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Report to the Joint Standing Committee on Environment and Natural Resources



Board of Environmental Protection Program Evaluation Report *November 2017*

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MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION
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STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION



PAUL R. LEPAGE
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November 1, 2017

Senator Thomas B. Saviello
Representative Ralph L. Tucker
Members of the Joint Standing Committee on Natural Resources
#13 State House Station
Augusta, Maine 04333-0013

Dear Senator Saviello, Representative Tucker, Committee Members:

In accordance with the Government Evaluation Act, Title 3, chapter 35 of the Maine Revised Statutes, the Board of Environmental Protection submits the attached Program Evaluation Report for your consideration.

The report summarizes the role and responsibilities of the Board, noting changes to those responsibilities since passage of P.L. 2011, c. 304 "An Act to Ensure Regulatory Fairness and Reform" (LD 1).

I look forward to the opportunity to discuss this report with the Committee at your convenience. If you have any questions or require additional information, please contact Cynthia Bertocci, the Board's Executive Analyst, at 287-2452 or cynthia.s.bertocci@maine.gov.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "James W. Parker".

James W. Parker, Chair
Board of Environmental Protection

cc: Paul Mercer, DEP Commissioner
Melanie Loyzim, DEP Deputy Commissioner

**Report to the Joint Standing Committee on
Environment and Natural Resources**

Program Evaluation Report

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I. Introduction

Pursuant to 3 M.R.S. § 955 of the State Government Evaluation Act (GEA), the Board of Environmental Protection (Board) is required to submit a program evaluation report to the Environment and Natural Resources Committee no later than November 1, 2017. This report is submitted in fulfillment of that requirement. The required report elements are addressed in Section II of the report, in the order set forth in statute.

The Legislature has periodically examined and modified the role and responsibilities of the Board. Most recently Public Law 2011, c. 304 “An Act to Ensure Regulatory Fairness and Reform” (LD 1) made several changes to the Board’s responsibilities, delegating a number of its responsibilities to the Commissioner of Environmental Protection (Commissioner) and focusing the work of the Board on major substantive rulemaking, applications of statewide significance, and decisions on appeals of Commissioner license decisions. Implementation of LD 1 has resulted in a reduction in workload with fewer Board meetings each year and less involvement of the Board in the overall work of the Department. The LD 1 changes to the Board’s role, and the Board’s current responsibilities, are discussed in Section II(B) of the report.

II. Required Report Elements (3 M.R.S. §956(2))

A. Enabling Law

Title 38 M.R.S. §341-A(2) establishes the Department of Environmental Protection consisting of the Board of Environmental Protection and the Commissioner of Environmental Protection. The purpose of the Board 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. The Board shall fulfill its purpose through rulemaking, decisions on selected permit applications, review of the Commissioner’s licensing and enforcement actions and recommending changes in the law to the Legislature.” (38 M.R.S. § 341-B). The Board’s duties and responsibilities are set forth in 38 M.R.S. § 341-D.

B. Description of the Program Administered by the Agency

1. General Description of Program

The Board has responsibility for certain functions within the Department that cut across several of the Department’s individual program areas.

As noted above, the Legislature has periodically examined and modified the role and responsibilities of the Board, most recently in 2011. LD 1 reduced the number of Board members from ten to seven, modified membership requirements, and made the following changes to the Board’s responsibilities:

- limited Board rulemaking authority to major substantive rules and those routine technical rules pertaining to Board procedures, with all other routine technical rulemaking delegated to the Commissioner;
- modified the criteria for determining whether an application constitutes a project of statewide significance, thereby changing the universe of applications that may come to the Board for original licensing jurisdiction;
- delegated approval of administrative consent agreements for resolution of enforcement matters to the Commissioner;
- delegated actions related to the revocation or suspension of a license to the Commissioner; and
- modified the Board's role in the modification of a license and/or the issuance of corrective action orders.

These changes, which are discussed further below, have resulted in a reduction in the Board's workload, with a resultant decrease in the average number of regular¹ Board meetings from 19 per year during the prior GEA review period of 2000-2009 to an average of 13 per year during the current review period of 2010-2017.

2. Board Membership

The Board consists of seven citizen members appointed by the Governor and approved by the Legislature. As set forth in 38 M.R.S. § 341-C, Board members are chosen to “represent the broadest possible interest and experience that can be brought to bear on the administration and implementation of [Title 38] and all other laws the board is charged with administering. At least three members must have technical or scientific backgrounds in environmental issues and no more than 4 members may be residents of the same congressional district. Members are appointed for staggered four year terms, and no member may serve more than two consecutive four year terms.” One member of the Board is appointed by the Governor as Chair. Four members of the Board constitute a quorum; a quorum is required to open a meeting and for a vote of the Board (38 M.R.S. § 341-E). (See Appendix A for biographical information on the current Board members.)

3. Operations

While the Board is administratively located within the Department of Environmental Protection, the Board has decision-making authority independent of the Commissioner in its areas of responsibility. Proceedings before the Board are governed by the Maine Administrative Procedure Act (MAPA), the Department's procedural statutes and rules governing the various types of proceedings (e.g., appeals of licensing decisions, rulemaking, etc.), and by program specific statutes and rules (e.g., air emissions, solid waste, wastewater discharge, site location of development, etc.)

The Board conducts all meetings in a forum that is publicly noticed and which any person may attend. The agenda for each Board meeting and a copy of all documentation provided to the Board for that meeting is published on the Board's web page approximately one week prior to the

¹ This number does not reflect additional days associated with Board adjudicatory hearings on applications of statewide significance.

meeting.² The Board provides live audio-streaming of Board meetings and hearings. The Board's web page contains information on Board procedures to assist members of the public in bringing their concerns to the Board. In cases where the Board holds a licensing hearing, the Board conducts the hearing in the area of the proposed project to allow for the widest possible participation by interested persons potentially affected by the project.

All correspondence between the Board and the parties to a proceeding and interested persons is channeled through the Executive Analyst and the Board Clerk to ensure that all Board members, as well as parties to the proceeding, receive the same information in a legally appropriate way. Board members do not discuss pending matters with one another, the parties, or any interested persons outside of a Board meeting. The Board is also bound by the *ex parte* communications provisions of the MAPA (5 M.R.S. § 9055) regarding adjudicatory proceedings.

4. Overview of Responsibilities: Priorities, Goals, and Assessment

The Board does not have an independent program agenda; rather the Board responds to work (such as proposed rules, requests for Board jurisdiction, etc.) forwarded to it by the Commissioner and to the appeals of Commissioner license and enforcement decisions filed with the Board by aggrieved persons. In each case, the goal of the Board is to conduct the specific proceeding in a fair and expeditious manner in accordance with the applicable statutes and rules.

(a) Rulemaking. The Board is responsible for the Department's major substantive rulemaking. The Board also adopts, amends and repeals routine technical rules as necessary for the conduct of its business (38 M.R.S. § 341-H(1)).

Priority: Priority for rulemaking is established by the Commissioner in response to changes in governing laws and program specific needs. The Board may initiate changes to its procedural rules.

Goal: To conduct rulemaking proceedings in accordance with the requirements of the MAPA and the program specific authorizing legislation, facilitate public review and input into proposed rules, and adopt rules that effectively implement the intent of the Legislature.

Relevant Review Criteria/Performance Measure: Rulemaking must be conducted in accordance with the requirements of the MAPA (5 M.R.S. §§ 8001 to 8074) and the requirements and limitations set forth in the relevant authorizing statute. The performance measure is a legally adopted rule that implements Legislative intent.

Assessment: Rulemaking is consistently conducted in accordance with the requirements of the MAPA, with all rules being approved by the Office of the Secretary of State. The practicability and effectiveness of the Department's rules (both routine technical and major substantive) are monitored by Department staff as they implement Department programs. The Board also monitors the practicability and effectiveness of rules through its application of the rules to the licensing applications and appeals of Commissioner licensing decisions it considers, and may

² Board of Environmental Protection website: <http://www.maine.gov/dep/bep/index.htm>.

recommend to the Commissioner changes needed to clarify or improve a rule. The Board may also recommend changes in statute to the Legislature.

During the review period, the Board conducted joint rulemaking with the Commissioner to update the Board and Department's procedural rules, Chapter 2 *Rule Concerning the Processing of Applications and Other Administrative Matters* and Chapter 3 *Rules Governing the Conduct of Licensing Hearings* to, among other things, incorporate changes enacted by LD1. The Board also conducted 17 major substantive rulemaking proceedings including Chapter 200 *Metallic Mineral Exploration, Advanced Exploration and Mining*. Major substantive rules currently pending before the Board include Chapter 418 *Beneficial Use of Solid Wastes* and Chapter 502 *Lakes Most at Risk from New Development and Urban Impaired Streams*.

(b) Appeals of Commissioner License Decisions. The Board reviews and issues decisions on appeals of Commissioner license decisions.

Background: License decisions of the Commissioner may be appealed to the Board or to Superior Court (or the Maine Supreme Judicial Court in the case of an expedited wind energy development, general permit for an offshore wind demonstration project, or a general permit for a tidal energy demonstration project). The filing of an appeal with the Board is not a prerequisite for the filing of a judicial appeal (38 M.R.S. § 344(2-A)). 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.

Priority: Appeals of Commissioner license decisions are processed as they are received. Statute and rule specify the deadline for the filing of an appeal of a Commissioner's license decision; untimely appeals are summarily dismissed by the Board Chair. Processing of a timely appeal begins immediately upon filing with timelines established in rule for the filing of various submissions. Parties may request that the Board delay processing of the appeal while the parties attempt to resolve the matter through mediation or another form of alternative dispute resolution. Under Department rules, the Board may, at the request of the parties, delay processing of an appeal for up to 6 months while the parties attempt to reach a resolution (06-096 C.M.R. ch. 2 § 24(B)(2)).

Goal: To process appeals expeditiously in accordance with the Department's procedural rules, the requirements of the MAPA, and program specific statutes and rules with Board decisions upheld on judicial review.

Relevant Review Criteria/Performance Measure. Appeals are processed in accordance with the procedural requirements set forth in the Department's rules, 06-096 C.M.R. ch. 2 § 24 and the statutes and rules governing the specific type of application. The performance measure is timely issuance of a license decision that is upheld on judicial review.

Assessment: Most persons aggrieved by a license decision of the Commissioner elect to appeal initially to the Board as opposed to Superior Court (or the Maine Supreme Judicial Court as applicable) since it is less costly and more accessible, especially for persons not represented by legal counsel. While the Board's decision in an appeal is subject to judicial review, many appeals

are resolved at the Board level, and those that are not have a more fully developed record for judicial review.

In recent years, the Board has stayed a number of its appeal proceedings to allow the parties to engage in alternative dispute resolution which in several cases has resulted in a negotiated resolution approved by the Board or the withdrawal of the appeal.

Since 2010, 13 of the Board's decisions on appeals of Commissioner license decisions have been appealed to court; 12 were affirmed and one (Saddleback Ridge Wind Project) was remanded to the Board for further proceedings. There are no judicial appeals of Board decisions currently pending.

(c) Decisions on Selected License Applications. The Board issues license decisions on applications of statewide significance.

Background: Title 38, section 341-D(2) provides that the Board shall decide each application for approval of permits and licenses that in its judgment represents a project of statewide significance. A project of statewide significance is a project that meets at least 3 of the following 4 criteria:

- Will have an environmental or economic impact in more than one municipality, territory or county;
- Involves an activity not previously permitted or licensed in the State;
- Is likely to come under significant public scrutiny; and
- Is located in more than one municipality, territory or county.

However, the Board may not assume jurisdiction over an application for an expedited wind energy development, a general permit for an offshore wind energy demonstration project, or a general permit for a tidal energy demonstration project.

In addition to the criteria listed above, State law specifically provides that certain applications such as an application for a commercial hazardous waste facility must be decided by the Board after opportunity for a public hearing (38 M.R.S. § 1319-R).

Priority: Applications over which the Board assumes jurisdiction are high priority projects; however, they are limited in number and processing proceeds in tandem with other Board work on a schedule established by the Board in consultation with the parties.

Goal: To conduct proceedings in accordance with the procedural and substantive requirements of the MAPA for adjudicatory proceedings and the applicable Department statutes and rules in an expeditious manner, providing for the due process rights of all parties and for meaningful public participation.

Relevant Review Criteria/Performance Measure: The Board must evaluate each application in accordance with the relevant statute and rules (e.g., solid waste management, site location of development, waste water discharge, etc.). In most instances, the Board holds an adjudicatory hearing on applications involving projects of statewide significance. In these cases, the

requirements of the Maine Administrative Procedure Act (5 M.R.S. §§ 9051 to 9064) governing adjudicatory proceedings and the Department's hearing rules also apply to the conduct of the proceeding. The performance measure is issuance of a license decision that is supported by the evidence, complies with existing law, and upheld on judicial review.

Assessment: During the review period, the Board had initial licensing jurisdiction over 3 applications involving adjudicatory hearings. The Board also had jurisdiction over 11 other licensing matters involving amendments, renewals, or post-closure licenses for various hazardous waste facilities which did not involve a public hearing. The three projects involving adjudicatory proceedings were:

- Application by Calais LNG Project Company, LLC and Calais LNG Pipeline Company, LLC to construct a liquefied natural gas terminal and import facility;
- Application by Paris Utility District for Site Specific Ambient Water Quality Criteria for Copper in the Little Androscoggin River; and
- Application by State of Maine Bureau of General Services for Expansion of the Juniper Ridge Landfill in Old Town.

The application by Calais LNG was ultimately withdrawn when the applicant lost title, right or interest in the property proposed for development. The Board approved the application by Paris Utility District and approved, with conditions, the proposed expansion of the Juniper Ridge Landfill. Neither decision was appealed to Superior Court.

(d) Petitions to Modify a License or Issue a Corrective Action Order.

Background: The petition process is an enforcement mechanism that allows the Department to re-open a license that was issued by the Department if certain conditions are found to exist. Title 38 M.R.S. § 341-D(3) provides that the Board may modify in whole or in part any license, or may issue an order prescribing necessary corrective action, whenever the Board finds that certain conditions set forth in statute are met

Priority: Action on a petition is a high priority. The Department's rules (06-096 C.M.R. ch. 2 §26) establish a timeline for the Commissioner to dismiss a petition or refer it to the Board, for the licensee to file its response, and for the Board to schedule a hearing on the petition unless the participants agree to another schedule which is approved by the Board.

Goal: To issue a decision on a petition to modify a license or issue a corrective action order in accordance with the requirements of statute as expeditiously as possible following referral by the Commissioner while providing for the due process rights of the parties.

Relevant Review Criteria/Performance Measure: The criteria for modification of a license or issuance of a corrective action order are set forth in statute (38 M.R.S. § 342(11-B)) and any hearing must comply with the MAPA requirements governing adjudicatory proceedings (5 M.R.S. §§ 9054 to 9061).

Assessment: In its 2009 GEA Report, the Board highlighted an increase in the number of petitions it had received to revoke, modify or suspend a license (12 within a five-year period),

several of which pertained to fish passage at hydropower facilities. Four of the Board's decisions to dismiss these petitions were appealed to Superior Court and then the Maine Supreme Judicial Court. In its decision (2008 ME 156),³ the Maine Supreme Judicial Court ruled that a decision to dismiss a petition to modify, revoke or suspend a license is an exercise of enforcement authority that lies with the agency and is not subject to judicial review.

LD 1 (effective June 13, 2011) subsequently amended the process for filing and consideration of petitions to modify a license or issue a corrective action order, and these changes have been incorporated in the Department's Chapter 2 *Rule Concerning the Processing of Applications and Other Administrative Matters*. Petitions to modify a license or issue a corrective action order are now referred to the Board by the Commissioner only if the Commissioner finds that the relevant criteria are met and a hearing should be held. The Board has not received any petitions to modify a license or issue a corrective action order since 2012.

(e) **Enforcement.** The Board hears appeals of emergency orders issued by the Commissioner.

Background: LD 1 reduced the Board's role in Department enforcement actions. The Board no longer reviews and approves administrative consent agreements; these agreements are now signed by the responsible party, the Office of the Attorney General, and the Commissioner (as opposed to the Board). However, pursuant to 38 M.R.S. § 341-D(6), the Board continues to hear appeals of emergency orders issued by the Commissioner pursuant to 38 M.R.S. § 347-A(3).

Priority: An appeal of an emergency order is a high priority. Statute requires that the Board provide the licensee an opportunity for hearing within 30 calendar days unless another time is agreed to by the licensee and the Department.

Goal: Timely resolution of appeals of emergency orders in accordance with applicable statutes.

Relevant Review Criteria/Performance Measure: The criteria for consideration of an appeal of an emergency order issued by the Commissioner are the provisions of the MAPA governing adjudicatory proceedings (5 M.R.S. §§ 9051-9064) and the relevant programmatic statutes and rules.

Assessment: Between 2009 and 2017, the Board heard two appeals of emergency orders: one pertaining to an underground oil storage facility at the Leighton Service Station in Auburn and the other an appeal by United States Surgical Corporation and Mallinckrodt, LLC of the Commissioner's Uncontrolled Hazardous Substance Site Order regarding remediation of the HoltraChem Chlor-Alkali Manufacturing Facility in Orrington. The Board affirmed the Commissioner's order regarding Leighton Service Station; there was no judicial appeal. The Board affirmed with modifications the Commissioner's Uncontrolled Hazardous Substance Site Order for the HoltraChem facility. The Board's decision was subsequently appealed to Superior Court, and then to the Maine Supreme Judicial Court. The Board's decision was upheld on appeal (decision of the Maine Supreme Judicial Court, 2014 ME 54), and Mallinckrodt is proceeding with remediation of the site.

³ Maine Supreme Judicial Court (2008 ME 156), decided October 9, 2008. Ed Friedman et al. v. Board of Environmental Protection, regarding water quality certification and fish passage at dams on the Kennebec River.

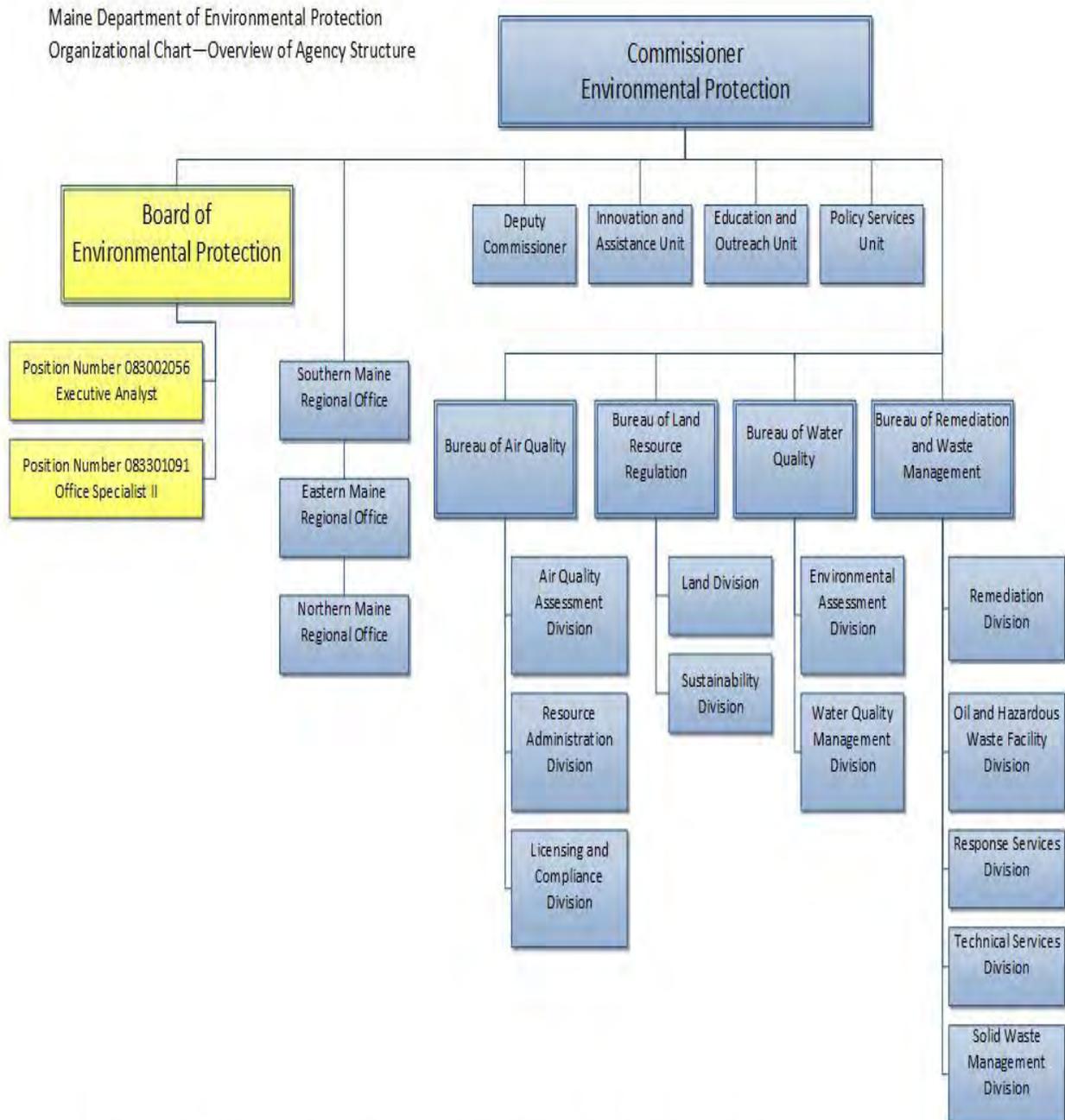
(f) Other Matters

In addition to the responsibilities discussed above, statute requires that the Board perform certain other duties. For example, statute requires that the Board make recommendations to the Legislature on changes to the classification of Maine waters including any use attainability analysis for a waterbody failing to meet its water quality classification (38 M.R.S. § 464). These matters are addressed as they are brought forward by the Commissioner.

C. Organizational Structure

As stated above, the Board of Environmental Protection is composed of volunteer members appointed by the Governor and confirmed by the Legislature. The Board is staffed by a full-time Executive Analyst who is hired by, and serves at the pleasure of, the Board (38 M.R.S. § 341-F). An Office Specialist II in the Office of the Commissioner serves as the Board Clerk (5 M.R.S. §12007) and provides administrative and logistical support to the Board. The Commissioner's staff provides administrative and technical support to the Board and makes recommendations to the Board on pending matters (38 M.R.S. § 342(11-A)). The Board may also retain the services of consultants as necessary to carry out its responsibilities (38 M.R.S. § 341-F(5)). (See Figure 1 Organizational Chart showing the Board's position with the Department's organizational structure.)

Figure 1.



Title 38 M.R.S. § 341-A(2) establishes the Department of Environmental Protection consisting of the Board of Environmental Protection and the Commissioner of Environmental Protection.

D. Financial Summary

The Board of Environmental Protection Fund was established by the Legislature as a non-lapsing fund to be used by the Board to carry out its duties (38 M.R.S. § 341-G). The fund does not have an independent source of revenue; rather money is transferred to the fund annually from the Maine Ground and Surface Waters Clean-up and Response Fund⁴, the Maine Hazardous Waste Fund, and the Maine Environmental Protection Fund. Transfers to the BEP Fund are in proportion to each contributing fund's percentage of the total special revenues received by the Department. The amount of money allocated to the Board of Environmental Protection Fund each fiscal year is limited by statute to \$325,000.

Board members volunteer their time, receiving \$55.00 per day plus expenses for their attendance at Board meetings and hearings (5 M.R.S. § 12004-D(2)). The Board of Environmental Protection (BEP) Fund provides "personal services" to fund the per diem for Board members, the position of Board Executive Analyst, and one Office Specialist II position serving as the Board Clerk. The BEP Fund also includes "all other" funds for the cost of Board meetings and public hearings such as room and equipment rental; travel and meal expenses; staff phone, computer and other technology costs; office supplies; mailings; training; and professional fees for court reporters and any consultants hired to assist the Board. There are no "capital" expenses.

The amount of money transferred to the BEP Fund annually and the amount expended can vary significantly from year to year depending upon the number and nature of the matters pending before the Board, which determines the number of meetings and public hearings required. Funds are transferred to the account at the beginning of the fiscal year based upon anticipated needs. Any funds remaining at the end of the fiscal year are carried forward, reducing the amount to be transferred into the BEP Fund at the beginning of the next fiscal year.

A summary of allocation and expenditures for the past ten years is presented in Figure 2. The increase in expenditures for FY 10 is largely attributable to proceedings associated with the appeal to the Board of the Department's Uncontrolled Hazardous Substance Site enforcement order issued to United States Surgical Corporation and Mallinckrodt, LLC for remediation of the HoltraChem Chlor-Alkali Manufacturing Facility in Orrington.

⁴ Public Law 2015, c. 319 merged the Maine Coastal and Inland Surface Oil Clean-up Fund and the Ground-Water Oil Clean-up Fund creating the Maine Ground and Surface Waters Clean-up and Response Fund.

Figure 2.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

Board of Environmental Protection (0025) Budget Program

10-Year History

	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17
Budget History										
Personal Services	199,430	202,996	210,319	213,354	182,682	181,798	197,379	201,706	213,146	208,598
All Other	98,646	102,246	109,889	109,889	108,689	109,889	109,889	109,889	109,889	109,889
Capital	0	0	0	0	0	0	0	0	0	0
<i>Totals:</i>	<i>\$298,076</i>	<i>\$305,242</i>	<i>\$320,208</i>	<i>\$323,243</i>	<i>\$291,371</i>	<i>\$291,687</i>	<i>\$307,268</i>	<i>\$311,595</i>	<i>\$323,035</i>	<i>\$318,487</i>
Expenditure History										
Personal Services	195,807	200,400	196,818	174,624	181,765	163,799	187,141	188,810	202,889	206,644
All Other	37,678	39,710	126,061	51,728	52,065	29,006	37,098	19,705	18,231	35,938
Capital	0	0	0	0	0	0	0	0	0	0
<i>Totals:</i>	<i>\$233,485</i>	<i>\$240,110</i>	<i>\$322,880</i>	<i>\$226,352</i>	<i>\$233,830</i>	<i>\$192,805</i>	<i>\$224,239</i>	<i>\$208,515</i>	<i>\$221,121</i>	<i>\$242,582</i>



E. Interagency Coordination and Cooperation

The Commissioner provides the Board with administrative support and the technical services of the Department (38 M.R.S. § 342(11) and (11-A)). The Board also utilizes the expertise of sister agencies such as the Department of Health and Human Services, Department of Inland Fisheries and Wildlife, and the Department of Marine Resources. These State agencies provide technical support on matters related to their areas of expertise. For example, the State Geologist with the Department of Agriculture, Conservation and Forestry provided technical assistance to the Department and the Board in the development of Department rule Chapter 200 *Metallic Mineral Exploration, Advanced Exploration and Mining*.

F. Constituencies Served

As stated previously, the purpose of the Board as set forth in statute 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)

The Board’s constituents are the people of Maine including persons (applicants, appellants) with matters pending before the Board for decision; as well as the general public including individuals, businesses, municipalities, other governmental entities, and various business, civic, and environmental organizations all of whom may be impacted by the statutes and rules administered by the Department. No changes are anticipated.

G. Alternative Delivery Systems

The Legislature most recently amended the Board’s role and responsibilities in LD 1 (P.L. 2011, c. 340), delegating certain of its duties to the Commissioner thereby streamlining certain Department functions such as routine technical rulemaking. The Board and Commissioner have amended the Department’s procedural rules and operating procedures to implement these changes. Other efforts to facilitate delivery of services include the following:

Alternative Dispute Resolution: With respect to appeals of Commissioner license decisions, the Board encourages use of alternative dispute resolution to resolve appeals as described in Section II(B)(4)(b) of this report.

Stakeholder Groups: With respect to the Board’s role in rulemaking, the Board encourages the Department’s use of stakeholder meetings with the regulated community and interested public to obtain information and explore different approaches to regulation. Up-front involvement of stakeholders frequently results in a better crafted rule and a more productive public hearing that is focused on the remaining issues in dispute.

Electronic Access to Information: The Board has improved public access to information on Board proceedings. Materials pertaining to Board meetings and hearings are posted on the Board’s webpage and live audio-streaming of meetings and hearings is available, providing more timely and cost effective distribution of information to the general public, the regulated community, and parties

to various proceedings. The Board has also developed guidance documents regarding Board procedures to assist the public and the regulated community. These documents, which are available on-line, are intended to make Board procedures more understandable to the general public and parties not represented by counsel, thereby contributing to more efficient proceedings.

H. Emerging Issues

Issues the Board anticipates that the Department, Board, and the Legislature may need to address in the near-term include the following:

- Metallic Mineral Mining. Following work by Department staff, the Board, and the Energy and Natural Resources Committee over a period of several years, the Board provisionally adopted Chapter 200 *Metallic Mineral Exploration, Advanced Exploration and Mining* in January 2017. The Board anticipates final adoption of the rule with the modifications directed by the Legislature in P.L. 2017, c. 142 at an upcoming meeting. With final adoption of Chapter 200, the State will have a comprehensive rule that is consistent with statute in the event the Department receives inquires, or an application, for metallic mineral mining in Maine.
- Solid Waste Management. The Board recently approved a 9.35 million cubic yard expansion of the State-owned Juniper Ridge Landfill in Old Town. During that proceeding, the Board noted ongoing public concern over the nature and origin of wastes disposed of at the landfill and, in particular, the amount of construction demolition debris coming into Maine for processing and the associated oversized bulky waste that is subsequently disposed of at Juniper Ridge. The Board anticipates that the Legislature will continue to see bills to address solid waste issues including the definition of “waste generated within the State;” the importation of construction demolition debris by solid waste processing facilities; and implementation of, and compliance with, the State’s solid waste management hierarchy.
- Energy. Historically, wind energy developments have been controversial and the Board expects that will continue to be the case. Since the Board’s last GEA Program Evaluation Report in November 2009, the Board has received appeals of nearly all licenses issued by the Department for expedited wind energy development projects including: Oakfield Wind, Record Hill Wind, Spruce Mountain Wind, Rollins Wind, Saddleback Ridge Wind, Oakfield II Wind Power, Passadumkeag Wind Park, Hancock Wind, Bingham Wind Project, Bowers Wind Park, and Canton Mountain Wind Project. With growing demand in southern New England for supplies of renewable energy, the Department will likely see applications for new electrical transmission lines to move energy south from Quebec and to provide additional transmission capacity for new and expanded wind energy developments in Maine. Offshore wind energy developments and associated transmission lines are also on the horizon.
- Water Quality. The Department has begun the process of soliciting public input for the triennial review of Maine’s Water Quality Standards as required by the Clean Water Act and Maine law (38 M.R.S. § 464(3)). The Board anticipates holding hearings on proposed changes in 2018, with recommendations coming to the Legislature in January 2019.

I. Comparison of Federal Laws and Regulations.

The only federal law specifically applicable to the Board (as opposed to the Department's programs as a whole) is the requirement at 38 M.R.S. §341-C(8) governing Board member participation in applications for National Pollutant Discharge Elimination System (NPDES) permits under Section 402 of the Federal Water Pollution Control Act, 33 United States Code, Section 1342. This provision of Maine law addresses Board membership and potential conflicts of interest in NPDES permitting and requires consistency with federal law and the regulations of the United States Environmental Protection Agency. It prohibits a Board member from participating in the review of, or action on, any application for a National Pollutant Discharge Elimination System (NPDES) permit if the Board member receives, or during the previous two years has received, a significant portion of income directly or indirectly from any NPDES license or permit holders or any applicant for a NPDES license or permit. "Significant portion of income" is defined in statute.

J. Use of Personal Information.

The Board does not collect, manage, use, or distribute the personal information of any person over the internet or otherwise.

Persons filing an application with the Department or appealing a license decision may provide personal information to the Board and/or Department to demonstrate, for example, title, right or interest in a property proposed for development and include contact information such as phone numbers and addresses in their submissions. Many of these applications are submitted electronically and, in some instances, are available on the Department's and/or Board's webpage for public review and comment. The Board does not remove such personal information from applications or appeal documents; consequently, it may be viewed by members of the public who review a specific application. Persons submitting applications or appealing license decisions are generally aware that such documents become a public record when filed with the Board and/or Department.⁵

In distributing information to interested persons on a mailing list for a rule or application, the Board blind-copies the material to persons on the mailing list so that the Board does not inadvertently distribute the email addresses of persons on the mailing list to all other persons on the mailing list.

K. List of Information Required to be Filed with the Agency.

The general public is not required to file any reports, applications, or similar paperwork with the Board.

The Department is required to notify the Board of applications accepted as complete for processing (38 M.R.S. §344(1)). License decisions issued by the Commissioner must be filed with the Board; this filing serves to establish the deadline for filing of an administrative appeal of a Commissioner's license decision (38 M.R.S. § 341-D(4)(A)).

⁵ Maine Freedom of Access Law (1 M.R.S. §§400-414)

Applicants for projects of statewide significance and the participants in an appeal proceeding must comply with applicable statutes and rules regarding certain submissions. In addition, licensees are required to comply with the terms and conditions of their licenses, which may include reporting requirements.

L. List of Reports Required by the Legislature

The Board has two standing reporting requirements.

- Title 38 M.R.S. § 341-D(7) requires the Board to report to the Joint Standing Committee of the Legislature having jurisdiction over natural resource matters by January 15th 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. The Board expects that the information provided in this report is helpful to the Committee.
- Title 38 M.R.S. §464(3)(B) requires the Board to hold public hearings periodically and make recommendations to the Legislature on changes to the State's water quality classification system and related standards (triennial review). The Board anticipates holding hearings on proposed changes in 2018, with recommendations coming to the Legislature in January 2019.

M. Provisions that May Require Legislative Review

Title 3 M.R.S. § 956(2)(Q) requires the agency to identify provisions in the agency's enabling or authorizing statutes that may require legislative review to determine the necessity of amendment to align the statutes with federal law, other state law, or decisions of the United States Supreme Court or the Maine Supreme Judicial Court.

Although not required to align the Board's statute with state or federal law, the Board recommends that the Legislature review and clarify the provision in statute regarding participation by the Maine Public Utilities Commission (PUC) in certain Board appeal proceedings. Title 38 M.R.S. § 341-D(4) provides for participation by the Chair of the Public Utilities Commission (or the Chair's designee) as a nonvoting member of the Board for appeals of Commissioner license or permit decisions regarding an expedited wind energy development, an offshore wind energy demonstration project, or a tidal demonstration project. To date, the PUC has not chosen to participate in these appeal proceedings perhaps due in part to the nature of the issues raised in the appeals, which have often been issues associated with sound, scenic resources, and wildlife impacts.

Given the variable nature of the issues raised in these appeal proceedings, the Board recommends that 38 M.R.S. § 341-D(4)(D) be amended as follows to clarify that PUC participation in appeals to the Board of Department license decisions for the above listed energy projects is optional and at the discretion of the PUC Chair:

[T]he chair of the Public Utilities Commission or the chair's designee may serve as a non-voting member of the board and is entitled to fully participate but is not required to attend meetings and hearings when the board considers an appeal pursuant to this paragraph.

III. Conclusion

Since the Board's last GEA Report in November 2009, the Legislature enacted LD 1 "An Act to Ensure Regulatory Fairness and Reform". LD 1 made substantial changes to the Board's responsibilities, particularly in the areas of rulemaking and enforcement, and focused the Board's work on appeal proceedings, major substantive rulemaking, and projects of statewide significance. These changes have reduced the Board's workload, resulting in fewer meetings and fewer hearings per year. The Board continues to improve the efficiency and transparency of its proceedings with on-line posting of guidance documents and meeting materials and has recently implemented audio-streaming of Board meetings and hearings to assist parties to proceedings as well as members of the interested public. Members welcome the opportunity to discuss this report with the Committee.

Appendix A: Board of Environmental Protection Members



James W. Parker, Chair
Veazie , 2nd 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, and re-appointed for a second term in May 2017. Governor LePage appointed Mr. Parker Board Chair in December 2014.



Alvin K. Ahlers
North Yarmouth
2nd 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's 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. Mr. Ahlers was appointed to a second term in May 2017.



Kathleen Chase
Wells, 1st Term

Ms. Chase is co-owner and Vice President of Chase & Hamlyn Mineral Extraction, which she founded with her husband in 1986. Ms. Chase has extensive municipal experience, having served as Tax Assessor for the Town of Wells for 18 years. She was elected to the Maine State Legislature in 2006, where she served four terms, completing her service in December 2014. During her tenure in the Legislature, Ms. Chase served on the Joint Standing Committee on Taxation and the Appropriations and Financial Affairs Committee. She has been an active member of numerous professional and community organizations including the Wells Chamber of Commerce, Maine Aggregate Association, Wells Rotary Club, past President and Founder of the Senior Needs Committee of Wells and Ogunquit, and President of Applause for a Cause Theatre Troupe. Ms. Chase was appointed to the Board by Governor Paul R. LePage in April 2016.



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, 2nd Term

Dr. Eastler is a Professor Emeritus 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 U. S. Air Force Reserves Colonel with 30 years of service. He was appointed to the Board by Governor Paul R. LePage in April 2012 and re-appointed for a second term in February 2014.



Jonathan B. Mapes
Sanford, 1st Term

Mr. Mapes is the President and Owner of H. A. Mapes Inc., a petroleum distribution and management company located in Springvale, Maine. Mr. Mapes has extensive knowledge regarding the regulation and safe handling of petroleum products and is a certified tank installer. He is a member of the Maine Energy Marketers Association and the Society of Independent Gasoline Marketers of America. Mr. Mapes has been active in his community serving on the Sanford Charter Commission, as chairman of the Sanford School Committee, member and past board of directors member of the Sanford Chamber of Commerce, member and past president of the area Kiwanis, and member and past president of the Sanford area YMCA. He was appointed to the Board by Governor Paul R. LePage in November 2015.
