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STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN ELIAS BALDACCI
GOVERNOR

DAVID P. LITTELL
COMMISSIONER

February 11, 2009

Senator Seth A. Goodall, Senate Chair
Representative Robert S. Duchesne, House Chair
Joint Standing Committee on Natural Resources
124th Maine Legislature
100 State House Station
Augusta, Maine 04333

Subject: Report on Special Fees Assessed

Dear Chairman Goodall and Chairman Duchesne:

The maximum amount that may be assessed under the State's authority to charge so-called "special fees" for evaluating environmental license applications was temporarily increased in a law enacted last year. D.E.P. proposed that increase as a result of an unprecedented number of large-scale energy development projects whose developers had either filed license applications or had indicated near-term filing. At the time of Committee deliberations on the special fee proposal at least a dozen pre-application meetings had occurred, ranging from liquefied natural gas (L.N.G.) facilities, to grid-scale wind power projects up to 800 MW, and transmission corridor upgrades, all totaling proposed costs well in excess of \$2 Billion.

Modifications to the special fee law were enacted so that costs expected to be well in excess of the \$75,000 maximum (which had been in place since 1999) could be recovered. Enactment of that change was in part made contingent on it being evaluated for permanent codification. The unallocated section of the Laws of 2007, c. 655, required the following:

Sec. 20. Report on special fees. By February 1, 2009, the Department of Environmental Protection shall submit to the joint standing committee of the Legislature having jurisdiction over natural resources matters a report on special fees assessed pursuant to the Maine Revised Statutes, Title 38, section 352, subsection 3. The joint standing committee of the Legislature having jurisdiction over natural resources matters has authority to submit legislation relating to the report.

This report briefly describes D.E.P.'s recent history with requiring the payment of "special fees" for the processing of license applications. The report also describes related longstanding statutory provisions of which we believe the Committee should also be aware as it deliberates over D.E.P.'s recommendations.

BACKGROUND. The State's environmental license application fees are intended to cover the cost of processing an application as well as post-decision monitoring of compliance. (*see* 38 M.R.S. § 352(1)) In situations where the costs for a particular application are expected to significantly exceed the amount published by D.E.P. in an annual fee schedule, the commissioner may invoke a special fee. (*see* 38 M.R.S. § 352(3)) As demonstrated later in this report by the number of applications received versus the number of times these fees have been assessed, use of

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17 STATE HOUSE STATION	106 HOGAN ROAD	312 CANCO ROAD	1235 CENTRAL DRIVE, SKYWAY PARK
AUGUSTA, MAINE 04333-0017	BANGOR, MAINE 04401	PORTLAND, MAINE 04103	PRESQUE ISLE, MAINE 04769-2094
(207) 287-7688 FAX: (207) 287-7826	(207) 941-4570 FAX: (207) 941-4584	(207) 822-6300 FAX: (207) 822-6303	(207) 764-0477 FAX: (207) 760-3143
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the State's special fee authority is now, and has always been, reserved for extraordinary situations that warrant special treatment given the workload associated with the applications. The special fee law, as amended, reads:

3. Maximum fee. The commissioner shall set the actual fees and shall publish a schedule of all fees by November 1st of each year. If the commissioner determines that a particular application, by virtue of its size, uniqueness, complexity or other relevant factors, is likely to require significantly more costs than those listed on Table I, the commissioner may designate that application as subject to special fees. Through August 31, 2009, a special fee may not exceed \$250,000. Beginning September 1, 2009, a special fee may not exceed \$75,000. Such a designation must be made at, or prior to, the time the application is accepted as complete and may not be based solely on the likelihood of extensive public controversy. All department staff who have worked on the review of the application, including, but not limited to, preapplication consultations, shall submit quarterly reports to the commissioner detailing the time spent on the application and all expenses attributable to the application, including the costs of any appeals filed by the applicant and, after taking into consideration the interest of fairness and equity, any other appeals if the commissioner finds it in the public interest to do so. The costs associated with assistance to the board on an appeal before the board may be separately charged. The processing fee for that application must be the actual cost to the department. The applicant must be billed quarterly and all fees paid prior to receipt of the permit. Nothing in this section limits the commissioner's authority to enter into an agreement with an applicant for payment of costs in excess of the maximum special fee established in this subsection.

RECENT HISTORY. In Fiscal Year 2008 (FY08), D.E.P. received a total of 4,269 license applications, 1,700 of which were standard applications. Projects that, by virtue of size, uniqueness, or complexity, might be appropriate for special fees would be filed under a standard application and the alternative maximum fee in 38 M.R.S. § 352(3). In FY08, no project application filed was subject to special fees. In FY07, 2,000 standard applications were received; of these, two L.N.G. import terminal project proposals were designated for special fee assessment. Prior to these two projects, the last special fee designation regarded initial development of the Maritimes and Northeast Pipeline in December 1997.

Although applications have not been filed, under provisions contained in last year's amendments to the special fee law, an agreement has been signed with Central Maine Power regarding the fees it will pay for evaluation of its proposed transmission corridor upgrades. This project has been described to D.E.P. as affecting over 542 miles in length of new transmission line and has over 3,662 abutters; with estimated costs over \$1.4B, it is expected to be the most expensive, and have the most significant physical footprint, of any project ever evaluated by D.E.P.

D.E.P. record on invoking special fees shows that they are project specific, rather than presumptively applicable to certain categories of development. For example, thus far this year two grid-scale wind power development proposals had applications filed with D.E.P. for evaluation but neither is having special fees assessed because the project size, uniqueness, or complexity does not warrant them. However, D.E.P. is using recent statutory authority provided for wind energy projects to have peer review costs paid by applicants, in one current instance specifically assessing the cost to the developer of hiring a peer reviewer to evaluate a required noise study.

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RECENT CASE STUDY: Downeast LNG, Inc. Of the L.N.G. import terminal applications filed thus far, Downeast LNG, Inc. provides the most complete example of how D.E.P.'s special fee authority works since it proceeded much further in the application evaluation process than the other applicant. (At this time, none of these applications remain pending with the State since Downeast LNG was withdrawn and the other applications were dismissed.)

Downeast LNG filed applications with D.E.P. in January 2007 that proposed development of a L.N.G. import terminal on an 80-acre parcel in Robbinston, Maine. The environmental protection related licenses it required from the State for that proposal were under the Site Location of Development Act, Natural Resource Protection Act, and MPDES Stormwater laws for development at the Robbinston parcel and the areas affected by a send-out pipeline that needed to run between the import terminal and its connection to the Maritimes and Northeast Pipeline approximately 25 miles to the north. The project also required evaluation because of air emissions that would result from operation of the facility. This project required detailed engineering and scientific analysis beyond other project proposals. The scope of an L.N.G. import terminal proposal placed demands on the State beyond any typical application filed with D.E.P. The size, uniqueness and complexity of this proposed project made it appropriate for special fees. In addition, for such an application, the process for Downeast LNG included Board of Environmental Protection (Board) consideration of, and its decision to take, jurisdiction over processing the application pursuant to 38 M.R.S. § 341-D(2). This assumption of jurisdiction required D.E.P. staff to provide technical support to the Board, and included the scheduling of public hearings and intervention in the matter by qualifying individuals or organizations.

At the time Downeast LNG's applications were accepted as complete for processing, the maximum special fee under 38 M.R.S. § 352(3) was \$75,000. Designation of the Downeast LNG applications for invocation of special fees proved necessary and appropriate since \$75,000 in costs were incurred, justified and billed to the applicant by the end of the public hearings. If Downeast LNG had not then withdrawn its applications, the State would then be in the position of subsidizing remaining costs from fees paid by much smaller applicants or other funding sources. This was also prior to any appeal that may have come after the Board issued a decision, and the costs of any such appeal would also have been absorbed.

RELATED AUTHORITY: Hydropower Projects. In another licensing area, the Legislature has recognized that projects warrant processing fees assessed using the size of a proposal in order to have the expected level of effort in line with the costs likely to be incurred by D.E.P. Hydropower projects are assessed application processing and licensing fees based on the megawatts of electricity proposed for, or actually, generated. The fee in 2008-2009 for a new hydropower facility is \$703 per megawatt. With typical hydropower projects being less than 50 megawatts, this has proven to be a sensible fee structure. However, for extraordinary projects the fee is not commensurate with the required effort.

A recent large-scale energy project has raised questions about this existing fee schedule. The Riverbank hydropower project, a 1,000 megawatt pumped storage facility to be located in Wiscasset along the Sheepscot River, is larger by far than any other hydropower project built in the state or region. This underground storage project (described more fully at www.riverbankpower.com) relies on drawing water from the Sheepscot River and moving it

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through underground turbines to generate electricity at peak hours and then return the water to the river at off-peak times.

RELATED AUTHORITY: Land Use Regulation Commission. In 2005, LURC used D.E.P.'s special fee authority as a guide when it sought establishment of an analogous provision for the fees it could charge when receiving an extraordinary application. The relevant portions of the law applicable to LURC projects reads:

§685-F. Extraordinary projects

1. Designation as extraordinary project. The director of the Maine Land Use Regulation Commission, referred to in this section as "the director," may designate a proposed project requiring review and approval under this chapter as an extraordinary project when the director determines that, because of the project's size, uniqueness or complexity, review of the project application is likely to:

A. Significantly impair the capacity of the commission's staff and cooperating state agencies to review other applications in a timely manner; or

B. Require the commission to incur costs that exceed the funding provided in accordance with section 685-D.

A project is considered to significantly impair the capacity of the commission's staff if review of that project is likely to occupy the equivalent of at least one person working full-time on that project for a minimum of 4 months. Designation as an extraordinary project must be made at or prior to the time the application is accepted as complete. The director shall notify the applicant in writing upon making the designation.

2. Processing fee. The processing fee for a project designated as extraordinary is the sum of the actual costs associated with review of that project application. These costs include, but are not limited to, costs of personnel, supplies, administration, travel, specialized computer software, services needed for review of that project, including review provided by other state agencies, and contracting for legal and consulting services. The director shall provide the applicant with an estimate of the processing fee for a project with a breakdown of anticipated costs. The applicant must pay 1/2 of the estimated processing fee prior to the beginning of the project review. The applicant must be billed quarterly for the remainder of the fee. The director shall deposit all processing fees in a dedicated account from which expenses attributable to the application review are paid. The commission shall withhold a decision on the project until the entire processing fee is paid. The director shall return all unspent funds to the applicant within 120 days of the commission's decision on the application.

Although the specification of certain expenses types differs from D.E.P.'s special fee authority, the fundamental difference between the laws is that there is no limit on the total fee that may be required from a LURC applicant. Since the stated goal of the LURC statute is allowing the agency to recover the actual costs of processing, similar to the stated goal under D.E.P.'s statute, this absence of a limit has proven appropriate for certain truly extraordinary projects. For example, Plum Creek Maine Timberlands, LLC, has thus far been billed \$1,170,316 by LURC for the actual costs incurred processing the company's Moosehead Lake area development proposal, with an additional \$383,435 projected for costs during the remainder of FY09.

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RECOMMENDATIONS. Historically D.E.P. has been extremely judicious in its use of special fees. We believe the recent experience with Downeast LNG, Inc. illustrates that the former maximum (\$75,000) fee is not adequate to allow the State to recoup the costs of processing extraordinary applications. We believe that last year's changes to the special fee law (38 M.R.S. § 352(3)) are appropriate for permanent codification, along with one clarification in fee provisions applicable to hydropower projects. Specifically, D.E.P. recommends that the law be amended to:

1. Allow the State to recoup costs commensurate with the level of effort associated with extraordinary projects while making the potential maximum a predictable amount. We believe last year's amendment of the maximum fee (to \$250,000) represents a reasonable compromise that would in nearly all circumstances be proportionate to work effort needed to process the type of proposal that would be subject to special fees. Appended to this report is draft legislative language that accomplishes this recommendation.

2. Set a maximum fee for hydropower projects. We believe an appropriate maximum for even the largest projects currently existing in Maine should be consistent with the special fee authority. Appended to this report is draft legislative language that accomplishes this recommendation.

If I can provide any additional assistance on this report or any issues related to it, please contact me by telephone at 287-8662.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Littell', with a large, sweeping flourish extending to the right.

David P. Littell
Commissioner

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An Act Regarding Environmental License Application Processing

Emergency preamble. Whereas, acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, current law specifying a cap on special fees associated with an application before the Department of Environmental Protection provides for a significantly reduced maximum fee as of September 1, 2009; and

Whereas, the reduced special fees are not adequate to allow for appropriate processing of applications that because of their size, uniqueness, complexity or other relevant factors are likely to require significantly more costs than otherwise provided for;

Whereas, the fee currently specified in law for a hydropower project with new or expanded generating capacity may result in an unnecessary fee for hydropower projects;

Whereas, it is therefore necessary to promptly adjust these fees;

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 38 M.R.S. § 352, sub-§ 3, is amended to read:

3. Maximum fee. The commissioner shall set the actual fees and shall publish a schedule of all fees by November 1st of each year. If the commissioner determines that a particular application, by virtue of its size, uniqueness, complexity or other relevant factors, is likely to require significantly more costs than those listed on Table I, the commissioner may designate that application as subject to special fees. ~~Through August 31, 2009, a~~ The maximum special-fee for processing an application may not exceed \$250,000. ~~Beginning September 1, 2009, a special fee may not exceed \$75,000.~~ Such a designation must be made at, or prior to, the time the application is accepted as complete and may not be based solely on the likelihood of extensive public controversy. All department staff who have worked on the review of the application, including, but not limited to, preapplication consultations, shall submit quarterly reports to the commissioner detailing the time spent on the application and all expenses attributable to the application, including the costs of any appeals filed by the applicant and, after taking into consideration the interest of fairness and equity, any other appeals if the commissioner finds it in the public interest to do so. The costs associated with assistance to the board on an appeal before the board may be separately charged. The processing fee for that application must be the actual cost to the department. The applicant must be billed quarterly and all fees paid prior to receipt of

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the permit. Nothing in this section limits the commissioner's authority to enter into an agreement with an applicant for payment of costs in excess of the maximum special fee established in this subsection.

Sec. 3. Effective date. This Act is effective September 1, 2009.

SUMMARY

The amendment provides that fees associated with an application processed by the Department of Environmental Protection may not exceed \$250,000.