450 rules so that  
8 people don't have to go through that again because  
9 it was a pointless transfer.

10 So getting back to Chapter 2, what I don't  
11 know standing here today is how the Department  
12 would handle a stock sale or the purchase of  
13 membership interest of a limited liability company  
14 if the transfer of ownership provisions are revised  
15 as proposed. Would DEP do as it did in the Chapter  
16 450 context and just have the permittee transfer  
17 the license back to itself or would these  
18 corporations A and B in my illustration here or B  
19 and C become the transferor and the transferee and  
20 would the parents have to demonstrate financial and  
21 technical capability? I don't think that really  
22 makes sense but we don't know how it would work and  
23 I think at a minimum the Department needs to  
24 clarify how it would actually implement the rule  
25 before it proceeds further in rulemaking. So as it

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1 Development Act permits because of Chapter 450 and  
2 so the Department after thinking about this for a  
3 while decided that under these circumstances the  
4 transfer would be from the permitted entity back to  
5 the same permitted entity. So just think about  
6 that for a second. We went through all this stuff,  
7 the application, you know, all this back and forth,  
8 it took quite a bit of time and effort and the net  
9 result was that the permit was transferred from the  
10 entity back to itself, from the same LLC or group  
11 of LLCs back to the same group of LLCs. So after  
12 all of this, even though nothing about the  
13 operation of the facilities in question have  
14 changed, the same personnel possessing the same  
15 technical capacity continued to manage the  
16 operations of the project, the same entity  
17 demonstrated the same financial capability to  
18 operate the project, you know, there's nothing to  
19 be gained by that kind of an exercise, but it  
20 serves as a really good example of why the  
21 statutory change was made back in 1995 and why the  
22 Chapter 2 rules were amended after that to remove  
23 those kinds of trigger points in the first place  
24 and then further clarified to eliminate all doubt  
25 so that the permit transfer process is reserved for

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1 stands, I think that the proposed amendment to  
2 transfer of ownership under Chapter 2 is going to  
3 trigger a lot of unnecessary permit transfers  
4 without a whole lot of environmental benefit but  
5 it's going to be a significant cost in terms of  
6 time and effort, both to the DEP and to the  
7 applicant, and I want to echo the point that Gary  
8 made is that it's going to unduly complicate and  
9 burden transactions that are designed to bring  
10 capital into Maine and invest in the Maine economy,  
11 and there are going to be a bunch of unintended  
12 consequences and some innocent bystanders are going  
13 to be harmed, including us, the Maine public.

14 So to the extent that the Department is  
15 concerned about the operations of a permittee  
16 changing and resulting in adverse environmental  
17 impact in the waste scenario -- the waste facility  
18 scenario, the Department has the ability at any  
19 time to enforce regulatory requirements and the  
20 terms of permits that are in existence, including  
21 making sure people have the financial capability  
22 and technical capability to run those projects, and  
23 I don't think it's necessary to amend the transfer  
24 of ownership provisions to accomplish that goal.

25 CHAIRMAN PARKER: Thank you. Any questions

1 from any Board members? Commissioner?  
 2 COMMISSIONER AHO: Thank you, Ms. Newman,  
 3 for your comments and I would just encourage you  
 4 also, as I did Mr. Vogel, that if you have any  
 5 suggestions in regards to the limited liability  
 6 corporation issue, that right now the current rule  
 7 allows for the transfer of membership interests in  
 8 a limited liability corporation to, in essence,  
 9 avoid any review of all those permit requirements  
 10 leaving the Department and the state at the end of  
 11 the process having to now go back and enforce  
 12 permits and licenses against a new operator. So if  
 13 you have any suggestions on how to narrow that,  
 14 that would be very much appreciated. I don't think  
 15 the Limited Liability Corporation Act in Maine was  
 16 in existence in 1995 when the Legislature made this  
 17 change so I think if you have some suggestions on  
 18 how to perhaps provide some limited state oversight  
 19 when those -- those things change, it would be  
 20 helpful.  
 21 MS. NEWMAN: I'll certainly attempt to ask  
 22 my corporate colleagues to address that. Being an  
 23 environmental attorney, I would be committing  
 24 malpractice if I were to attempt to draft those  
 25 things. My concern, however, is that this is going

1 to entangle the Department in trying to establish a  
 2 rule to fine tune which corporate transactions of  
 3 which types should trigger permit transfer  
 4 oversight and that it's going to be very hard for  
 5 anybody, and, Gary, if you can do this, great, but  
 6 I think it's going to be -- it's going to really  
 7 involve DEP in deciding which transactions are  
 8 going to get -- you know, are going to trigger the  
 9 Chapter 2 transfer of permit requirements and it's  
 10 going to be very, very messy, and that in itself  
 11 will create the kind of uncertainty that I think is  
 12 injurious to our economy. You know, I understand  
 13 the Department's frustration, and I have reason to  
 14 know that the Department is frustrated, but I -- I  
 15 don't think we should let the tail wag the dog.  
 16 MS. BERTOCCI: I don't understand much  
 17 about corporate structure so the Department's  
 18 concern obviously is that the entity holding the  
 19 license has the technical and financial ability to  
 20 do what they've said in the past, so when it -- if  
 21 they're bought out by somebody else, say you switch  
 22 from corporation B to C, is there any other way  
 23 that one would know that the same resources would  
 24 still flow to that licensee other than, you know,  
 25 the ability of the Department to check and ask

1 questions? I mean, are there any things in their  
 2 agreements that would ensure that the permittee is  
 3 still going to have the same resources and  
 4 commitment from the owners of the controlling  
 5 interest to the operation of that facility?  
 6 MS. NEWMAN: Well, I'm not sure how to  
 7 respond to your question honestly, but otherwise  
 8 every single transaction going forward in Maine is  
 9 going to have to be run by the Department. That's  
 10 my fear.  
 11 CHAIRMAN PARKER: Any other questions?  
 12 Thank you.  
 13 MS. NEWMAN: Thank you.  
 14 CHAIRMAN PARKER: There being no other  
 15 testimony, we will close the hearing. The hearing  
 16 is now closed.  
 17 (Whereupon, the above-named hearing was  
 18 concluded at 10:00 a.m.)  
 19  
 20  
 21  
 22  
 23  
 24  
 25

1 CERTIFICATE  
 2  
 3 I, Joanne P. Alley, a Notary Public in and for  
 4 the State of Maine, hereby certify that on the 21st day  
 5 of May, 2015, personally appeared before me the  
 6 within-named witnesses who were sworn to testify to the  
 7 truth, the whole truth, and nothing but the truth in the  
 8 aforementioned cause of action and that the foregoing is  
 9 a true and accurate record as taken by me by means of  
 10 computer-aided machine shorthand.  
 11  
 12 I further certify that I am a disinterested  
 13 person in the event or outcome of the aforementioned  
 14 cause of action.  
 15  
 16 IN WITNESS WHEREOF, I have hereunto set my hand  
 17 this 3rd day of June, 2015.  
 18  
 19  
 20 \_\_\_\_\_  
 21 Joanne P. Alley  
 22 Court Reporter/Notary Public  
 23 My commission expires: July 17, 2015  
 24  
 25



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