

# MAINE STATE LEGISLATURE

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Senate Legislative Record  
One Hundred and Twenty-Fifth Legislature  
State of Maine

Daily Edition

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WHEREAS, we must honor the establishment of Vietnam War Remembrance Day for the millions of men and women who served with valor during the Vietnam War, those who were wounded with wounds both seen and unseen during the conflict and those who gave the ultimate sacrifice to their State and Nation; now, therefore, be it

RESOLVED: That We, the Members of the One Hundred and Twenty-fifth Legislature of the State of Maine now assembled in the Second Regular Session, on behalf of the people we represent, take this opportunity to join in the observance of Vietnam War Remembrance Day in order to honor the contributions of veterans who served in the United States Armed Forces in Vietnam during war and during peace; and be it further

RESOLVED: That suitable copies of this resolution, duly authenticated by the Secretary of State, be transmitted to the Department of Defense, Veterans and Emergency Management.

Comes from the House, **READ** and **ADOPTED**.

**READ** and **ADOPTED**, in concurrence.

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Senate at Ease.

Senate called to order by President Pro Tem  
**DEBRA D. PLOWMAN** of Penobscot County.

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The President Pro Tem requested the Sergeant-At-Arms escort the Senator from Androscoggin, Senator **MASON** to the rostrum where he assumed the duties as President Pro Tem.

The Sergeant-At-Arms escorted the Senator from Penobscot, Senator **PLOWMAN** to her seat on the floor.

Senate called to order by President Pro Tem **GARRETT P. MASON** of Androscoggin County.

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Off Record Remarks

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#### ORDERS OF THE DAY

The Chair laid before the Senate the following Tabled and Later (2/28/12) Assigned matter:

SENATE REPORTS - from the Committee on **JUDICIARY** on Bill "An Act To Amend the Laws Governing the Deference Afforded to Agency Decisions"

S.P. 493 L.D. 1546

Majority - **Ought to Pass as Amended by Committee Amendment "A" (S-394)** (8 members)

Minority - **Ought Not to Pass** (5 members)

Tabled - February 28, 2012, by Senator **HASTINGS** of Oxford

Pending - motion by same Senator to **ACCEPT** the Majority **OUGHT TO PASS AS AMENDED** Report

(In Senate, February 28, 2012, Reports **READ**.)

**THE PRESIDENT PRO TEM:** The Chair recognizes the Senator from Oxford, Senator Hastings.

Senator **HASTINGS:** Thank you Mr. President. Ladies and gentlemen of the Senate, we'll now take up a bill that has been languishing on the table for some time. I will take a minute and remind you what this bill is all about. The motion before the Body is the Majority Ought to Pass Report. The subject matter deals with the law school question from Administrative Law courses as to what deference will a court in the state of Maine give to the interpretations made by an agency of its rules and the statutes governing that agency. When an agency, for instance the DEP or the Maine Revenue Services or LURC, has made a ruling and that ruling is appealed to the court system, to what extent will the courts just defer to the interpretation of the rules and statutes made by the agency or to what extent will the court actually make its own interpretation and determine if they believe that is the correct interpretation. That's the framework. The law in Maine right now has been developed not by the Legislature but by the courts. Over time the courts have issued their rulings which guide the lower courts that the agency interpretations of rules and statutes that govern the agency are to be given great deference by the courts. That's the words they use, great deference. What's the practical effect of that? The practical effect is if you believe that you have been wronged by an agency decision, that they have not correctly interpreted their rules and statutes, and you get to court and you say, "Judge, the agency was wrong in interpreting the rules." Basically what it means is the judge is going to say, "I'm not going to substitute my judgment. I'm going to make my own evaluation. The court's not going to make its own evaluation and we're going to just accept what the agency found." I think you can see that gives you very little opportunity to appeal or to have redress in the courts. One of the reasons for deference, I think over time the courts have said that if it involves an area of expertise, of the particular expertise of the agency, they ought to defer to their experience on that. It also can lead to, I guess, the other argument as it leads to uniformity of decision because no one can ever win an appeal from the agency, essentially. On the other side of this, think of it now, it gives the winner at the lower level a big club. It makes it very hard to even question an agency's interpretation of its rules. As we all know, agencies develop agendas as time goes on. If you are the citizen who has been ruled against by the agency, you've got to get to court and find out there is really nothing you can do about it. The court's going to say, "Even if I thought the agency was wrong, I have got to give the agency decision great deference and I'm not going to look into it any more." There are two types of cases. Let me back up now. What does this bill do? What the bill in front of you does, the Majority Report says not what the original bill did, which was to say that there would be no deference given to agency decisions. It simply says that the courts need not, they don't have to. We're sending a message to the courts that if they question, if they have reason to question the agency's

interpretation of its rules and statutes, that we would like them to do so. Give the citizen, the person who is in court, his true day in court and take another look at it and see if they believe the agency has done correctly.

We heard two different arguments. It's interesting, in the public hearing so people like this change and some people don't. Think about it. There were two types of cases that this would apply to. One is that big DEP or LURC case where it's very contentious. We have an applicant. We have five or six people fighting against it that were allowed, they were given standing and they are in there. They duke it out and really have a trial, a major trial, at the DEP level. Finally a ruling is made and maybe the applicant gets their permit in the end. That applicant likes the rule of deference. They have finally won this major battle and they like the idea that when they go to court when somebody appeals there is really very little likelihood of a successful appeal. We've heard the argument that this is really good for business because it's the business that finally wins that permit at the DEP level and we give them some certainty that they are not going to lose on appeal. That's one kind of case. The other kind of case, which is really the vast majority of the cases of agency determinations, is one citizen against the State of Maine. The State, perhaps on an issue of taxes or on some permit or perhaps on any number of our regulatory agencies make rulings and fine, deny, or grant permits. It's one person against the State. Think of it. If you're just that one person and you come to see me or another lawyer and say, "I want to appeal this. They just didn't pay attention. They did not interpret their statute." I'm going to tell you, "Well, we can appeal but the court, under the present rule of great deference, is just going to say that there is nothing they can do. The agency's made its rule. We have to give it deference, so you are out of luck." I came down on the side of that individual, where it's the individual against the State, to give that individual a fair shake in court. That's why we have courts. Send a message to the courts that they don't have to give great deference to the agency's decision if they have a good argument in front of them and the court independently believes that that interpretation was wrong. We are inviting them to take a second look and their own look and give the citizen a day in court. I recognize that this could maybe cause some consternation to someone who's won that hard fought battle through the DEP or LURC or the like. Darn it all, I really think that what really bothers me is this idea, this sense, and it was voiced in committee by attorneys, that if you lose at the agency level don't even bother going to court because there is really no way to win because of deference. Ladies and gentlemen, thank you very much for your attention and I urge you to support the pending motion. Thank you.

**THE PRESIDENT PRO TEM:** The Chair recognizes the Senator from Sagadahoc, Senator Goodall.

Senator **GOODALL:** Thank you Mr. President. Men and women of the Senate, I rise today to put what this bill does in context, hopefully in a more simplified form, to what it really does when you are talking about the boots on the ground. Ninety-five to ninety-eight per cent of people get their permits in the Department of Environmental Protection and most other land use agencies. This is the area that's this is going to impact the most. At the same time, this is the area that we are often debating about in terms of creating jobs: the MPRP project with CMP, when we're talking about a mining bill, when we're talking about a solid waste bill, when we're talking about building a highway across Maine,

the East-West Highway. All of these construction jobs acquire these permits. Paper mills require air licenses. This is bridges, roads, etcetera. This is a great impact, a negative impact, on those types of jobs. That's what we have to start with first. If 98% of those folks get their permits and their permits are often granted on many issues that are black and white, setbacks for example. We've had great debates on those setbacks, vernal pools, shoreland water fowl, bird habitat, etcetera. Now an applicant comes in and gets his or her permit; a developer, a realtor, any entity. They have gotten that permit through a long process, a process of give and take, and one they often agree upon at the end. Are they always satisfied 110%? No, of course not. They have their permit in hand and they then want to go put a shovel in the ground. What this bill does is bring more uncertainty to those projects. It will put people in a position of leaning on their shovel rather than putting it in the ground because they can't go to work because they are going to have to wait for more appeals. It's going to be easier for attorneys, people such as myself, the good Senator from Oxford, and maybe the Senator from Kennebec, I don't think he does land use work at all, to appeal these projects on behalf of clients if we have clients that are opposed to them. This is another alternative, another arrow in the quiver for attorneys to pull out and argue to the judges that the decision that was made in the agency was wrong. Attorneys, such as myself, are going to argue, "You don't need to defer to the underlying agency. The agency that has the experts in it. The agency that understands these rules. You should make your own decision. We should re-litigate the whole thing right here in court. With all due respect, Your Honor, you probably don't have all the expertise, such as air quality, such as water quality."

What does that do? It creates month after month after month of delay. Look at the Oxford Casino right now. Their DEP decision, opinion, was appealed. You know what? That Oxford Casino is arguing, I'm almost positive though I have not read the briefs, but I can almost guarantee you they are arguing to the court that they should defer to the agency decision. That's what happens in practice. We heard earlier what the standard of law is. When courts receive an appeal they look at the appeal. Lawyers are going to argue, if you are against the project, against the permit, if you want to stop people from going to work, you want to halt the project, or you want the project to go away, that the underlying agency made a error on the errors of law. They already had to look at the statute if it's argued, or the rule, but the findings were not supported by the evidence and there was abuse of discretion. The courts review this carefully because attorneys make good arguments. Attorneys are trying to slow down these projects at times.

Ultimately what's going to happen, in my opinion, is courts are still going to defer to the agencies because many of these statutes are black and white. There are statutes that allow agencies greater interpretation of how to apply the rules, but in those instances they are often working with the applicant, as well as people that may be opposed to that, to resolve the issue and issue the permit. This is a great law school argument. It has great consequences on many industries in our state. We heard the issue about taxes earlier and I believe those issues are heard de novo when they get up to the court level, meaning they are re-litigated again. They are not deferring to the agency decision. What this really impacts is the construction industry and the energy industry.

I just think it has a grave impact on the cost of projects in the future. The uncertainty, the one thing that we are all trying to lessen in this state when it comes to regulatory issues. At the end of the day, if the courts are going to ultimately defer to the agency, often because the issues are black and white, why are we going to give lawyers one more tool, one more arrow in the quiver, to get their nose under the tent and slow down these projects, projects which are granted 95% to 98% of the time. People want to go to work. We should let them go to work. We shouldn't slow up these projects. We have a good environmental land use regime in this state, meaning our regulations, ones that we often agree on unanimously in both these Bodies. Democrats and Republicans. Have there been problems with those underlying environmental statutes. Yes. Are we fixing them? Yes. Do we have to keep reviewing them? Yes. If they are inappropriate to our environment regulatory system here in the state we should change them. We shouldn't throw out what is a long precedent of cases. Currently, this bill, in my opinion, would put us in the minority in the country. There are two states in the country that have these statutes. This is what this is. We are changing the statute about deference. We hear arguments that we're one of 15 in the country. That includes case-made law, not statutes. We're putting something in law. This is a great tool for attorneys and I think it is one that we should reject. Thank you, Mr. President.

**THE PRESIDENT PRO TEM:** The Chair recognizes the Senator from Franklin, Senator Saviello.

Senator **SAVIELLO:** Thank you Mr. President. Ladies and gentlemen of the Senate, I appreciate the effort here on this deference bill and I appreciate the information that was recently sent out. I think if you look at this Rules on Agency Deference, none of them have to do with environmental issues, which all along we've suggested that perhaps environmental should be removed from the debate and we wouldn't be having a debate today. Let me set the stage for you. As many of you know, and I've talked about this before, I was a former environmental manager Verso Mill. I am retired. I have no contact with the Verso Mill other than through the constituents that work there. Let me set the stage, because in my old job I had to administer the Clean Air Act and the Clean Water Act. I'm going to use the Clean Water Act as an example as I walk through this. The Clean Water Act sets a goal, some say it sets a policy, that by 1985, and you can see that we're a bit behind, there would be zero discharge, no discharge, from the facilities. Obviously, we can't get there and I'm setting the state for what I'm going to use as an example in a minute. When a license is issued related to the Clean Water Act. Let me step back for one second. The State of Maine is a delegated state, which means we're responsible for administering those laws of the nation. This means we have to do what the federal government tells us to do, otherwise we'll lose that delegation and that is something the industry wanted, contrary to my personal belief, years ago. When you appeal a license that is issued at the federal level the whole license is stayed. It all goes away until the court case is ended. I want to emphasize that. The whole license is stayed. At the end, if you lose the appeal, you do not go back to the beginning. You start from the day of the appeal, so any requirements that you are required to put into place to reduce pollution start the day the license or the appeal is denied or accepted or whatever. Same thing is true on the Clean Air Act.

The State of Maine is different. That's not unusual. We're different. We say that that particular item is not stayed. It's simply set aside. You still have to comply with the whole license. By the way, if you lose the appeal you better be in compliance the day that license is issued because we're going to hold you responsible for it. Shortly, I hope that you will get the information from the paper industry, but I'm not going to use the paper industry in my example. I'm going to use the Wilton Waste Water Discharge. In the State of Maine we issues 400 waste water discharge licenses. Probably maybe a dozen of them are related to the paper industry. We have over 700 air licenses. In the example I'm about to give to you I want you to just think of anything related to one of those things because this is what this bill could do to those licenses. Wilton Waste Water Discharge, under full disclosure, I am a Wilton Selectman, but this is not a true example but this is something that truly could happen. We have to negotiate our license with the department. It's a negotiation because remember the Clean Water Act's goal is to get to zero. When they put that into place they knew that technology was going to change over time to get to zero. For phosphorous, something we all know about, that causes algae blooms in lakes, the range that one might have could be from 100 pounds to 1 pound, or let's use zero. However, the technology is not to get you to zero. It might be able to get you to 50. As you work with the department, ultimately the license comes out with the 50 pounds. Somebody now appeals that license. Because there is no longer a bright line, there is no longer deference to the DEP, the judge decides, "You know what? I'd like to learn about phosphorous." So what happens? Well, the Town of Wilton now has to make a big decision. Do they go and make the technology expenditures to come in compliance with the 50 pounds, knowing at the end of the day that if this appeal is upheld they are going to have to go to 1 pound and there is no technology for it, or do they take the risk and make that investment, knowing that they might have the appeal turned the other way? What do they have to do? They have to go hire a lawyer. They have to go fight this in court and prepare a brief. Guess what the State has? The State has an expense because the Attorney General's going to be asked to come and defend that license. At the end of the day, have we gotten any further? No. I would use Wilton as an example, but I want you to think about everybody; the 400 waste water discharge licenses out there, the 700 air licenses that could be caught in the same thing. This is a bad bill. I will be voting against it. Thank you very much.

**THE PRESIDENT PRO TEM:** The Chair recognizes the Senator from Penobscot, Senator Plowman.

Senator **PLOWMAN:** Thank you Mr. President. Men and women of the Senate, I'd like to take you back to the Maine Constitution of 1820 and the national Constitution as put forth by our founders. Our Constitution expressly recognized the powers of government and the different branches. The people who wrote these expected that, human nature being what it was, each branch would try to engross its power to enlarge it but they used the word engrossed when they are describing this. It relied on the fact that sometimes two branches could get together to take the power from another. In order to prevent that kind of thing from happening, they talked about the delicate balance between the powers as allocated by our founders to us. When we are talking about the apportionment of powers, what they decided was that one branch, the people who elect us in the Legislative Branch,

would have a branch of government that answered to them directly, that we would have an Executive Branch, and that we would have a Judiciary. We're not supposed to enlarge our powers or enlarge the powers of the other branches. The deference law enlarges the power of the Executive Branch. It takes away from the power from the courts to authoritatively decide what we, as the elected members elected by the public, are doing. It takes away the judicial review. With judicial review, they are supposed to be impartial. The Executive Branch and the agencies are not impartial. They have their interpretation which sometimes is exceeded by their mission and the rules that are written are the rules that cannot be interpreted by the court. If you are talking about certainty heads I win, tails you lose is the only certainty that deference can give you. If you don't mind, as a citizen, handing off your right to an authoritative review of what an agency has done to you, then you will like deference. If you like the certainty that you will lose because someone is deferring, someone being the court who has the expressed power in the Constitution to interpret the law, to an Executive agency over the will of the people who elected you, then you will like deference. If you think that the small business on the corner should have no say in what an agency says because a large company who negotiates has power, and it doesn't matter that you are on the same ranking as a citizen, then you will like deference. If you like the separation of powers as given to us by our forefathers, then you probably won't like deference. You won't like it at all.

A former member of the Body, who was a member of the Tax Committee and Chair of the Tax Committee, and I believe I can say his name, Senator Tom Watson, passed a piece of legislation as Chair of the committee that had to do with tax policy. When MRS chose to interpret it, he approached them and said, "That's not what we meant." Maine Revenue Service said, "It doesn't matter, it's our interpretation that counts, not what the Legislature says." They imposed their will on the citizens in the state of Maine instead of our will. Since agencies are not elected, you have no recourse except to hopefully come back before the Legislature and ask. Meanwhile, justice delayed is justice denied. It all depends on who makes the decision in deference. If a town makes a decision there is no deference given to a town. If the town makes a decision that factors into the permit and you go to court, anything the town has made that sets you back there is deference given by the court to a decision made by a municipality but not to an agency that is governed by deference under the law. Yes, you have heard, and you will hear, that there will be cases filed and there are cases filed. You just heard about one that's been filed. It's slowing down the project. In the end, there will be many, many cases filed regardless of where there is deference or not. If you take deference to the need not, then there is still deference available. The court can and should if the case says that they complied with the law as written and as interpreted by the court, who is the only dispassionate member, the only dispassionate party, to the proceedings. Why would you not want a dispassionate person to determine whether an agency has ruled according to statute or according to their mission? That's what this bill says. When you appear in court it's not heads I win, tails you lose. You stand there as a citizen with rights and your rights accrue to you by virtue of the Constitution and the ability of the court to insure that what was written in statute is actually how you should have to live and not what the interpretation by an agency determines for your life. You know what? I think we need to be able to ask the court to take back their power, to be dispassionate, to look at the case before them, and to rule on

behalf of the citizen before them with all the abilities that accrue to us as citizens with rights guaranteed by the Constitution. Thank you, Mr. President.

**THE PRESIDENT PRO TEM:** The Chair recognizes the Senator from Penobscot, Senator Schneider.

Senator **SCHNEIDER:** Thank you Mr. President. Men and women of the Senate, I just wanted to draw your attention towards a couple of paragraphs in a handout that was distributed by Senator Saviello. I just wanted to point out, it says; "For our members Lincoln Paper and Tissue, Old Town Fuel and Fiber, Sappi Fine Paper, UPM of Madison, Verso Paper, and Woodland Pulp, the most common agency rulings that get appealed to the courts are permit decisions by DEP and BEP. Most of our permit applications are very complicated and time consuming. While the process can be frustrating, after negotiating with the agency and making necessary changes, most license applications are ultimately approved. Controversial license decisions may be challenged in the courts by interested parties. If L.D. 1546 becomes law, there will be an increased uncertainty in the appeals process and a great likelihood that a permit approved will be overturned. For this reason, we are opposed to this bill, both in its original version and amended." I just want to say that I had understood from the Red Tape Commission that business after business got up and spoke that this kind of a change would be disadvantageous. I find it sort of ironic that I'm standing here saying that we need to oppose this because this would negatively impact our business climate, while my other colleague from Penobscot is arguing the other side of this issue. I want to let you know, for four years I tried to work with both sides of the aisle to pass legislation that would help the business climate with regard to a situation where originally in the state of Maine, even after permits were issued, a small group within a community could bring a petition and oppose a project and stop a project dead in its track, even after it had gotten all of its permitting. That original bill was vetoed by the previous Governor and last year we unanimously approved that bill. It took a great deal of effort, but there was compromise on all sides so for everybody, I think, it was a win. It has brought a lot more certainty to business. There is a balance between making sure that all the citizens are heard and a balance between what is fair in a process. I believe we will be making it much more difficult for business, the business community. We will be unbalancing what we have worked so hard over the last two years to make more receptive to businesses and the business community. I just believe that we're going to be taking a step backwards if we move forward with this. I urge your opposition of the pending motion. Thank you.

**THE PRESIDENT PRO TEM:** The Chair recognizes the Senator from Sagadahoc, Senator Goodall.

Senator **GOODALL:** Thank you Mr. President. Men and women of the Senate, I'll be brief. I just wanted to, since the good Senator from Penobscot brought the issue of L.D. 1, Regulatory Reform and Fairness Committee, I thought it was appropriate we just go over the history real quick. This bill was part of the Governor's Phase I proposals on that concept draft. She is right. Numerous businesses, one after another, told us that it was not a good idea and to reject it. I believe that this bill, despite some businesses having come to the table late, is one like many over the years that is slipping through the cracks and people aren't

necessarily aware of the consequences. This bill, when it was heard in L.D. 1, and I paraphrase someone from the Conservation Law Foundation who had practiced law on the private side, representing large corporations, and now is with a non-profit focused on protecting the environment and striking reasonable compromises on development projects, who said that this bill will make their life much easier. However, they are opposed to it because it is bad policy for the state of Maine. To me, I'm not sure why we want to be giving lawyers greater opportunities to appeal projects after they have gone through a long deliberative process, often involving negotiations, where, overwhelmingly, the parties that are involved are satisfied and that the environmental regulations, land use regulations, and other regulations that impact the state of Maine are upheld. Lastly, cases are overturned in courts. That's why we have appeals. They do get overturned because, using one quote from the law court in an opinion dealing with Tenants Harbor LLC, a general store dealing with gas pumps, the Chief Justice wrote, "Although we normally defer to a State agency's interpretation of a statute, statute language issued here compels a contrary interpretation." If you look further into the opinion, you will see that what they are basing their decision on says, "We construe the statute based on the plain, common, and ordinary meaning of its term and we avoid absurd, inconstant, and illogical or unreasonable results." There is no reason to pass this bill today. I urge you to reject it. Thank you, Mr. President.

**THE PRESIDENT PRO TEM:** The Chair recognizes the Senator from Kennebec, Senator Katz.

Senator **KATZ:** Thank you Mr. President. Men and women of the Senate, there has been a great deal of talk about environmental permitting and what impact this bill might have on that. I appreciate that that's an important part of this debate, but I would remind everyone that this bill's application it is not limited to the Department of Environmental Protection. It applies to all agency decisions and rulings. I think we tend to view these things through the prism of our own experience. That's how I look at this bill. I look at clients I represented before the Department of Human Services, for instance on child support matters, where I think that they had been treated poorly by the department. Yet we couldn't win on appeal, because the judge was obligated to give great deference to the interpretation of the laws we pass to the agency. I've represented clients before the Department of Motor Vehicles who I feel were treated poorly, but yet we were not successful on appeal because the judge had to give great deference to the interpretation of the statute by that agency. I've represented people before the Maine Revenue Service, people I feel were treated poorly and were unsuccessful on appeal because the judge felt compelled, under the current law, to give great deference to the interpretation of our statutes that we wrote to the agency that's enforcing them. I think it really comes down, and I understand there is a great deal of debate here, as to whether this is going to make it easier or harder to get a permit in the state of Maine. I don't deny that that's a critically important debate to have. I look at it a little bit differently, from what is a fair judicial process. Ultimately the question is who determines what a statute means. The Legislature passes a statute. Who's going to get to say what that statute means? It's going to be one of two people, or one of two entities. Is it going to be a judge, who is well trained, who is appointed by the Governor, who is by definition expert in the law, who's been approved by this Body or

is it going to be some often faceless employee of an agency or a board that may have no legal training or may or may not have their own particular agenda? When a judge is asked to make a statutory interpretation, I've got confidence that that person is trained and impartial to do so. I don't have that same confidence about people who work for agencies. They may be very hard working people, very dedicated State employees, but they haven't had any training in interpreting statutes. When we all pass something, I'd rather had a judge interpreting it than an agency. It's for that reason that I will vote in favor of the pending motion. Thank you, Mr. President.

**THE PRESIDENT PRO TEM:** The Chair recognizes the Senator from Franklin, Senator Saviello.

Senator **SAVIELLO:** Thank you Mr. President. Ladies and gentlemen of the Senate, I just want to clarify a few things. First of all, I don't disagree with what my brother and good Senator said just a minute ago. It is from my view and my perspective because there are about 10,000 people still working in the pulp and paper industry and I won't go on to how many are working in the forest products industry because it is significant in the state. We already have a big battle to fight. I've often suggested the best way to address this bill is to take Title 38 out, but no one seems to be interested in doing that. Let me address the small gas station that's been brought up. Let me put it to you in another perspective. Suppose that an aggrieved, I had to put that in there, individual decides to appeal that gas station tank being put in. The small Mom and Pop store will have to go get a lawyer to fight that decision. It's more than a waste water license. It's more than air licenses. My sad experience in the courts is that it's more than a heads or tails decision. They look at the procedures that were followed in the court and in the issuance of the license and the permit. At least my experience has been the question on deference often goes to the law court. The constitutionality is still there. It still can be protected. To say that it is not is not a true statement. I want to close with this e-mail that I also received from Scott Beal at Woodland. At the end of his e-mail he said, "This bill is a step backwards to me by creating an element of judiciary uncertainty," as was mentioned earlier before. Thank you very much, Mr. President.

**THE PRESIDENT PRO TEM:** The Chair recognizes the Senator from Penobscot, Senator Plowman.

Senator **PLOWMAN:** Thank you Mr. President. I'd just like to point out that the way the bill is drafted, the court will still defer to the agency's interpretation or findings and facts. We're not talking about the facts that they used to arrive at their decision, but to look at how they interpreted the law, how they wrote the rules. The case that was brought up previously, the Tenant's Harbor case, that one was so easy that I can't believe that it had to go to court. The DEP didn't even follow its own rules. They must have forgotten to read the paragraph where the directions to the business were in their own rules. It didn't take long for the court to find that they hadn't obeyed exactly what they were asking for. I don't consider that. I know the work was done for a very fine lawyer. I won't comment further. If you want your legislative intent to be how decisions are made, then you need to reserve your own power and restore the power to the judiciary. This deference idea started at the federal level where deference was accorded. At the federal level there are House Committees,

Senate Committees, Committees of Conference, letters that go back and forth, and you don't really have to question the intent of Congress. It's so clear when they get through. That's why we have the acts before us. This is a citizen legislature. We work in joint committees. The negotiations that go on regarding our intent happen in a horseshoe, back and forth, with an analyst taking notes and often times no debate on the floor. The materials that are produced may or may not be clear to an agency or to a citizen. When a citizen stands before you and an agency makes a rule, they have to live under the rule, not the law. When you live under rules, the rules are subject to interpretation. When they are subject to interpretation by the people who make them, no one ever admits they are wrong, or very rarely. They have to be very wrong. This is called the "laugh out loud" standard in some law firms. In order to overturn the agency decision, they have to have made a decision that would make you laugh out loud. The Senator from Kennebec, Senator Katz, has said that it doesn't affect only permits. It doesn't. It affects your everyday life, and that of your family, and most importantly, that of your constituents. I was asked to divide this out. I thought since when is it correct to say some people have Constitutional rights and others don't when something is being interpreted by a dispassionate court. The proposal was to make it for companies of 50 people or less. Fifty people or less would get justice because we would not defer on those kinds of decisions, no matter what they were, because they were small enough that they shouldn't have to meet some other criteria. The only criteria you have to meet is whether you deserve to have a dispassionate person look and decide if the court defer and they have the absolute power. The most incredible power that we get is the sovereign power to interpret our laws. It's sovereign. The court is the dispassionate person. If you have a company with 50 people or less should you have the benefit of flipping the coin? I didn't see that as a fair amendment. You either will decide that giving up your freedoms is more expedient and that justice doesn't need to be handed to every citizen because expediency matters, or you will decide that expediency supersedes all. That is the question here in my mind. It's not economic development. It's not whether someone negotiated to get a permit. Frankly, I don't think you should have to negotiate if it's within the law. I do feel that it is something that we owe to everyone to decide if they have the right to stand before a judge and have a chance to win without the agency having to have made someone laugh out loud. Thank you, Mr. President.

**THE PRESIDENT PRO TEM:** The Senator from Sagadahoc, Senator Goodall, requests unanimous consent of the Senate to address the Senate a third time on this matter. Hearing no objection, the Senator may proceed.

Senator **GOODALL:** Thank you Mr. President. Men and women of the Senate, I think that our judges in the judicial system would be quite alarmed if they thought or believed that people weren't getting justice, those that appeared in front of them. People do make arguments that the statutes are interpreted poorly and wrongly and should be overturned. They make arguments why that is the case, and the judges weigh those facts and arguments and they make a decision. Yes, there is a body of case law, a body of law developed by judges, that they do defer to experts in these areas and all agencies, land use, Health and Human Services, what have you, on the interpretation of the statute or the rule. The fact of the matter is that people are being hurt. It's not

a laugh out loud standard. Cases do get overturned. Frankly, many of the arguments I hear about individual statutes interpretations by the agencies, I think we have to look at ourselves in the mirror once in a while and see what laws we pass in here. Mistakes are made. If there are bad laws, let's change those laws. We increased oversight on the rules. Through L.D. 1 we clarified the issue about agency discretion dealing with guidance documents. This is counterproductive to the steps we've taken. Lastly, just one issue. We heard the good Senator from Penobscot talk about the facts and the courts are not going to be looking at the facts. The reality is, as a practitioner, if you go in and you make an argument to the court saying that they need not defer, you've got to ask for the entire record to be opened up most times. More facts to supplement the record in court. You are going to be re-litigating the whole issue. In essence, the court is going to be looking at whether or not a permit should be granted and a decision should be issued for whatever it may be coming out of a State agency decision. I would argue that the courts do provide justice, that they are deliberative, and that they are fulfilling a Constitutional obligation. At times we all have issues with statutes and rules and it's our responsibility to get it right. Lastly, as I said in the public hearing, we do have an issue in this state with legislative intent. We need to fix that. That's where a lot of these problems arise, I believe, and we should create a system that does create a body of legislative intent. I am more than willing to work on that with the good Senator from Penobscot. Thank you, Mr. President.

**THE PRESIDENT PRO TEM:** The Chair recognizes the Senator from Oxford, Senator Hastings.

Senator **HASTINGS:** Thank you Mr. President. Ladies and gentlemen of the Senate, very briefly. You are being offered a very simple choice. There is no argument that the current rule of great deference makes it next to impossible to appeal. The paper companies say so. It also makes it next to impossible for that poor client of Senator Katz who has been told by the tax people that he owes a tax because they made a new interpretation of a law. We've all heard of those circumstances. Whose side do you come down on? This Majority Report will make it easier for that client of Senator Katz to make his case to the court and have the court make an independent determination. You are going to side on one group or the other. The large interests or the probably vastly larger number of individuals, small businesses, who feel aggrieved by agency rules and that are told by their attorney that they have got nothing to stand on, that they can't win. I come down on their side. I sympathize with the larger companies. I do have sympathy for their position. I have heard the term used today, throwing them under the bus. I do not feel I should be throwing the small businessman, Senator Katz client, under the bus for the benefit of other interests. Thank you very much.

On motion by Senator **GOODALL** of Sagadahoc, supported by a Division of one-fifth of the members present and voting, a Roll Call was ordered.

**THE PRESIDENT PRO TEM:** The pending question before the Senate is the motion by the Senator from Oxford, Senator Hastings to Accept the Majority Ought to Pass as Amended Report. A Roll Call has been ordered. Is the Senate ready for the question?



The Doorkeepers secured the Chamber.

The Secretary opened the vote.

**ROLL CALL (#411)**

YEAS: Senators: COLLINS, COURTNEY, DIAMOND, FARNHAM, HASTINGS, HILL, KATZ, LANGLEY, MARTIN, MCCORMICK, PLOWMAN, RAYE, SNOWE-MELLO, THIBODEAU, THOMAS, WHITTEMORE, THE PRESIDENT PRO TEM - GARRETT P. MASON

NAYS: Senators: ALFOND, BRANNIGAN, CRAVEN, GERZOFKY, GOODALL, HOBBS, JACKSON, JOHNSON, PATRICK, RECTOR, ROSEN, SAVIELLO, SCHNEIDER, SHERMAN, WOODBURY

ABSENT: Senators: BARTLETT, DILL, SULLIVAN

17 Senators having voted in the affirmative and 15 Senators having voted in the negative, with 3 Senators being absent, the motion by Senator **HASTINGS** of Oxford **ACCEPT** the Majority **OUGHT TO PASS AS AMENDED** Report, **PREVAILED**.

**READ ONCE.**

Committee Amendment "A" (S-394) **READ**.

On motion by Senator **KATZ** of Kennebec, Senate Amendment "A" (S-424) to Committee Amendment "A" (S-394) **READ**.

**THE PRESIDENT PRO TEM:** The Chair recognizes the Senator from Kennebec, Senator Katz.

Senator **KATZ:** Thank you Mr. President. Men and women of the Senate, the action we just took was to approve a change in the law to say that the court need not give deference to agency's interpretations of statutes or their own rules. This amendment, Mr. President, narrows that change to simply indicate that the court need not give deference to the agency's interpretations of statutes. In other words, the amendment would leave the current law in place where the court would give deference to an agency's interpretation of its own rules. The reason for the amendment, from my perspective, is as follows: it has to do with who wrote what. I don't think agencies have any place interpreting or telling everyone what a statute means that they had absolutely nothing to do with passing. We pass statutes. I think decisions about what those statutes mean are appropriately left to judges. With respect to agency rules, the agency does write the rules. I do believe it's appropriate to give deference to an agency's interpretation of a rule it has written itself, not written by the Legislature. I suggest it is proper to allow an agency to give deference to a rule the agency itself writes. That's the distinction. That's the reason for the amendment. Thank you, Mr. President.

**THE PRESIDENT PRO TEM:** The Chair recognizes the Senator from Franklin, Senator Saviello.

Senator **SAVIELLO:** Thank you Mr. President. Ladies and gentlemen of the Senate, I appreciate the good effort, but that doesn't solve the problem. Thank you.

On motion by Senator **SAVIELLO** of Franklin, supported by a Division of one-fifth of the members present and voting, a Roll Call was ordered.

**THE PRESIDENT PRO TEM:** The Chair recognizes the Senator from Sagadahoc, Senator Goodall.

Senator **GOODALL:** Thank you Mr. President. I just wanted to rise and point the irony in this amendment, especially our prior actions. We are now going to be reviewing all the rules in our committees upon every agency decision. Often many of the rules we give our legislative blessing through major substantive rule making. We've asked for more and more power, more and more power to review these rules. We are giving our endorsement. Therefore I'm just confirming what the good Senator from Franklin said, this amendment still causes problems. In fact, many areas of State laws we ask agencies to make rules rather than putting them in statute. That's the decision that we make as a Legislature. I just urge you to reject this amendment.

**THE PRESIDENT PRO TEM:** The pending question before the Senate is the motion by the Senator from Kennebec, Senator Katz to Adopt Senate Amendment "A" (S-424) to Committee Amendment "A" (S-394). A Roll Call has been ordered. Is the Senate ready for the question?

The Doorkeepers secured the Chamber.

The Secretary opened the vote.

**ROLL CALL (#412)**

YEAS: Senators: COURTNEY, KATZ, MARTIN, MCCORMICK, RAYE, ROSEN, THIBODEAU

NAYS: Senators: ALFOND, BRANNIGAN, COLLINS, CRAVEN, DIAMOND, FARNHAM, GERZOFKY, GOODALL, HASTINGS, HILL, HOBBS, JACKSON, JOHNSON, LANGLEY, PLOWMAN, RECTOR, SAVIELLO, SCHNEIDER, SHERMAN, SNOWE-MELLO, THOMAS, WHITTEMORE, WOODBURY, THE PRESIDENT PRO TEM - GARRETT P. MASON

ABSENT: Senators: BARTLETT, DILL, PATRICK, SULLIVAN

7 Senators having voted in the affirmative and 24 Senators having voted in the negative, with 4 Senators being absent, the motion by Senator **KATZ** of Kennebec to **ADOPT** Senate Amendment "A" (S-424) to Committee Amendment "A" (S-394), **FAILED**.

Committee Amendment "A" (S-394) **ADOPTED**.

Senator **ALFOND** of Cumberland **OBJECTED** to **SUSPENSION OF THE RULES** for the purpose of giving this Bill its **SECOND READING** at this time.

**ASSIGNED FOR SECOND READING NEXT LEGISLATIVE DAY.**

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Senator **ROSEN** of Hancock was granted unanimous consent to address the Senate off the Record.

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Senator **COURTNEY** of York was granted unanimous consent to address the Senate off the Record.

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Senator **COLLINS** of York was granted unanimous consent to address the Senate off the Record.

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Senator **LANGLEY** of Hancock was granted unanimous consent to address the Senate off the Record.

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All matters thus acted upon were ordered sent down forthwith for concurrence.

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On motion by Senator **COURTNEY** of York, **ADJOURNED** to Monday, April 2, 2012, at 10:00 in the morning.