



Board of Environmental Protection
Summary of Activities in Calendar Year 2014 and
Issues for Committee Consideration

Report to the Joint Standing
Committee on Environment and Natural Resources

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Attachments:

- A. Board of Environmental Protection Members: Biographical Information
- B. Permitting of Grid-Scale Wind Energy Development: List of Licensing Decisions
 Appealed to the Board

**Board of Environmental Protection
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Environment and Natural Resources**

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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. § 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. § 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 submitted in fulfillment of this statutory requirement.

II. Membership

Biographical information on the current Board members is found in Attachment A. Changes to Board membership in 2014 are summarized below.

Thomas Dobbins, Scarborough. In March 2014, Governor LePage appointed Thomas Dobbins to fill the seat vacated by M. Wing Goodale in December 2013. Mr. Dobbins has extensive experience in petroleum storage and petroleum transportation in coastal waters. He currently serves on the Maine State Pilot Commission, the Portland Harbor Commission, and the Portland Harbor Dredge Committee.

Richard Gould, Greenville. Richard Gould completed his service on the Board in June 2014, having served the maximum of two terms. Upon completion of his term, Board Chairman Foley and others thanked Mr. Gould for his many years of distinguished service to the people of Maine.

Mark Draper, Caribou. In October 2014, Governor LePage appointed Mark C. Draper of Caribou to fill the seat vacated by Dick Gould. Mr. Draper is currently the Solid Waste Director for Tri-Community Recycling & Sanitary Landfill in Fort Fairfield, a position he has held since 2003.

Board Chairman Robert A. Foley of Wells was elected to the Maine House of Representatives for House District #7 on November 4, 2014 and resigned from the Board effective December 2, 2014.

James Parker of Veazie. Governor Paul LePage appointed Board member James Parker to serve as Chair of the Board.

III. Responsibilities and Duties

The Board's responsibilities as set forth in 38 M.R.S. § 341-D include:

- Major substantive rulemaking: The Board holds public hearings on, and provisionally adopts, major substantive rules of the Department for consideration by the Legislature;
- Appeals of Commissioner licensing and enforcement actions;
- Decisions on certain permit applications: The Board makes the original licensing decision on any application for approval of a permit or license that in its judgment represents a project of statewide significance. Additionally, the Department's statutes specify that certain applications such as those pertaining to commercial hazardous waste facilities must be reviewed and decided by the Board;
- 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 the 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. The Board maintains a webpage with biographical information on Board members, meeting materials, information on pending matters of broad public interest, and guidance to facilitate public participation in matters pending before the Board.

IV. Issues for Committee Consideration

A. Major Substantive Rules

As discussed In Section V below, the Board is forwarding two major substantive rules to the Committee for consideration this session: Chapter 119 Motor Vehicle Fuel Volatility Limit (Amendments) and Chapter 500 Stormwater Management (Amendments). These provisionally adopted rules have been submitted to the Legislative Council pursuant to 5 M.R.S. § 8072.

B. Grid-Scale Wind Energy Developments

Since enactment of the Maine Wind Energy Act, Title 35-A Chapter 34-A Expedited Permitting of Grid-Scale Wind Energy Development (P.L. 2007, c. 661), the Department has issued decisions on 11 applications for grid-scale wind energy developments from 2009 through 2014 (for ten separate projects¹). All of these licensing decisions (100%) were subsequently appealed to the Board. Two of the appeals were by applicants who were denied approval by the Department. The Board upheld the Commissioner's licensing decision in nine cases, reversed in one case, and one case is pending. See Attachment B for a list of these expedited wind energy projects. This compares to an appeal rate of 2.7% (3 of 108) for new non-wind energy Site Law applications during the same time period. Of the ten appeals decided by the Board to date, nine (90%) have been appealed to the Law Court. The high rate of appeal reflects continuing opposition to grid-scale wind energy projects by some persons who live in the vicinity of these projects and/or dissatisfaction with the decision.

In the Board's January 2014 report to the Committee, the Board commented on a number of issues raised in appeals of grid-scale wind energy projects. The major issues raised by opponents continue to be scenic impact, sound level limits and the use of noise easements to achieve compliance, financial capacity including provision for decommissioning, and tangible benefits. These issues are discussed more fully below.

- (1) Scenic Character and Existing Uses Related to Scenic Character: Persons opposed to wind energy developments raise a number of issues regarding the impact of grid-scale wind energy projects on scenic character and existing uses related to scenic character including concerns about the limitations of the visual impact assessments and the ultimate disposition and decommissioning of these projects.
 - Scenic Resources of State or National Significance. The statute specifies the resources which may be considered when assessing the visual impact of a proposed wind energy project. There is concern that the law's reliance on "Maine's Finest Lakes" (1989) and the "Maine Wildlands Lakes Assessment" (1987) to designate lakes as scenic resources of state or national significance is inadequate given the age of the reports and the intended use of the reports at the time of their preparation. The Board has heard significant public frustration that local natural resources that may contribute significantly to the scenic character of an area, such as a scenic ridgeline, are not afforded consideration under the law. Additionally, appellants have argued that the evaluation criterion in 35-A M.R.S. § 3452(3) pertaining to continued use and enjoyment of a resource tend to under value more pristine, less frequently used areas.

¹ The Department processed 11 applications for ten separate wind energy projects, including two applications for the Oakfield Wind Project. Following initial approval of the Oakfield project by the Department and subsequently the Board and the Law Court on appeal, the project was revised to increase the number and size of the turbines. The licensing decision approving the revised project was also appealed to the Board and subsequently to the Law Court.

- Visual Impact Assessment Eight Mile Limit. Appellants frequently question whether the visual impact assessment limit of 8 miles from a scenic resource of state or national significance set forth in statute (35-A M.R.S. §3452(4)) is appropriate. The location of many projects on ridgelines coupled with the increasing size and height of turbines as technology advances has resulted in concern that newly proposed projects are visible at increasingly greater distances.
 - Nighttime Lighting of Turbines. The Federal Aviation Administration (FAA) requires that turbines be lighted for safety purposes. The red, blinking lights on turbines can be visually intrusive particularly when reflected on the surface of a waterbody at night. This issue may be addressed in part if and when the FAA approves radar activated lighting system technology for wind turbines. The Department has begun to condition permits to require the licensee to apply to the FAA for use of radar activated lighting if and when new technology is approved for turbine lighting by the FAA.
 - Cumulative Impact. There is concern over a concentration of wind projects in certain areas of the state. Persons express a sense of being surrounded, with the potential for turbines to be viewed in multiple directions. This concern is not adequately addressed when the scenic impact can only be considered as viewed from a scenic resource of state or national significance (SRSNS). Policy guidance on whether it is best to concentrate wind energy development in certain locations or to distribute it more broadly across the landscape would be helpful. There are obviously related questions regarding the number and location of energy transmission lines and corridors. Additionally, appellants express concern that the law does not adequately address the scenic impact of multiple projects being viewed in succession as one travels through the landscape as may be the case for persons hiking portions of the Appalachian Trail.
- (2) Sound Level Limits: In its 2012 amendments to Chapter 375, the Department established a lower nighttime sound level limit of 42 dBA at protected locations for wind energy developments. This change has addressed some concerns regarding unwanted sound; however, appellants continue to question whether the sound level limits established in rule are protective of public health. They also question the methodology for modeling of sound propagation and whether the required sound level limits will actually be met. Additionally, Chapter 375 includes a provision allowing a generator of sound to obtain a noise easement from the owner of a protected location that allows higher levels of sound than otherwise required by rule. Appellants often question the appropriateness of allowing the use of such sound level easements to meet licensing requirements.
- (3) Financial Capacity and Decommissioning: Appellants often challenge the adequacy of financial provisions for decommissioning wind energy projects at the end of their useful life. Funding for decommissioning is often cited as important from a scenic impact and public safety perspective. The statute itself does not address decommissioning, and the Department's authority to address this important issue is only found in the unallocated language of Public Law 2007, c. 661 (LD 2283) Part A, §B-13(6). Statutory guidance on financial assurance for decommissioning would be helpful to the Department.

(4) Tangible Benefits: To demonstrate that an expedited wind energy development provides significant tangible benefits, the Wind Energy Act requires an applicant to establish a community benefits package (35-A M.R.S. § 3454(3)). Title 35-A §3451(10) requires assurance of such benefits to the “host community or communities to the extent practicable and affected neighboring communities.” When the generating facilities are located in a township, statute provides that the county in which the facilities are located is a host community. For the unorganized or deorganized areas of the state, including townships, there has been disagreement over whether the developer or qualifying host communities (e.g. the county) should make the determination as to which entities are offered and/or receive a benefits package and whether all eligible entities should at least be offered a benefits package. Guidance in this area, as well as clarification of “affected neighboring communities,” would be helpful. Additionally, appellants question whether the energy generated by the projects must be, or should be, used to meet demand in Maine.

C. Smaller-Scale Wind Energy Development in Organized Areas

The development of smaller-scale wind energy developments is an emerging issue. Title 35-A § 3456 provides for a limited review of smaller-scale wind energy developments in organized areas that have a generating capacity of more than 100 kilowatts but are not large enough to trigger permitting under the Site Law. These projects are required to obtain a certification from the Department that the generating facilities comply with the Department’s noise control rules, are sited to avoid unreasonable adverse shadow flicker effects, and are constructed with adequate setbacks to protect public safety. With the increase in size and efficiency of turbines, the Department has received inquiries regarding the requirements for such small-scale projects. While small in terms of generating capacity, such projects may be located in environmentally sensitive areas and have the potential to have significant scenic and other natural resource impacts which are not subject to review. The Wind Energy Act also does not require developers of these projects to demonstrate financial assurance or provisions for decommissioning.

V. Summary of Matters before the Board in 2014

The Board held 12 meetings in 2014. Matters considered by the Board are summarized below.

A. Rulemaking

In accordance with 38 M.R.S. § 341-H(1), the Board shall “adopt, amend or repeal 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 M.R.S. § 341-H(2)).

Major Substantive Rules. The following major substantive rules have been forwarded to the Legislature for consideration this session:

- Chapter 119 Motor Vehicle Fuel Volatility Limit (Amendments). The proposed amendments require retailers that sell gasoline in York, Cumberland, Sagadahoc, Androscoggin, Kennebec, Knox or Lincoln counties to sell only federal reformulated gasoline referred to as RFG beginning June 1, 2015 as required by P.L. 2013, c. 221 and c. 453. A public hearing was held on March 6, 2014. The amendments were provisionally adopted by the Board on June 5, 2014.
- Chapter 500 Stormwater Management (Amendments). This was a joint rulemaking by the Board and the Commissioner because the rule contains both major substantive and routine technical provisions. The proposed amendments to Chapter 500 are intended to encourage the use of innovative stormwater designs that will accommodate measures for addressing climate change and resiliency and adaptation in infrastructure, and provide greater flexibility for the regulated community. Amendments include a new voluntary low impact development credit, new treatment levels for redevelopment projects, updated performance standards, and additional stormwater treatment options. Provisions pertaining to compensation fees and mitigation credits (Section 6 of the existing rule) are being deleted from Chapter 500 and placed in a new chapter since these provisions are routine technical. A public hearing was held on October 16, 2014. A number of changes to the draft rule were made in response to comments received. The Board provisionally adopted the rule at its meeting on December 18, 2014.

Major Substantive Rules Submitted in 2014. The Board submitted the following rules to the Legislature for review and approval in 2014:

- Chapter 106 Low Sulfur Fuel / Amendments. This was a joint rulemaking by the Commissioner and the Board since portions of the rule are routine technical while others are major substantive. The routine technical amendments incorporated the updated statutory limits on fuel sulfur content. The major substantive amendments established a process for sources to seek an alternative emission reduction strategy. Sulfur emissions are the predominant cause of visibility impairment (regional haze) in the Northeast and Mid-Atlantic states. A public hearing was held on December 5, 2013. The rule was provisionally adopted on January 23, 2014. The Legislature authorized final adoption in Resolve 2013, Chapter 95. The amendments were finally adopted by the Board on May 1, 2014.
- Chapter 200 Metallic Mineral Exploration, Advanced Exploration and Mining. Public Law 2011, chapter 653 “An Act to Improve Environmental Oversight and Streamline Permitting for Metallic Mineral Mining in Maine” directed the Department of Environmental Protection to provisionally adopt and submit to the Legislature by January 10, 2014 rules for metallic mineral mining in accordance with the framework established in the Maine Metallic Mineral Mining Act. In response to this legislative directive, the Department hired a consultant to assist Department staff in the drafting of the rule. After several months of

work by an interdisciplinary team of Department staff members, staff submitted a draft rule to the Board in September 2013. The Board held a public hearing on the proposed rule on October 17, 2013. The Board received extensive comment on the rule during an 8 hour public hearing and two written comment periods. The Board and Department staff reviewed these comments during deliberative sessions on November 7, November 21, December 3, December 19, 2013 and January 10, 2014 and revised the rule in response to comments on a number of complex and contentious issues. The rule was provisionally adopted by the Board on January 10, 2014 with the unanimous vote of the members present at the meeting. The Legislature did not authorize final adoption of the rule.

Routine Technical Rules. The Board and Commissioner amended a routine technical procedural rule governing licensing hearings by the Board and the Commissioner.

- Chapter 3 Rules Governing the Conduct of Licensing Hearings (Amendment). Public Law 2013, chapter 300 (LD 1497) “An Act to Make Minor Changes and Corrections to Statutes Administered by the Department of Environmental Protection” amended the Maine Administrative Procedure Act (MAPA) to eliminate the requirement for the issuance of press releases and public service announcements of a licensing hearing. The amendment deleted the requirement that the Department issue press releases and radio and television public service announcements of licensing hearings from the Department’s hearing rule. This was a joint rulemaking by the Board and the Commissioner because Chapter 3 governs licensing hearings held by the Commissioner as well as those held by the Board. The proposed rule amendment was noticed for a 30 day written public comment period on September 24, 2014. The comment period ended October 27, 2014. The proposed rule amendment was subsequently modified in response to comments received to note that federally delegated programs may have additional hearing notice requirements. The proposed Chapter 3 amendment was adopted by the Board and the Commissioner on December 18, 2014.

B. Appeals of Commissioner 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. Under provisions of 38 M.R.S. §341-D(4), the Board may affirm, amend, or reverse the Commissioner’s decision, or remand the matter to the Commissioner for further proceedings. In an appeal proceeding, 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 processes appeals 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 2014 are summarized below.

Appeals Decided. The following appeals were decided by the Board:

- Bowers Wind Project. Champlain Wind, LLC applied for a permit to construct a 16 turbine (48 MW) wind energy development in Kossuth Township in Washington County and Carroll Plantation in Penobscot County. The Commissioner denied the application finding that the proposed project would significantly compromise views from a scenic resource of state or national significance and would have an unreasonable adverse effect on the scenic character and existing uses related to scenic character of the resource. The applicant (Champlain Wind, LLC) and the majority landowner (Douglas Humphrey and Bowers Mountain, LLC) appealed the Commissioner's decision to the Board. Following oral argument by the parties, the Board affirmed the Commissioner's decision to deny the project on May 1, 2014. The Board's decision has been appealed to the Law Court.
- Sand Dune Alteration, Popham Beach, Phippsburg. The Department issued a Natural Resources Protection Act permit to Carol Reece for development of a lawn, walkway, and gravel driveway in a frontal dune for the purpose of allowing vehicular access to the applicant's lot on a seasonal basis. The Board received two timely appeals of the Commissioner's licensing decision, one from Jonathan Day and one from Mary Small, Ann Wong, and John McCarty. Issues raised on appeal to the Board included concerns regarding the impact to the frontal dune, potential for flooding, and scenic and aesthetic impacts to the resource. Following oral argument by the parties, the Board affirmed the Commissioner's decision on March 6, 2014. The Board's decision was subsequently appealed to Superior Court. In a decision dated December 22, 2014, the court found in favor of the appellant on the interpretation of one provision of the Department's Sand Dune Rules. Ms. Reece has appealed the Superior Court's decision to the Maine Supreme Judicial Court.
- Residential Pier Expansion, Falmouth. The Department issued a Natural Resources Protection Act permit to Paul and Janis Walsh for the expansion of an existing residential pier. The permit was appealed to the Board by Marjorie Getz and David Tourangeau who argued, in part, that there would be unreasonable adverse impacts to aquatic habitat and that the applicants had alternatives to the project. Following oral argument by the parties, the Board affirmed the Commissioner's decision on June 5, 2014. The Board's decision has been appealed to Superior Court.
- Land Application of Septage, Crystal. The Department issued a solid waste license to David A. Noyes for the land application of septage in the town of Crystal. The permit was appealed by Michael Charette, an abutter to the land application site, who raised a number of objections including adequacy of site soils, potential impacts to groundwater, and financial capacity and technical ability of the applicant. Following oral argument by the parties, the Board affirmed the Commissioner's decision on June 5, 2014. There was no judicial appeal.

- Juniper Ridge Landfill, Old Town, Application by State of Maine Bureau of General Services (BGS) and NEWSME Landfill Operations, Inc. (NEWSME). BGS/NEWSME filed an application to remove certain restrictions and limitations on the disposal of in-state municipal solid waste (MSW) at Juniper Ridge Landfill. The Department granted conditional approval for the disposal of no more than 81,800 tons per year of MSW at JRL. The Board received two appeals of the Department's licensing decision. The appeal by BGS/NEWSME argued, in part, that the Department erred by applying the waste hierarchy to the application and that a greater volume of MSW should be allowed. The appeal by Edward Spencer argued in part that landfilling of unprocessed MSW does not comply with the waste management hierarchy. Following oral argument by the parties, the Board affirmed the Commissioner's decision on June 19, 2014. There was no judicial appeal.
- Canton Mountain Wind Project, Canton and Dixfield. On June 16, 2014, the Department issued a permit to Canton Mountain Wind, LLC for an eight turbine, 24 megawatt expedited wind energy development to be located in Canton and Dixfield. The permit was appealed by Alice McKay Barnett who objected to, among other things, findings regarding sound, noise complaint response protocols, and the use of easements to comply with sound level limits. Following oral argument by the parties, the Board affirmed the Commissioner's decision. The Board's decision has been appealed to the Law Court.

Appeals Withdrawn. The following appeals were withdrawn prior to consideration by the Board:

- Limestone Water and Sewer District Publicly Owned Treatment Works. On September 18, 2013, the Department issued a modification of the facility's waste discharge license amending the discharge limits and the monitoring and reporting requirements for inorganic arsenic and total arsenic. In October 2013 a timely appeal of the permit modification was filed by the Aroostook Band of Micmac. The appeal was subsequently withdrawn on March 5, 2014.
- Residential Pier, Southwest Harbor. The Department issued a Natural Resources Protection Act permit to F. Ronald Jenkins for construction of a residential pier on Greening Island in Southwest Harbor. The permit was appealed by Alexander and Alexandra Hack. Consideration of the appeal was stayed by the Board at the request of the parties to provide for alternative dispute resolution. The parties subsequently came to agreement and the appeal was withdrawn on July 9, 2014.
- Maine Department of Transportation (MDOT) Bridge Replacement, South Bristol. The Department accepted a permit-by-rule application in December 2013 by MDOT for replacement of a bridge in South Bristol. Beth Fisher filed a timely appeal of the licensing decision arguing, in part, that the project did not qualify for permit-by-rule and that a full application with visual assessment should be required. The appeal was withdrawn on April 9, 2014.

Appeals Pending. The following appeals are pending:

- Bingham Wind Project. On September 8, 2014, the Department issued a permit to Blue Sky West, LLC and Blue Sky West II, LLC for a 62 turbine, 206 MW expedited wind energy development to be located in Bingham and Mayfield Twp. in Somerset County and Kingsbury Plt., Abbot, and Parkman in Piscataquis County. The permit decision was appealed to the Board by Friends of Maine's Mountains and Alice McKay Barnett. Issues on appeal include, among other things, financial capacity, provisions for decommissioning, scenic impacts, wildlife impacts, noise complaint response protocols, and the use of easements to comply with sound level limits. The appeal is pending.

C. License Applications Requiring Board Approval

The Board acted on two licensing matters specifically delegated to it in statute.

- Dragon Products Company, LLC Request for Alternative Mercury Emissions Limit. State law at 38 M.R.S. § 585-B(5) establishes mercury limits for an air emission source. 38 M.R.S. § 585-B(5)(B) provides that a source may apply to the Board, and the Board shall grant, a license modification establishing an alternative emissions limit for mercury if the Board finds that the proposed mercury emission limit meets the most stringent emission limitation that is achievable and compatible with the class of the source, considering economic feasibility. Pursuant to this provision of law, Dragon Products applied for an alternative limit for its cement manufacturing facility in Thomaston. Following review of the application and opportunity for public comment, the Board approved the license amendment on July 17, 2014 granting an alternative mercury emission limit of 42 pounds per year and the applicable 40 CFR Part 63, Subpart LLL federal mercury emissions standard of 55 pounds of mercury per million tons of clinker produced.
- Paris Utility District Request for Site-Specific Ambient Water Quality Criteria for Copper in the Little Androscoggin River. The Paris Utility District submitted an application for renewal of its waste discharge permit that included a request for site-specific aquatic life ambient water quality criteria (AWQC) for copper in the Little Androscoggin River from the facility's outfall to the confluence of the Little Androscoggin with the main stem of the Androscoggin River. Given high levels of copper in the utility's drinking water distribution system, the wastewater treatment facility has had difficulty meeting its existing waste discharge limits for copper. The request for a site-specific standard was based on a determination that the river could accommodate higher levels of copper without adversely impacting aquatic life. Copper is limited in wastewater discharges primarily because of its potential for toxic effects on aquatic life.

Maine law, 38 MRSA, §420(2)(B), and 06-096 CMR Chapter 584 state that the Board may change the statewide criteria for a particular toxic substance by adopting site-specific numeric criteria for a toxic substance to reflect site-specific circumstances different from those used in the derivation of the statewide criteria. The adoption of site specific numerical criteria may only occur as part of a licensing proceeding and upon a finding that the site-

specific criteria are based on sound scientific rationale, are as protective as federal water quality criteria, and are protective of the most sensitive designated use of the water body. The Board held a public hearing on PUD's application on September 18, 2014. Following additional public comment on the revised draft permit, the Board approved the permit and site-specific aquatic life ambient water quality criteria for copper in the Little Androscoggin River.

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 by the Commissioner in 2014.

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 administrative orders in 2014.

VI. Significant Law Court Decisions

The following decisions of the Law Court issued in 2014 may be of interest to Committee members:

- Water Quality Certification for the Eel Weir Hydropower Project, Sebago Lake, Cumberland County.

On August 30, 2011, the Department approved the water quality certification for the Eel Weir Hydropower Project at the outlet of Sebago Lake subject to certain conditions necessary to meet State water quality standards including conditions related to lake level, minimum flow requirements for the bypass reach of the Presumpscot River, and eel and fish passage. The project is owned and operated by S.D. Warren Company.

The Board received two appeals of the Commissioner's decision. Appellant Charles Frechette argued that the lake level management plan for Sebago Lake would result in lower lakes levels that would adversely impact recreation, navigation, and aquatic habitat. Appellant Douglas Watts objected to the certification arguing, in part, that the proposed operation of the facility would result in lake levels that are too high and would not provide sufficient water to the bypass portion of the Presumpscot River to meet state water quality standards. Mr. Watts also argued that the law requires the immediate installation of fish passage to allow landlocked salmon to pass back and forth between the lake and the river. The Board denied the appeals and affirmed the Commissioner's decision.

Douglass Watts appealed the Board's decision to Superior Court (Business and Consumer docket), and subsequently to the Maine Supreme Judicial Court. In a decision dated July 15, 2014 (*Douglas H. Watts v. Board of Environmental Protection et al.*, 2014 ME 91), the Court affirmed the Board's decision with respect to the water level management of Sebago Lake finding that the Board properly construed and applied the water quality standards for Class GPA waters balancing the lake's designated uses which include recreation, fishing, agriculture, hydroelectric power generation, drinking water supply, and habitat for fish and other aquatic life.

- HoltraChem Chlor-alkali Manufacturing Facility in Orrington, Penobscot County.

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 including the removal of all five landfills. The Commissioner's Order was subsequently appealed to the Board pursuant to 38 M.R.S. § 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. The proceeding involved extensive testimony by expert witnesses both in support of, and in opposition to, the Commissioner's cleanup order. The Board issued its decision in an order dated August 19, 2010 in which it upheld the Commissioner's Order with some major modifications. In particular, the Board agreed with the Commissioner that the wastes in Landfills 1 and 2 must be removed in order to ensure the protection of public health and safety and the environment. However, the Board found that Landfills 3, 4 and 5 could remain on site with, among other things, new covers that meet RCRA Subtitle C standards and additional groundwater extraction and treatment.

Mallinckrodt, LLC and U.S. Surgical Corporation subsequently appealed the Board's decision to Superior Court (Business and Consumer docket) and then to the Maine Supreme Judicial Court. Mallinckrodt argued, in part, that the Commissioner lacked statutory authority to issue a compliance order under the Uncontrolled Hazardous Substance Site Law to compel cleanup of the site, that the Board was required to adopt rules of practice for uncontrolled sites hearings, and that the Board's consultants should be subject to cross-examination. In a decision dated April 3, 2014, the Court affirmed the judgment of the lower court and the Board's decision, which modified and affirmed the Commissioner's compliance order (*Mallinckrodt US, LLC et al. v. Department of Environmental Protection*, 2014 ME 52). The Court found that the Commissioner acted within his

authority to issue a cleanup order and that the Board did not commit legal error by conducting its proceedings in accordance with the procedural rules established in the Maine Administrative Procedures Act and the Uncontrolled Sites Law rather than promulgating separate rules to govern the proceeding. The Court also found that because the Board's consultants did not submit evidence and did not serve in an advocate capacity, the Board was entitled to rely on their advice and was not required to permit the parties to cross-examine them. Mallinckrodt is now working with Department staff to implement the cleanup order.

- Passadumkeag Windpark, Expedited Wind Energy Project, Penobscot County.

In February 2012, Passadumkeag Windpark, LLC filed an application for an expedited wind energy development consisting of 14 (3.0) MW turbines and associated structures to be located on Passadumkeag Mountain in Grand Falls Township, Penobscot County. The Commissioner denied the application finding that the project would have an unreasonable adverse impact on the scenic character of Saponac Pond, a scenic resource of state or national significance.

The applicant and the majority landowner subsequently filed an appeal of the Commissioner's decision with the Board. Following oral argument by the parties and a presentation by Department staff, the Board reversed the Commissioner's decision and issued a permit for the project in August 2013. The Board's decision was appealed to the Maine Supreme Judicial Court by persons who had supported the Commissioner's denial of the project.

In a decision dated October 21, 2014, the Law Court affirmed the Board's decision (*Passadumkeag Mountain Friends, et al v. Board of Environmental Protection et al.*, 2014 ME 116). The Court found that the Board's decision, not the underlying Department decision, was the operative decision for review by the Court, that the Board's decision was supported by substantial evidence in the record, and that the process before the Board was fair and did not affect the due process rights of the respondents.

VII. Informational Sessions

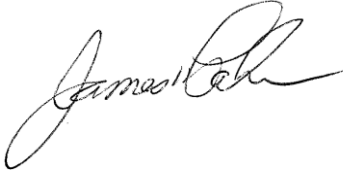
The Board held two informational sessions for Board members in 2014, one on statutes governing Board proceedings including issues such as ex-parte communications, and the other on the provisions of the Maine Wind Energy Act. Informational sessions are designed to update Board members on various areas of their responsibility. The sessions are open to the regulated community and the general public.

VIII. Closing

Board members are committed to carrying out their 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 2014. I would be happy to respond to any questions you may have.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James W. Parker". The signature is fluid and cursive, with the first name "James" being the most prominent.

James W. Parker, Chair
Board of Environmental Protection

Attachments:

- A. Board of Environmental Protection Members: Biographical Information
- B. Permitting of Grid-Scale Wind Energy Development: List of Commissioner Licensing Decisions Appealed to the Board

Attachment A: Board of Environmental Protection Members



James W. Parker, Chair
Veazie, 1st Term

Mr. Parker is a professional engineer and former State Representative for District 18. Mr. Parker served in the 125th Legislature and was a member of the Joint Standing Committee on Environment and Natural Resources and the Special Select Committee for Regulatory Fairness and Reform. Mr. Parker graduated from the University of Maine with a degree in civil engineering. Following employment with James W. Sewall Company, he founded Civil Engineering Services, Inc. (CES, Inc.), an engineering consulting firm providing services in a variety of areas including water supply, wastewater, solid and hazardous waste management, and site development. Mr. Parker retired from the firm in 2009, and now spends summers as a charter captain for whale and sightseeing tours on the downeast coast. Mr. Parker was appointed to the Board by Governor Paul R. LePage in June 2013. Governor LePage appointed Mr. Parker Board Chair in December 2014.



Alvin K. Ahlers
North Yarmouth,
1st Term

Mr. Ahlers is a retired Registered Professional Engineer. He served as Environmental Manager for Fairchild Semiconductor Corporation in South Portland from 1993 to 2004 where he was responsible for managing environmental compliance for the facility and was an active member of Maine DEP's Environmental Leadership program for Fairchild. Prior to joining Fairchild, Mr. Ahlers was employed by ABB Environmental Services (formerly E.C. Jordan Co.) of Portland. Since retiring he has been active in town government, currently serving on the Town of North Yarmouth Budget Committee and on the town's Economic and Sustainability Committee. He was appointed to the Board by Governor Paul R. LePage in September 2011.



Thomas W. Dobbins
Scarborough, 1st Term

Mr. Dobbins began his professional career with the Coast Guard, inspecting U.S. and foreign vessels for compliance with federal environmental and safety laws and regulations. Mr. Dobbins joined Getty Petroleum in 1989 and Sprague Energy in 1995, managing their deep water petroleum storage facility in South Portland from 1989 to 2007. Mr. Dobbins continues to assist Sprague Energy managing their Port Security Grants. Mr. Dobbins holds a USCG 100 ton Masters License, and currently serves on the Maine State Pilot Commission, the Portland Harbor Commission, and the Portland Harbor Dredge Committee. He is a member of the Friends of Casco Bay and a past member and director of Clean Casco Bay. He was appointed to the Board by Governor Paul R. LePage in March 2014.



Mark C. Draper
Caribou, 1st Term

Mr. Draper is the Solid Waste Director for Tri-Community Recycling and Sanitary Landfill in Fort Fairfield, a position he has held since 2003. Before joining Tri-Community, Mr. Draper was a Senior Environmental Engineer at the Champion International Corporation/International Paper mill in Bucksport where he was responsible for oversight of the mill's landfill operation, waste reduction and recycling activities, and hazardous waste management. Mr. Draper also served as plant engineer for the mill's 290-MW co-generation power plant from 2001-2003. Mr. Draper is currently the president of the Maine Resource Recovery Association and Chairman of the Northern Maine Solid Waste Management Committee. He was appointed to the Board by Governor Paul R. LePage in October 2014.



Thomas E. Eastler
Farmington, 1st Term

Mr. Eastler is a Professor of Environmental Geology at the University of Maine Farmington. He obtained his undergraduate degree from Brown University and his masters and doctorate degrees in Geology from Columbia University. His research interests include terrain analysis, remote sensing, and fuel and non-fuel mineral resource depletion. Dr. Eastler has devoted much of his professional career to teaching and has mentored many aspiring geologists. Dr. Eastler has also served as a consultant to a number of entities including Lawrence Livermore Laboratories in California and Raytheon UTD in Virginia. He is a Fellow of the American Association for the Advancement of Science and the Geological Society of America (GSA). Dr. Eastler is a retired Colonel U. S. Air Force Reserves with 30 years of service. He was appointed to the Board by Governor Paul R. LePage in April 2012.



Susan M. Lessard
Hampden, 2nd Term

Ms. Lessard is the Town Manager for the Town of Hampden. She has more than 28 years of experience in local government in Maine and has extensive experience in solid waste management issues, municipal financial management, and community development. She is a past president of the Maine Municipal Association, and has served on the Municipal Review Committee and the Maine Rural Development Council. Her educational background is in public administration and engineering. She was appointed to the Board as a member in July 2007 and reappointed to the Board by Governor Paul R. LePage in September 2011. Ms. Lessard served as Chair of the Board from December 2008 to September 2012.

Attachment B: Permitting of Grid-Scale Wind Energy Development List of Commissioner Licensing Decisions Appealed to the Board

The following wind energy licensing decisions have been appealed to the Board:

- Rollins Wind Project (2009): Lincoln, Lee, Winn, Burlington, Mattawamkeag, Penobscot County. Size: 40 (1.5 MW) turbines. Issues on appeal: noise, wildlife impacts. Board decision on the appeal: appeal denied, project approved. Appeal to the Law Court: Board decision affirmed.
- Record Hill Wind Project (2009-2010): Roxbury, Oxford County. Size: 22 (2.3 MW) turbines. Issues on appeal: noise, financial capacity, decommissioning, scenic character, wildlife impacts, stormwater, shadow flicker. Board decision on the appeal: appeal denied, project approved. Appeal to the Law Court: Board decision affirmed.
- Oakfield Wind Project (2010): Oakfield, Aroostook County. Size: 34 (1.5 MW) turbines. Issues on appeal: financial capacity, noise, scenic character, decommissioning. Board decision on appeal: appeal denied, project approved. Appeal to the Law Court: Board decision affirmed. Project later revised, see Oakfield II.
- Oakfield II Wind Power Project (2012): Aroostook and Penobscot Counties. Size: 50 (3.0 MW) turbines. Issues on appeal: scenic character, impacts to birds and bats, wetlands, financial capacity. Board decision on appeal: appeal denied, project approved. Appeal to the Law Court: Board decision affirmed.
- Spruce Mountain Wind (2010 – 2011): Woodstock, Oxford County. Size: 10 (2.0 MW) turbines. Issues on appeal: noise, decommissioning, scenic character, wildlife impacts, stormwater. Board decision on appeal: appeal denied, project approved. Appeal to the Law Court: withdrawn.
- Saddleback Ridge Wind Project (2011-2013): Carthage, Canton, and Dixfield, Franklin and Oxford Counties. Size: 12 (2.75 MW) turbines. Issues on appeal: noise, scenic character, tangible benefits. Board decision on appeal: appeal denied, project approved. Appeal to the Law Court. The Law Court remanded the matter to the Board for use of the new Chapter 375 sound level limit. The Board issued a permit imposing the new nighttime sound level limit as directed by the Court. No further appeals.
- Passadumkeag Windpark (2012-2013): Greenbush, Summit Mountain Twp., Grand Falls Twp., Greenfield Twp., Penobscot County. Size: 14 (3.0 MW) turbines. Issue on appeal: scenic character. Board decision on appeal: appeal granted, project approved. Appeal to the Law Court: Board decision affirmed.
- Hancock Wind Project (2013): T16 MD, T22 MD, Aurora, Osborn, Hancock County. Size: 18 (3.0 MW) turbines. Issues on appeal: financial capacity, decommissioning, phased development and appropriate scope of review, tangible benefits. Board decision on appeal: appeal denied, project approved. The Board's decision was not appealed to the Law Court.

- Bowers Wind Project (2013-2014): Kossuth Twp., Carroll Plt., Penobscot and Washington Counties. Size: 16 (3.0 MW) turbines. Issue on appeal: scenic character. Board decision on appeal: Appeal denied, project denied. The Board's decision has been appealed to the Law Court where it is pending.
- Canton Mountain Wind Project (2014): Canton and Dixfield, Oxford and Franklin Counties. Size: 8 (3.0) MW turbines. Issues on appeal: noise complaint hotline protocol, use of noise easements. Board decision on appeal: appeal denied, project approved. The Board's decision has been appealed to the Law Court where it is pending.

Appeal Pending before the Board

- Bingham Wind Project (2014- 2015): Bingham and Mayfield Twp., Somerset County and Kingsbury Plt., Abbot and Parkman, Piscataquis County. Size: 62 (3.0) MW turbines. Issues on appeal: decommissioning, financial capacity, tangible benefits, impact to bats and eagles, cumulative scenic impact. The appeal of the Bingham Wind Project is pending with the Board.