FINAL REPORT

TO THE

COMMITTEE ON THE ENVIRONMENT AND NATURAL RESOURCES

LD 159 STAKEHOLDER GROUP

DECEMBER 12, 2011

STAKEHOLDER GROUP PARTICIPANTS

Nancy Smith	GrowSmart Maine
Brian Rayback	Maine Real Estate and Development Association
Barbara Berry	Maine Association of Realtors
Nick Bennett	Natural Resources Council of Maine
Jenn Burns Gray	Maine Audubon
Greg Connors	Maine Municipal Association
Bill Monagle	Cobbossee Watershed District
Rick Licht	Licht Environmental Design, LLD
Jay Kamm	Northern Maine Development Commission/Maine Association of Planners
Renee` Carter	Code Enforcement Officer, Town of Windham
Elizabeth Hertz	Maine State Planning Office/Land Use Team
Phillip deMaynadier	Maine Inland Fisheries & Wildlife

REPORT BY LD 159 STAKEHOLDERS GROUP

In June, 2011, the Legislative Committee on the Environment and Natural Resources sent a letter to Nancy Smith, Executive Director of GrowSmart Maine, accepting her offer to convene a stakeholder group to address Sections 2 and 3 of LD 159, **"An Act To Foster Economic Development by Improving Administration of the Laws Governing Site Location of Development and Storm Water Management".** (Attachment A is a copy of this letter.) GrowSmart Maine invited key individuals representing balanced geographic, demographic and professional perspectives. The group met four times, and broke into two subcommittees to discuss specific components identified in the first meeting. The work of each subcommittee was reported back to the full group for incorporation into the final report.

This report is a consensus of all stakeholder members, who are pleased to present their results and sincerely hope that it will be of value to the committee's continued work.

Our stakeholder group was unable to reach consensus on changing the thresholds in the definition of structure and subdivision within the laws governing the Site Location of Development (Site Law). Although still supportive of the concept, Maine Real Estate and Development Association (MEREDA) acknowledged that efforts within this process to increase thresholds would be unproductive because of strong opposition from the environmental community and the Maine Municipal Association along with individual municipal representatives. These stakeholders raised concern about the limited capacity of most Maine communities to take on the detailed technical responsibilities associated with Site Law review. The stakeholders were concerned that, in this time of tightening budgets and reduced capacity, for most Maine towns, adding site law review responsibilities currently covered by DEP would require additional municipal (or contract) staff, potentially increasing costs and therefore taxes at the municipal level.

We shifted our efforts at the first meeting, focusing on the core issues for developers regarding Site Law: added costs, delays, and a lack of predictability often associated with redundancies and/or additional requirements when both the municipality and DEP have authority over a project. Our stakeholder group addressed these concerns directly, keeping in mind that the intent of Site Law is to protect Maine's environment while ensuring the economic and social well-being of the state.

RECOMMENDATIONS:

There are two components to our final recommendations. Legislative action is not required for these recommendations. There is groundwork to be done before changes in statute can be identified.

1. Outreach and education in partnership with Maine municipalities is required to fully implement existing "Delegated" and "Capacity" Authority, and to realize optimal use of coordinated third-party delegation.
2. Local opposition, and the unpredictable process that results, may be reduced by encouraging development in designated growth areas within the municipality, so that developers' plans are more likely to be compatible with the citizens' vision for their community.

1. Outreach/education for municipal officials

The group concluded that improvements to the Site Law process could be accomplished by coordinated educational efforts among all perspectives including DEP and other state agencies, the Maine Municipal Association, the Maine Real Estate and Development Association, the Maine Association of Planners, Maine Association of Realtors, GrowSmart Maine, Regional Economic Development Councils and Regional Planning Commissions, and other relevant organizations. The stakeholder group identified several aspects of the current Site Law review process that could benefit from a concerted outreach/education effort:

- **"Delegated" and "Capacity" Authority**

  The stakeholder group had extensive discussions on municipalities with either "Delegated" or "Capacity" authority to administer Site Law or its equivalent. A summary of information is found in Attachment B. Both of these mechanisms eliminate the duplication often experienced by developers when review processes are administered by both DEP and host municipalities. Engaging with the 14 participating communities is necessary in order to better understand the value of each process and to learn why so few municipalities have adopted either.

  With the information gathered, these programs could be amended and improved, potentially increasing the number of municipalities choosing to participate.

- **Third Party Delegation**

  When DEP uses a third party for the permitting and review process, as provided in statute (See Attachment C for the complete text of 38 MRSA sec. 344-A.), municipalities that choose to use third parties for local permitting peer review should be encouraged to use the same third party as DEP.

Circumstances necessary for education and outreach efforts on these topics to be effective:

- Information provided must be consistent to all audiences.
- A central clearinghouse of available resources is needed.
- Outreach structured to encourage a mix of perspectives in both the audience and the presenters will result in broad-based training, with the added bonus of a better understanding of the perspectives of all who deal with Site Location of Development.
- Potential partners: Maine Municipal Association (local planning boards and code enforcement officers), Maine Real Estate and Development Association (MEREDA), Maine Association of Realtors (MAR), Maine Association of Planners (MAP), state agencies, Regional Economic Growth Councils and GrowSmart Maine (GSM).

2. Simplifying the Site Law rules within municipally designated Growth Areas

Simplifying the site law process within designated growth areas may result in a more efficient process because developers' efforts would be focused in areas identified by the municipality as suited to significant development. This would also result in reduced likelihood that a project will meet strident local resistance because it is in keeping with the town's vision of its own future.

Attachment D provides information on a pilot project investigating this concept.

In order to increase the siting of significant projects in municipally-designated growth areas, the group concluded that several efforts should be encouraged:

- Development of a toolbox and inventory of best practices (such as the recently created Maine Farmland Trust publication, focused on working farmland, "Cultivating Maine's Agricultural Future, A Guide for Towns, Land Trusts, and Farm Supporters"
- Compilation of case studies from towns that have successful designated growth areas, showing reduced costs of providing services.
- Inventories listed above could be housed at the Land Use Planning component of the State Planning Office, with Maine Association of Planners and/or GrowSmart Maine as other options. A shared approach is possible.
- Designated growth areas should be designed to meet the needs of developers as well as the municipality, if they are to be effective tools.
- It is important that technical assistance continue to be provided to municipalities from state agencies and regional councils as needed, as there is much expertise at these levels that would benefit many Maine's communities.

The stakeholders who participated in this process hope that the perspectives offered here and the information provided in the attachments are useful as the Committee continues its work.

ATTACHMENT A

Nancy Smith, Executive Director
GrowSmart Maine
309 Cumberland Avenue, Suite 202
Portland, ME 04101

June 9, 2011

RE: LD 159, An Act To Foster Economic Development by Improving Administration of the Laws Governing Site Location of Development and Storm Water Management

Dear Ms. Smith:

As you know, the Environment and Natural Resources Committee voted "ought to pass as amended" on LD 159. The bill, in Sections 2 and 3, proposed to revise the thresholds for review by the Department of Environmental Protection pursuant to the laws governing the site location of development by changing the definitions of "subdivision" and "structure."

The Committee was unable to reach consensus on ways to resolve the issues raised by Sections 2 and 3 and therefore, did not include those provisions in the Committee's amendment. The Committee's vote was due in part to your presentation to the Committee in which you proposed that GrowSmart Maine convene a stakeholder group to address the issues raised in Sections 2 and 3.

We would like to thank you for your participation during the Committee's worksessions on LD 159 and we look forward to GrowSmart Maine's report as outlined in your June 3, 2011 proposal (copy attached).

Again, thank you for agreeing to undertake this very important work and if you have questions, please do not hesitate to contact us.

Sincerely,

Thomas Saviello
Senate Chair

James Hamper
House Chair

cc: Members, Environment and Natural Resources Committee

ATTACHMENT B
Delegation vs. Capacity

During the review of the current Site Law review process in Maine, the LD 159 Stakeholders Group spent a significant amount of time examining several specific aspects of the process:

- Current Maine law provides two alternatives through which municipalities can opt for a greater role in Site Law review. Based on some basic research conducted by GrowSmart Maine for the larger group, it appears that in the late 1980's, the Legislature first authorized "Delegation" (38 M.R.S.A. 489-A) as a means by which certain municipalities are delegated by DEP to administer state Site Law requirements and are authorized to issue state site law permits. In a somewhat similar fashion, in the mid 1990s, the Legislature also authorized the concept of "Capacity" (38 M.R.S.A. 488(19)) which allows municipalities designated by DEP as having the specific administrative components and resources (i.e. "capacity") to administer the statutory requirements of Site Law. Those municipalities designated by DEP as having "Capacity" do not issue state Site Laws permits but rather their own permits that have the same power and authority as state Site Law permits.
- It was also reported to the stakeholder's group that certain municipalities make use of a third party review process to consolidate stormwater review and thus reduce repetitive review requirements administered by DEP and host municipalities.

Municipalities with delegated or capacity designation on next page.

Municipal Capacity / Delegated Authority Status

Town	Delegated Site	Delegated Traffic	Capacity Site	Capacity SW	Effective Dates, Comments
Auburn	X			X	1/25/89 – Subdivision (L-016027-06-A-N) 9/27/89 – Subdivision & Structure (L-016556-06-A-N) 9/15/08 – Stormwater Capacity reinstated by letter
Augusta					4/16/92 – Subdivision & Structure (L-017732-06-A-N) Delegated Authority Suspended 7/28/99
Bangor	X			X	12/14/88 – Subdivision (L-014163-06-AA-N) 1/27/93 – Subdivision & Structure (L-017638-06-A-N) 9/15/08 – Stormwater reinstated by letter
Belfast					9/16/96 – Structure (L-019194-06-B-N) Delegated Authority Suspended 7/28/99
Biddeford			X		3/9/99 – Subdivision & Structure
Brunswick			X		1/1/97 – Subdivision & Structure
Caribou			X		6/23/98 – Subdivision & Structure
Freeport				X	2/9/99 – Stormwater
Holden			X		10/16/97 – Subdivision & Structure
Kennebunk			X		1/1/97 – Subdivision & Structure
Lewiston	X			X	9/27/89 – Subdivision & Structure (L-016555-06-A-N) 4/23/99 – Stormwater; 9/15/08 stormwater reinstated by letter
Portland	X	X		X	1/27/93 – Subdivision and Structure (L-017695-06-A-N) 3/3/99 – Traffic & Stormwater
Saco	X			X	9/29/92 – Subdivision & Structure (L-017825-06-A-N) 4/1/99 – Stormwater
Sanford			X		1/1/97 – Subdivision & Structure
Skowhegan			X		3/9/99 – Subdivision & Structure
Topsham	X			X	6/28/06 –Subdivision & Structure 6/28/06 - Stormwater
Wells			X		1/1/97 – Subdivision & Structure
Windham					2/13/91 – Structure (L-017045-06-A-N) Delegated Authority Suspended 3/8/2008
Yarmouth					9/29/95 Structures (L-018925-06-B-N) Delegated Authority Suspended 6/9/99

The Stakeholders Group discussion of these issues generated a number of questions that were posed to current and former DEP staff. The answers received by the Stakeholder's Group were consistent and significantly helped to shape the group's final recommendations. The questions posed and a summary of the responses are as follows:

Question Number 1:

There are two very similar provisions in the Site Law that allow municipalities to largely assume the task of administering the law: Capacity (38 M.R.S.A. 488(19)) and Delegation (38 M.R.S.A. 489-A). What is the history of why there are these two very similar provisions? It seems that they allow municipalities to get to pretty much the same place. Also, do you know if there is actually a difference in what municipalities are allowed to do under each of these two provisions? Is one more effective than the other?

Summary Response: Site Law, like all special area management laws enacted in the early 70s, was based on the idea that the state would assume special permitting authority with respect to large projects, but delegate that authority to the municipalities once they developed ordinances, boards, etc. that could handle it. DEP proposed the concept of "capacity" in the mid-1990s (the delegation process is much older). There were towns that clearly had the capacity and were doing essentially the same review as the DEP but would not take delegation (e.g. South Portland). The only real difference between the two is there are fewer reporting requirements and filings to the DEP under Capacity. Under either category, the limits on the size of projects that towns can **permit** are the same: structures from 3-7 acres and single family residential subdivisions from 15-100 acres. There is also a provision under either category where a municipality can ask the DEP to review larger projects; these requests are granted in some cases. There appears to be no evidence as to whether **municipal review** under one or the other category is "more effective." The DEP is not required to be notified of projects approved under "capacity."

Question Number 2:

One of our stakeholders brought up a mechanism in which municipalities, DEP and a developer agree to the use of a third party contractor to do stormwater review for Site Law projects. The developer pays for the contractor and it sounds like DEP and the municipality agree in advance to abide by the results of the review. Is this process defined anywhere in rule or statute? Is it done based on policy or on an ad hoc basis? Also, do DEP and the municipality both agree that they will not question the results of the review or do they retain the right to question the review or withdraw from the agreement to use the contractor if the contractor does not do an adequate review? Finally, does the Dept. believe this process is good? Is it ever used address standards other than those for stormwater? Should it be?

Summary Response: Developers have the ability under current state law to have stormwater reviewed through the county soil and water conservation districts (SWCDs). The DEP entered into MOAs with York, Cumberland and Androscoggin SWCDs (perhaps Waldo too) years ago to allow for a quicker review of stormwater controls (stormwater only) for developers due to a large volume of applications and limited engineering resources at the DEP. Part of the reason was that some towns already required review by the SWCD, so it made sense to review things only once. The process is not defined in law. DEP meets twice a year with the SWCDs, inviting town engineers as well, to review stormwater standards with the hope that these meetings help all involved parties to be on the same page. The

value of this to DEP at this time is questionable given the current lower volume of applications as compared to when the approach was implemented.

Question Number 3:

Another issue brought up for discussion relates to activities in Topsham, has delegation). The Topsham planner believed that delegation worked well except for the fact that DEP retained jurisdiction over any new Site Law permits that pertained to the Topsham Fair Mall. This was because DEP had issued the original Site Law permit for the mall, and therefore would retain jurisdiction in perpetuity. Is this true? If so, does DEP always retain Site Law jurisdiction when it has issued the original Site Law permit for a development or is this situation unique to Topsham?

Summary Response: In Topsham, there is a unique arrangement. It appears that the original permit was issued in 1982 and has a specific condition that any development on the commercial lots must come to the DEP for approval. Projects include Topsham Fair Mall, Highland Green Active Adult Community, The Highlands Retirement Community and Bowdoin Mill –all significant projects .

While the Town still has local site plan and of course subdivision review authority and grant such permits, the DEP Site Law review is conducted through DEP – thereby creating a "two stop shopping" rather than what would be a "one stop shopping" for permits.

ATTACHMENT C

This is existing statute describing DEP's ability to enter into outside contracts for review of applications.
The first sentence of the statute describes this process concisely.

38 §344-A. OUTSIDE REVIEW OF APPLICATIONS

The commissioner may enter into agreements with individuals, partnerships, firms and corporations outside the department, referred to throughout this section as "outside reviewers," to review applications or portions of applications submitted to the department. The commissioner has sole authority to determine the applications or portions of applications to be reviewed by outside reviewers and to determine which outside reviewer is to perform the review. When selecting an outside reviewer, all other factors being equal, the commissioner shall give preference to an outside reviewer who is a public or quasi-public entity, such as state agencies, the University of Maine System or the soil and water conservation districts. Except for an agreement for outside review regarding review of an application for a wind energy development as defined in Title 35-A, section 3451, subsection 11, a certification pursuant to Title 35-A, section 3456, an application for an offshore wind power project as defined in section 480-B, subsection 6-A or a general permit pursuant to section 480-HH or section 636-A or an application for a hydropower project, as defined in section 632, subsection 3, that uses tidal action as a source of electrical or mechanical power, the commissioner may enter into an agreement with an outside reviewer only with the consent of the applicant and only if the applicant agrees in writing to pay all costs associated with the outside review. [2009, c. 615, Pt. E, §4 (AMD).]

1. Standards for outside review. Prior to entering into an agreement with an outside reviewer, the commissioner must determine that:

A. The agreement protects the public interest and the interest of the applicant; [1991, c. 471, (NEW).]

B. The agreement ensures a fair, consistent and adequate review of the application; [1991, c. 471, (NEW).]

C. The agreement provides the public with the same opportunity to comment on the application as would be provided if the application were reviewed by the department; [1991, c. 471, (NEW).]

D. The outside reviewer meets the minimum qualification standards established by the commissioner; and [1991, c. 471, (NEW).]

E. The application can not be reviewed by existing departmental personnel in a reasonable period of time. [1991, c. 471, (NEW).]

[1991, c. 471, (NEW) .]

2. Qualifications. The commissioner shall establish qualification standards for outside reviewers and shall develop a list of qualified outside reviewers. Standards established by the commissioner must include initial qualification standards and standards ensuring that outside reviewers continue to maintain a high level of scientific and regulatory expertise in one or more relevant areas of knowledge.

[1991, c. 471, (NEW) .]

3. Conflict of interest. An outside reviewer may not review any portion of an application submitted by an applicant who directly or indirectly employed the reviewer in any capacity at any time during the 12-month period immediately preceding the submission of the application. An outside reviewer must sign a written agreement with the commissioner not to be employed, directly or indirectly, by any applicant whose application was reviewed by that reviewer for at least 12 months from the date the review of the application is complete.

[1991, c. 471, (NEW) .]

4. Penalty. Notwithstanding section 349, any person who knowingly violates subsection 3 is guilty of a Class D crime. Notwithstanding Title 17-A, sections 4-A and 1301, the fine for each violation may not be less than $5,000 nor more than $25,000.

[1991, c. 471, (NEW) .]

5. Repeal.

[1993, c. 356, §2 (RP) .]

ATTACHMENT D

Concept Draft: Regulatory Streamlining in Growth Areas Dec 12, 2011

Prepared by Liz Hertz of the State Planning Office and Steve Walker of IF&W

Pilot Project: Enhancing the draw of growth areas

IT'S ALL VOLUNTARY, all of it!

One mechanism to address all three of the issues that have been raised as problems currently encountered with the development of site law projects – predictability, processing time, and fees -- would be the option to implement regulatory streamlining in growth areas. Growth areas have been identified by and ratified through municipal participatory process. Municipalities identify these areas based on their vision for the future of their communities. As such, these areas represent the community's will for the location of the majority of the development they anticipate over the next ten years. The size and scope of most site law projects and their resulting impacts make the growth area the most appropriate place for most of them. This is not to say that site projects couldn't happen outside the growth area but those projects would not qualify for the streamlined regulatory process. To qualify for this option, towns would have to have adopted consistent comprehensive plans and the subsequent land use ordinance and accept authority from the State.

A pilot

Over the several years, a diverse group of individuals has worked on the idea of streamlined regulation for just one protected resource – vernal pools. The goal of this effort is to increase regulatory flexibility at the local level while providing incentives – in the form of time and cost avoidance- to developers along with financial remuneration for willing land owners in the rural area. This process would also reduce the time commitment required of reviewing agencies as the growth area would be, for all intents and purposes, pre-permitted for impacts to this protected resource. Projects outside of the growth area would not be limited in any way; however, they would not be eligible for the streamlined permitting process and would go through the federal and state regulatory processes in place at the time. Two interested towns have been working with the regulators, planners, and resource experts to test drive this approach. A list of participants includes the DEP, MDIFW, Army Corps of Engineers, EPA, town planners, economic development directors, land trusts, conservation commissions, development consultants, spatial analysts, and members of University of Maine Sustainability Solutions Initiative.

How it works

1. An interested town must have a consistent comprehensive plan and subsequent land use ordinance in place. The town must also have completed an inventory of its vernal pools.

2. The town informs DEP and MDIFW that it has an interest in developing regulatory streamlining for vernal pools in its growth area(s).

3. MDIFW and vernal pool experts work with the town to assess the vernal pool resources in the growth and rural areas. Together they create a streamlined regulatory plan. Based on the vernal pools in the designated growth area(s), vernal pools in the rural area(s) are identified that, if protected through

acquisition or easement, can serve as compensation for impacts to the growth area vernal pools. The town identifies the willing landowners with vernal pools on their rural properties. The DEP, MDIFW, EPA and USACE sign off on the streamlined regulatory plan. They relinquish their regulatory authority over this resource in the growth area as long as each time a vernal pool in the growth area is impacted by a development the corresponding vernal pool conservation is undertaken in the rural area. Willing landowners in the rural areas with vernal pools on their property would receive a payment for their vernal pools if they were willing to put a conservation easement on the area.

4. If the town has the ability to fund the first steps of the vernal pool mitigation plan, they go ahead and complete that transaction. This allows the municipality to advertise that development in the growth area which impacts vernal pools is free from vernal pool regulations increasing predictability and decreasing processing time and fees. The developer repays the municipality according to a pre-established formula and proceeds.

If the town is not able to raise the funds to 'prepay' for the first development that will happen when the first developer comes into the picture. Based on the impacts the development will have, the developer pays into a fund which is then used to purchase the development rights in the rural area based on the streamlined regulatory plan.

5. The town reports back to DEP and ACOE each year indicating what transactions have taken place.

How each of the parties benefits:

Developers: don't have to be concerned with impacts to vernal pools on their site. They are not delayed by seasonal considerations in the identification of vernal pools or by the permit process for this resource.

Willing rural land owners: receive payment for extinguishing the development rights surrounding vernal pools on their property either through acquisition in fee or easement.

Municipalities: are seen as business friendly and transparent by developers. Growth is drawn into designated growth areas reducing the expense of providing services to growth which occurs in outlying rural areas. Community character is enhanced and preserved as growth areas become more vibrant and rural areas maintain their rural qualities.

Natural resources: are protected in areas where their long-term viability is most assured.

These tailored plans better protect the natural resource, increase economic opportunities, and allow towns to more directly shape how they do business.