

MAINE STATE LEGISLATURE

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**STATE OF MAINE
114TH LEGISLATURE
FIRST REGULAR SESSION**

*Final Report
of the*

**SUBCOMMITTEE TO
EVALUATE THE
BOARD OF ENVIRONMENTAL PROTECTION**

*to the
Joint Standing Committee on
Energy and Natural Resources*

December 1989

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I. EXECUTIVE SUMMARY

Environmental regulation has changed dramatically in the past two decades both in terms of scope and complexity. The mandate for Maine's primary environmental regulatory agency has not kept pace. With the exception of the Trafton Commission in 1982, the enabling legislation for the Board of Environmental Protection has never been comprehensively reviewed while the mandate, scope and purpose of the Board have changed considerably. The purpose of this study was to review the current role, structure, functions and enabling legislation of the Board of Environmental Protection and to recommend any needed changes.

Three major trends have marked the history of the Board. First, there has been a shift since its inception in the early 1940s, from technical members representing state agencies or specific interest groups to nontechnical, public members. Second, the scope and mandate of the Board has expanded from its original, limited control over water pollution to the regulation of a wide variety of environmental impacts including land development, solid and hazardous waste, and air pollution. Finally, as a reflection of the more complex and expanded mandate of the Board, the need to delegate routine functions to the commissioner and agency staff has increased.

The Joint Standing Committee on Energy and Natural Resources requested permission from the Legislative Council to establish a 6-member subcommittee to evaluate the structure and function of the Board of Environmental Protection. The Council convened a subcommittee that met throughout the 1989 interim. This report reflects the subcommittee's findings and suggested changes.

In summary, the subcommittee finds that the state is best served by the retention of the nontechnical citizen membership of the Board of Environmental Protection. In addition, the subcommittee finds that the Board must sustain itself as an independent decision-making body, distinct from the Commissioner and the agency staff. Finally, the subcommittee finds that the opportunity for public input into environmental decisions should be improved.

To achieve these ends, the subcommittee has recommended a variety of changes which are described in detail in section IV. Most importantly, the Board should be provided with a small professional staff of its own. This will allow the preservation of a truly independent Board to oversee implementation and administration of the environmental mandates enacted by the Legislature.

In addition, the subcommittee recommends that the functions of the Board and the Commissioner be clearly delineated. The Commissioner should be responsible for all administrative matters and routine licensing and enforcement activities. The Board should hear appeals of the Commissioner's decisions, have final authority over all rule-making, retain jurisdiction over any controversial or precedent-setting applications, and should have final authority over the settlement of enforcement actions.

Finally, a variety of significant, but smaller changes should be made in support of these two basic recommendations.

II. INTRODUCTION

This study and recommended legislation are a result of LD 722, "An Act to Redesign the Structure of the Board of Environmental Protection" sponsored by Sen. Kany, Speaker Martin, President Pray and Rep. Michaud. The bill cited the need for a comprehensive review of the Board of Environmental Protection's role, structure, function and enabling legislation. LD 722, as amended, is attached as Appendix A.

The Subcommittee met 5 times over the interim. All meetings were open to the public. The public was twice invited to present their views on the purpose of the Board and any suggestions for change. The Subcommittee recommended statutory changes which were accepted by the full Joint Standing Committee on Energy and Natural Resources. A draft bill is included in Appendix D. Suggested changes and the background for those changes are outlined in Section IV.

As a point of interest, the term "department" is used throughout this report to refer to the combination of the staff agency and the Board. This is consistent with the statute though not always with common usage. If the text refers specifically to the Board, the Commissioner, or the agency, those terms are used.

III. HISTORY OF THE BOARD OF ENVIRONMENTAL PROTECTION

General Trends. Although 1971 is often cited as the inception of the Board of Environmental Protection, the Board actually had its origins in the early 1940s. Since that time, three major trends have marked its history and are highlighted in this section and in Appendix B.

First, there has been a shift from members with technical expertise representing either state agencies or the regulated community to nontechnical members of the general public. Technical expertise is not a prerequisite for membership at this time.

Second, the regulatory scope and mandate of the Board has expanded from licensing wastewater discharges to include licensing of all significant land developments and almost every form of environmental pollution. The Board is also now charged with interpreting its legislative mandate through rule-making and thus guiding all departmental actions.

Third, as the Board's mandate has grown in scope and complexity, the practical need to delegate routine licensing, permitting and certification functions to the commissioner and agency staff has increased. Maintaining the decision-making independence of the Board has thus emerged as a major issue.

History. The Sanitary Water Board (SWB), an eight member board composed of technical people created in 1941, is the forerunner of the current Board of Environmental Protection. The duty of the SWB was to "recommend methods of preserving Maine's waters to those causing pollution". They were staffed by the Chief Sanitary Engineer. The SWB was empowered to license new discharges into Maine waters in 1945, although existing discharges were exempted. The mandate of the SWB and environmental regulation throughout the 1940s was to prohibit new major nuisance discharges into Maine's waters.

In 1951, the SWB was renamed the Water Improvement Commission (WIC) and the composition changed to include the Commissioner of Health and Welfare, representatives from the regulated community, as well as 2 public members. The duties of the WIC were expanded to include making recommendations for classification of state waters to the Legislature. The water pollution duties of the WIC were strengthened throughout the 1950s to include the right of entry into the facilities of dischargers and a requirement that all plans for drainage, sewage treatment and disposal be submitted to the WIC. Changes to the WIC's powers and duties during the early 1960s were few and were focused on municipal treatment plants.

In the late 1960s the mandate of the WIC changed dramatically reflecting a greater societal awareness of environmental problems. The WIC was renamed the Water and Air Environmental Improvement Commission in 1967, as the mandate of the commission was expanded to include the regulation of air pollution. The Commission was expanded to the current Board size of 10 members. The 2 new members were to be knowledgeable in the area of air pollution.

In 1969, the Commission was renamed the Environmental Improvement Commission (EIC), and the composition changed to include only public members representing specific interests. The duty to "exercise the police power of the State to control, abate and prevent pollution", the current mandate of the Board, was enacted. The EIC was empowered to develop rules for the conduct of hearings, reflecting a greater sophistication in the hearing process. In recognition of this change, the Superior Court was required to decide appeals from EIC decisions from the existing record rather than hold de novo hearings.

In 1970, the mandate of the EIC was again expanded with the passage of the Site Location of Development Act and regulation of oil and petroleum discharges. In 1971, rule-making authority for the EIC was expanded to include all laws which it administered. Rules began to be more important in environmental regulation by the Commission as the scope and complexity of statutory coverage increased.

The structure of the current Department of Environmental Protection, including both the Board and the agency, was enacted in 1972 as part of a major reorganization of state government. The commissioner was made an ex-officio member of the Board who could only vote to break a tie. The Department's mandate expanded to include the regulation of great ponds (formerly under the Maine Forest Service) and coastal wetlands (formerly under the Wetlands Control Board). The enabling legislation for the Board was only slightly modified in this transition and, for the most part, just changed the name of the Board. In 1973, the powers of the Board were expanded to include the revocation, modification and suspension of licenses and subpoena power for issues at hearing.

Except for the inclusion of the Commissioner of the Department, the Board became a truly independent citizen board in 1975 when representation requirements for members were dropped. As in current statute, members were to "represent the broadest possible interest and experience that can be brought to bear." The delegation of environmental permits to the commissioner began in 1975, with minor site law, air emission and waste discharge permits. Emergency procedures for rulemaking and stop-work orders were enacted in 1977.

The Legislature considered a major bill to overhaul the Board and review the Department in 1981. Although the bill did not pass, Governor Brennan established the Trafton Commission to review the operations of the Department. While its

mandate included broader departmental issues such as processing times for applications and departmental staffing, the Subcommittee did recommend several changes for the Board. These included:

1. Reducing the size of the Board and requiring members to have some technical expertise;
2. Reducing the role of the Board to only hear appeals of Commissioner decisions;
3. Requiring the Chair to take on more administrative duties and in turn compensating the Chair for those functions; and
4. Removing the Commissioner from the Board.

The Trafton Commission also recognized the overwhelming regulatory task undertaken by the Board and stressed the importance of having a separate decision-making body to serve as a check on the commissioner's decisions.

The legislation recommended by the Trafton Commission was introduced late in the 1983 legislative session and covered a broad range of issues involving the entire Department. Because the bill was so broad and far-reaching, few of the changes suggested by the Commission were adopted. The Commissioner was removed from the Board and the number of permit decisions delegated to the Commissioner was expanded.

Attention has been focused on the agency rather than the Board during the second half of the 1980s. A management study undertaken by Peat, Marwick, Main & Company resulted in significant changes in how the agency functions internally, however, this review only briefly touched on functions and operations of the Board. Other than those discussed above, few significant changes have been suggested or enacted for the Board during the 1980s. One exception is that the authority to initiate enforcement matters was expanded in 1989 to include the commissioner as well as the Board.

IV. ISSUES AND RECOMMENDATIONS

1. The growing complexity of the Board's mandate threatens the strength and independence of the citizen board.

Although one of the original purposes of this study was to examine the desirability of a professional board similar in structure to the Public Utilities Commission, there was very little support for this change. The appeal of a citizen board to review and decide environmental policy in Maine is very strong. Instead of restructuring the Board, the subcommittee recommends that the existing citizen board be retained and strengthened through the addition of professional staff support. The primary purpose of the Board's staff should be to provide the Board with an independent evaluation of the information and issues presented to it.

There was disagreement within the Subcommittee regarding the number of staff required to provide the Board with background information and analysis. The majority recommends that an Executive Director be hired for the Board and that a Clerk Typist currently working for the Board be shifted from the Commissioner's accounts to the Board's account. The minority recommends that two professional and one clerical staff be assigned to the Board.

The responsibilities of the proposed staff are outlined in Appendix C, together with a breakdown of job tasks and responsibilities should additional staff be added at a later date. The Executive Director should be hired at the level of Department Bureau Directors to reflect the importance of this position. It is the subcommittee's intent that any staff for the Board report directly to the chair of the Board rather than to the Commissioner.

2. The statutory goals of the Department and Board are redundant and do not reflect the current purpose of each.

The goals of the Department and Board have been modified over the years and are redundant or inconsistent with the current functions of each.

The subcommittee recommends that the goals of the Department be redefined borrowing from current language establishing the purpose of the Board. The subcommittee also recommends that the purpose of the Board be rewritten to reflect its current duties principally as a policy-maker and as an appeals board.

3. The respective roles and duties of the Board and Commissioner need to be clearly defined in the statutes.

The statutory law is inconsistent in its use of the term "Department"; sometimes it implies the Commissioner and agency staff, sometimes the Board and Commissioner. Also, the duties of Board and the Commissioner have evolved over the years and warrant a reexamination to clarify their roles.

The Subcommittee recommends that the use of the terms, "Department", "Commissioner" and "Board" in Title 38 be reviewed and amended to reflect the current roles of each. The Subcommittee recommends that the Board be primarily responsible for rule-making and interpretation of statutes. It should also function as an appeals board. The Commissioner should be responsible for administrative functions, routine permitting, licensing and reporting requirements and most enforcement matters. The proposed legislation found in Appendix D includes only those statutory changes that involve significant amendment of existing law. The committee will receive recommended changes in the use of the terms, "Department", "Commissioner" and "Board" throughout Title 38 during their deliberations on the bill. Printed copies of recommended changes will be available at the public hearing on this bill.

4. Delegation of permitting functions is not consistent throughout the Bureaus and the Board continues to delegate scores of routine permits on an individual basis.

The Subcommittee recommends that Title 38 be amended to make all licensing decisions the responsibility of the Commissioner except for any application that the Commissioner recommends and the Board determines:

1. Is precedent-setting in that it involves a policy, rule or law that the Board has not previously interpreted;
2. Involves important policy questions that the Board has not resolved;
3. Involves important policy questions that the Board believes requires re-examination; or
4. Generates substantial public interest.

In addition, routine certification functions related to tax exemptions and wastewater treatment plant operators should be transferred statutorily to the Commissioner. Aggrieved parties will continue to have the ability to appeal decisions of the Commissioner to the Board in the proposed statutory changes.

The Subcommittee recommends that the Board retain its rule-making responsibilities and thus set standards and requirements for licensing decisions, subject to its statutory authority and legislative oversight.

5. **The Board is currently empowered to initiate enforcement proceedings, however, it is not actively involved in enforcement. The Commissioner is responsible for day to day enforcement responsibilities.**

The Subcommittee recommends that the enforcement role of the Board be changed to advise the Commissioner on both the adequacy of enforcement activities and penalties, and enforcement priorities. The Board should not be empowered to initiate enforcement actions although it should retain its authority to approve or reject administrative agreements.

In addition, any administrative agreements entered into by the Commissioner should be open for public comment for at least 7 days prior to the scheduled Board decision.

6. **The Board has myriad reporting requirements that are purely routine and should be line-agency responsibilities. Currently, the agency prepares the reports for the Board's approval.**

The Subcommittee recommends that the multiple reporting requirements for the Board within Title 38 be transferred to the Commissioner. The Board will be required to report biennially to the Legislature on the effectiveness of Maine's environmental laws and any recommendations for changes.

7. **The time and effort required by Board members to fulfill their obligations is enormous and should be reflected in their compensation.**

While the composition, terms and qualifications for Board members should remain the same, the Subcommittee recommends that the compensation for each meeting and hearing be increased to \$100 per day in recognition of the tremendous amount of preparation time required of members. A minority position on the Subcommittee recommends the members be compensated \$100 for each day of hearings and \$200 for each scheduled meeting.

The Subcommittee intends by this increase in compensation to promote Board membership that represents a broad cross-section of Maine citizens.

8. **The current quorum requirements for rule-making hearings and public hearings on applications and issues are too low to ensure informed decision-making by the entire Board.**

Currently, the Maine Administrative Procedures Act requires that four Board members be present at rule-making hearings for proposed rules. In recognition of the importance of this function, the Subcommittee recommends that quorum requirements be increased to six members for rule-making hearings. Quorum requirements for all other

Board hearings will be increased from two members to three members. The Subcommittee also expects that Board staff will attend public hearings to summarize the issues for members that are not present. Quorum requirements for Board meetings will remain at six members.

9. The statutes are not clear on the admissibility of new evidence in an appeal.

The Subcommittee recommends that the statutes be clarified to allow relevant new information to be added to the record during appeal to the Board. The Board should supplement the record established by the Commissioner when the Board finds that the evidence is relevant and that the person presenting the evidence could not reasonably have been expected to have presented the information at an earlier point in the process.

10. The Board has held hearings on proposed rules that are not ready for public hearing, wasting valuable Board time.

The Subcommittee recommends that the Commissioner be required to solicit public comment on proposed new or amended rules before asking the Board to initiate the formal rule-making process. In addition, the Subcommittee recommends that Board staff review proposed rules and evaluate whether or not the rules are ready for formal public hearing.

11. There is frequently no opportunity for public comment on the staff agency's final revisions of a proposed rule prior to final Board adoption.

The Subcommittee recommends that a 14 day period be required for review and written public comments to the Board on proposed rules prior to adoption by the Board.

12. There is currently no single coordinated source of information on pending applications and departmental decisions.

The Subcommittee recommends that the Commissioner establish and maintain a data base to track the disposition of applications and licensing decisions. The data base should serve both as a source of information on pending applications and as a reference on precedents established by previous departmental decisions. The Subcommittee also recommends that the date base be augmented by a central archive of all applications, licenses and permits. The department currently is developing such a data base.

13. There are not clear standards and procedures governing adjudicatory proceedings before the Board and ex-parte communications for matters at issue. The current structure of these proceedings also hinders effective public participation.

The Subcommittee recommends that the Board rewrite rules governing its adjudicatory hearings. A written policy for ex parte contacts should also be developed. Finally, the Subcommittee recommends that the Board provide clearly designate periods for public comment both early in the adjudicatory proceeding after the initial presentations of the parties to the proceeding and at the end of the hearing.

14. The absence of some verbatim record of Board deliberations hinders the appeals process.

The Subcommittee recommends that all proceedings before the Board be electronically recorded. Currently, a record of Board deliberations may not be available for use in an appeal. The proposed legislation includes the cost of a tape recorder.

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APPENDIX A
STUDY LEGISLATION

APPENDIX A Study Legislation

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

Whereas, the current structure of the Board of Environmental Protection was created almost 2 decades ago; and

Whereas, environmental laws, regulations and policies have become increasingly complex; and

Whereas, the expertise, time and commitment required of citizen members of the Board of Environmental Protection to perform the rule-making and licensing functions delegated to the board by the Legislature have become overwhelming in the face of increasingly complex environmental issues; and

Whereas, a comprehensive review of the role, structure and effectiveness of the current board is needed; and

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

Sec. 1. Commission established. Resolved: That the Commission to Evaluate the Structure and Function of the Board of Environmental Protection be created. The commission shall consist of 7 members representing the joint standing committee of the Legislature having jurisdiction over natural resource matters as follows: two members of the Senate, appointed by the President of the Senate; and 5 members of the House of Representatives, appointed by the Speaker of the House of Representatives. Appointments shall be made within 30 days of the effective date of this resolve. The Chair of the Board of Environmental Protection and the Commissioner of Environmental Protection shall advise and consult with the commission upon request.

Note: This legislation was never enacted. The study was conducted under the auspices of the Legislative Council. The original legislation is provided here to give the reader the general legislative intent in studying the Board of Environmental Protection.

The commission shall hold an organizational meeting at the call of the Executive Director of the Legislative Council within 45 days of the effective date of this resolve. At this meeting, the commission shall elect a chair from within the membership. The commission shall hold a public hearing and meet as needed to carry out this resolve. Legislators shall receive legislative per diem and reimbursement for expenses upon application to the Executive Director of the Legislative Council; and be it further

Sec. 2. Study. Resolved: That this commission shall study:

1. The relationship between the Board of Environmental Protection and the Department of Environmental Protection in regards to licensing and permitting authority, developing and promulgating rules and deciding appeals;
2. The current work load, staffing needs and expertise of the board as those factors affect the board's ability to make decisions independently of the department;
3. Time requirements of citizen members to attend meetings and become informed on complex environmental issues; and
4. Effective models for regulatory oversight and review of environmental decision-making in use in other states and their applicability to Maine; and be it further

Sec. 3. Work plan. Resolved: That in examining these questions the commission shall:

1. Conduct, summarize and analyze a review, including a literature search on alternative models of environmental decision-making;
2. Review the history of the relationship between the department and the board;
3. Review findings and recommendations of previous studies of the board's role;
4. Evaluate time requirements and expertise of board members to:
 - A. Review issues;
 - B. Make license and permit decisions;
 - C. Promulgate rules;
 - D. Decide appeals;
 - E. Attend meetings; and

F. Decide enforcement actions; and

5. Evaluate staffing requirements for the board based on Maine's experience and models in use in other states; and be it further

Sec. 4. Report. Resolved: That this commission shall report its findings and recommendations, together with any legislative recommendations, to the joint standing committee of the Legislature having jurisdiction over natural resource matters not later than December 15, 1989; and be it further

Sec. 5. Staff support. Resolved: That staff support shall be requested from the Legislative Council; and be it further

Sec. 6. Appropriation. Resolved: That the following funds are appropriated from the General Fund to carry out the purposes of this resolve.

1989-90

LEGISLATURE

Study Commissions - Funding

Personal Services	\$2,695
All Other	9,900

Provides funds for the per diem, meeting and related expenses of the Commission to Evaluate the Structure and Function of the Board of Environmental Protection. This amount includes up to \$5,000 for travel expenses for invited speakers from out of state.

LEGISLATURE
TOTAL

\$12,595

Emergency clause. In view of the emergency cited in the preamble, this resolve shall take effect when approved.

STATEMENT OF FACT

This amendment changes the composition of the Commission to Evaluate the Structure and Function of the Board of Environmental Protection, proposes an outline of tasks to address the questions to be studied by the commission, changes the final reporting date for the study and adds funds for travel expenses for invited speakers.

Note: the amendment replaced the original bill.

APPENDIX B
HISTORY OF THE
BOARD OF ENVIRONMENTAL PROTECTION

APPENDIX B
HISTORY OF THE BOARD OF ENVIRONMENTAL PROTECTION

1941
Sanitary Water
Board (SWB)

1945
(PL 1945 c. 345)

1947

Composition/
Compensation

Comm. of Health & Welfare
Comm. of Agriculture
Comm. of Inland Fisheries & Game
Chairman of Public Utilities
Commission
2 rep. manufacturing
2 rep. municipal
Board members receive no
compensation but travel
expenses covered

Duties/
Powers

-Study and investigate water
pollution
-Recommend methods of preserving
Maine's waters to those causing
pollution

License all new discharges into Maine waters.
Existing discharges grandfathered. Public
hearings required.
Discharge license fee = \$50

Legislation prohibits potato or potato part
discharges. Wood slab and debris discharges in
inland waters prohibited

Staff

Technical Secretary was Chief
Sanitary Engineer

Staff for Board changed to be any engineer
employed by Department of Health and Welfare

Enforcement

Attorney General given injunctive authority

Appeals

Appeals to Superior Court

Comments

Composed of technical people and
focused on water pollution.

Commission given teeth through licensing authority

Source: Office of Policy & Legal Analysis

1949
(PL 1949, c. 418)

1951
(PL 1951, c. 383)
Water Improvement Commission
replaces SWB

1953
(PL 1953, c. 403)

Composition/
Compensation

Comm. Health and Welfare
2 rep. from manufacturing
2 rep. from municipalities
2 rep. from general public
Required to meet at least 2 times per year

Board compensated \$10 per day

Duties/
Powers

Deposition of wood slabs and wood
debris into tidal waters
prohibited

Assumed duties of SWB
May recommend to Legislature classification of
state waters

Strengthened water classification system
Public hearings on classifications required and 2
members must attend
Required to make recommendations on water
classification after public hearings

Municipalities regulated by Board for discharges
Required to conduct surveys of water pollution
Exemptions for grandfathered discharges into
certain rivers given deadline of 1955

Staff

Director of Department of Health
and Welfare may staff the Board

Empowered to employ consultants, however
encouraged to use technical personnel employed by
the State

Enforcement

Empowered to enforce statutes and regulations
under its control (water discharge licenses)

Appeals

Comments

Public members added to commission representing
specific constituencies

1955
(PL 1985, c. 425)

1957
(PL 1957, c. 365)

1959
(PL 1959, c. 295)

Composition/
Compensation

Added 2 representatives of
conservation interests

Duties/
Powers

Right of entry granted
Empowered to accept federal funds
for sewage treatment grants

Consult and advise on water pollution and sewage
systems
Develop standards for municipal treatment
facility operations
Plans for drainage, sewage treatment and disposal
required to be submitted to commission for advice
Had money for grants to treatment facilities to
cover 20% of the costs

Required to keep records of all proceedings
Grandfathered discharges as follows:
sewage treatment facilities before 1959
industries before 1953

Staff

Enforcement

Appeals

Justice of the Superior Court allowed to request
additional information in deciding appeal - is
able to make an independent decision

Comments

1961
(PL 1961, c. 305)

1963
(PL 1963, c. 412)

1965

Composition/
Compensation

No significant changes

Duties/
Powers

Approval required for plans for
new drainage, sewage treatment
and disposal facilities built
by municipalities or sewer
districts
Empowered to enforce reasonable
standards for operation and
maintenance of municipal
treatment facilities

Staff

Enforcement

Appeals

Appeals of commission decisions to State
Administrative Hearing Commissioner, part of
larger reorganization of appeal procedure in
State government

Comments

Not alot of change in early 1960's. Activities
focused on municipal treatment plants

1967
(PL 1967, c. 475)
Water and Air Environmental
Improvement Commission

1969
(PL 1969, c. 431, c. 499, c. 571)
Environmental Improvement Commission

1970

Composition/ Compensation	2 members knowledgeable in air pollution added, brings total to 10 members	Commissioner of Health and Welfare dropped from Commission. All public members now representing specific interests 3 members required for quorum	
Duties/ Powers	Required to study air pollution abatement and report to Legislature Give technical assistance to local air pollution agencies	Required to establish air quality regions Required to establish ambient air quality standards and emission standards "Duty to exercise police power to control, abate and prevent pollution" Statutes allow licenses to be granted for less than 1000 gpd without hearing Grant air pollution licenses and permits Cease and desist for air pollution violations Remediation costs recoverable May make rules and regs for conduct of hearings Presiding member of Commission may administer oaths to witnesses giving testimony pH of discharges regulated	Commission approves or rejects site law permits License oil terminals and facilities Discharges of oil and petroleum products prohibited Site law passed
Staff		Director hired at pleasure of the Commission	
Enforcement	Violators may have hearing before the Commission. Commission forwards findings to Attorney General		
Appeals	Civil appeals returns to Superior Court	Appeal proceedings before Superior Court not <u>de novo</u> . Court decides the case on the merits of the existing record	
Comments	Tightened water purity standards Purview extends to air	Hearings become more formal	Expansion of duties to regulate development and oil and petroleum discharges

1971
(PL 1971, c. 256, c. 359, c. 414, c. 461, c. 527)

1972
(PL 1972, c. 618)
Current BEP/DEP established

1973
(PL 1973, c. 217, c. 450)

Composition/ Compensation	Six members for quorum except for hearings Per diem increased from \$10 per day to \$25 per day	Adds commissioner of DEP as ex-officio member, may only vote to break a tie	
Duties/ Powers	All plans for new industrial discharges must be submitted to the Commission All dischargers required to report to the Commission Rule-making authority of Commission extended to all laws which it administers - previously had it only for water discharge licenses and site law permits Authority to hold hearings extended to employees or representatives. Emergency preamble for legislation references hearing examiners and an overloaded schedule Commission establishes discharge license fees	In addition to assuming duties of previous EIC, BEP now regulates -Great Ponds alteration -Coastal Wetlands activities Undertakes duties of the Maine Mining Commission Solid waste duties	Conduct of hearings formalized re: fees, when info not public, processing times. BEP may revoke, modify or suspend licenses that it issues. BEP given subpoena powers Open burning dumps grandfathered to 1975 Maine water pollution laws brought into conformity with federal law
Staff	44 member staff for Agency	Commissioner empowered to employ consultants Commissioner appointed by Governor with advice of the Legislative Council	
Enforcement	Attorney General empowered to institute injunctive proceedings for regulations. Violation of regulations subject to penalties		Penalty ceilings increased substantially
Appeals			
Comments	Regulation of coastal wetlands enacted - under auspices of Wetlands Control Board Rules become more important in environmental enforcement	Very little statutory language is changed in the transition from EIC to BEP	

1974
(PL 1973, c. 712, c. 788)

1975
(PL 1975, c. 288, c. 395, c. 614)

1976
(PL 1975, c. 771)

Composition/
Compensation

Conflict of interest provision enacted for members that earn a substantial portion of their income from license or permit holders or applicants to bring Maine in compliance with Federal Water Pollution Control Act

Representation requirements for members dropped
"Members shall represent the broadest possible interest and experience which can be brought to bear."
Per diem increased to \$40 per day

Commissioner becomes nonvoting member
BEP appointments approved by ENR Committee rather than Legislative Council

Duties/
Powers

Empowered to grant variances for open-burning dumps
BEP may delegate to commissioner
-Site law permits
-Waste discharge permits
-Air emission licenses
Subject to ceiling set on size of activity

Staff

Enforcement

Appeals

Appeals of Commissioner-delegated decisions to the BEP

Comments

Delegation of permitting authority to the department begins
BEP becomes a purely citizen board except for commissioner

1977
(PL 1977, c. 300)

1978
(RL 1977, c. 596)

1982
Trafton Study Recommendations
(Most NOT Enacted)

Composition/
Compensation

4 year terms

Recommended reducing size from 5 to 10 (Quorum = 4)
Remove Commissioner from Board
Staggered terms
Require technical competence of members in some of
the issues before the Board

Duties/
Powers

Hearing process formalized
Rule-making formalized
BEP empowered to adopt emergency
rules
Citizens may petition BEP to
promulgate rules
BEP may order violators to take
actions immediately to reduce
danger - appeals are to the BEP

Chair should be taking on more administrative
duties and compensated for that time

Staff

Commissioner may reorganize the DEP with the
approval of the BEP

AG should continue to provide legal advice but BEP
may need to contract out services

Enforcement

Appeals

Party may ask BEP to reconsider
decision, then appeal to
Superior Court
Court's review of BEP decisions
limited to points of law or
procedural questions

Recommended role be primarily for appeals of
commissioner decisions
De novo appeals

Comments

Necessary to have separate decision-making board
Public input difficult
Decisions not consistent
Too much work for adequate review
Note:-The bill incorporating these changes was
introduced late in the session. Few changes were
adopted. The bill also recommended changes to
the agency

1983
(PL 1983, c. 596)

1984
(PL 1983, c. 743)

1986
(PL1985, c. 746)

Composition/
Compensation

Commissioner no longer ex-officio
member of BEP (Trafton
recommendation)
Governor appoints chairman

2 members of BEP required to attend every hearing
Legislative per diem

Termination provisions for members tightened

Duties/
Powers

Delegations to Commissioner
expanded to include:
-Great pond permits
-Oil discharge licenses
-Hazardous waste transporter
licenses
-Solid waste permits
-License renewals (Trafton
recommendation)
Permit by rule authorized
Commissioner given more
administrative functions of BEP
Financial transactions shifted to
Commissioner
Budgeting done by Commissioner

Hearings for permits delegated to Commissioner not
required to have BEP members present
BEP & Commissioner given subpoena power for any
matter at issue for a hearing

Staff

Commissioner may reorganize the
DEP after consultation with BEP

Enforcement

*Appeals

Comments

Purely citizen board
Maine Environmental Protection
Fund established.

1987
(PL 1987, c. 125)

1988

1989
(PL 1989, c. 311)

Composition/
Compensation

At least 4 members from each
congressional district
No member may serve more than 2
terms

Duties/
Powers

Staff

Proposed BEP staff not funded in Part II Budget

Enforcement

Enforcement duties shifted from BEP to both board
and Commissioner

Appeals

Comments

Peat Marwick Main & Co. analyzes management needs of DEP, significant changes instituted. Scope more limited than the Trafton report

Legislative Council sponsors study to review the BEP

APPENDIX C
BOARD OF ENVIRONMENTAL PROTECTION
STAFF FUNCTIONS
AND
POSITION CHARACTERISTICS

APPENDIX C

BEP STAFF FUNCTIONS

ADMINISTRATION

- Organize meeting agendas and hearings
- Develop appropriate work policies and procedures for staff, Board meetings, and hearings
- Manage the information flow and work schedule of the Board
- Provide all relevant information on applications to the Board
- Record the minutes of Board meetings and hearings
- Maintain a docket of all applications before the Board including all documents filed
- Assist the Board in reviewing the implementation of Board and department rules and policy directives
- Assist the Board in reviewing the enforcement efforts of the department
- Prepare orientation materials for new members

ISSUE RESEARCH

- Assist Board in understanding legal requirements, formulating rules, and evaluating facts
- Assist Board in understanding scientific and technical issues
- Research and identify important issues and brief the Board on these issues
- Clarify areas of dispute before the Board
- Assist the Board in reviewing past department and Board policies for consistency
- Assist the Board in reviewing department applications and licensing decisions for policy-making, precedent-setting, and controversial applications
- Assist the Board in assessing the department's recommendations on specific applications (Note the staff will not be making recommendations, but will highlight issues)
- Report to the legislature

HEARINGS

- Prepare for and do background work for public hearings
- Summarize findings of facts, issues, and laws to the Board (make no recommendations)
- Facilitate public participation by educating the public on hearing procedures
- Assist the Board in determining if proposed rules or regulations are ready for public hearings

BEP STAFF POSITION CHARACTERISTICS

EXECUTIVE DIRECTOR

- Identifies and summarizes important environmental issues of interest to the Board
- Performs diverse and complex research on issues for the Board
- Supervises the Board's staff and is responsible to the Board for staff functions
- Sets work priorities and determines methods to accomplish objectives
- Coordinates information gathering for the Board
- Serves as a liaison to the Department of Environmental Protection and the Attorney General's Office
- Provides expert, professional assistance to the Board
- Coordinates special projects
- Reviews Board products for content and consistency
- Staffs public hearings
- Reports to the chairperson of the Board
- Drafts rules and regulations

POLICY ANALYST (recommended by Subcommittee minority)

- Provides analysis of policy, technical, scientific, and legal issues to the Board
- Gathers policy, technical, scientific, and legal information for the Board
- Provides staff assistance to the executive director and the Board
- Develops public participation education for public hearings
- Staffs public hearings

ADMINISTRATIVE ASSISTANT

- Provides administrative assistance and clerical support to the staff and Board
- Assists staff in public hearing preparation and Board meetings
- Prepares materials for Board review
- Records the minutes of Board meetings and public hearings

APPENDIX D
PROPOSED LEGISLATION

89 PL c. 890

Proposed ChangesComments

12/15

Sec. X. 2 MRSA § 6, sub-§ 4 is amended to read:

4. Range 88. The salaries of the following state officials and employees shall be within salary range 88:

State Purchasing Agent;
 Director, Arts and Humanities Bureau;
 Director, State Museum Bureau;
 Director of the Bureau of Parks and Recreation;
 State Director of Alcoholic Beverages;
 Executive Director, Retirement System;
 Director of Public Lands;
 State Librarian;
 Director of Employee Relations;
 Director, Bureau of Air Quality Control;
 Director, Bureau of Land Quality Control;
 Director, Bureau of Water Quality Control;
 Director, Bureau of Oil and Hazardous Materials Control;
 Director, Bureau of Solid Waste Management; and
 Director, Bureau of Administration; and
Executive Director, Board of Environmental Protection.

This section sets the salary level of the Executive Director equal to that of DEP bureau directors.

Salary range 88 = \$38,542 to \$59,384

Sec. X. 5 MRSA § 938-A is enacted to read:

1. Major policy-influencing positions. The following positions are major policy-influencing positions within the Board of Environmental Protection. Notwithstanding any other provision of law, these positions and their successor positions shall be subject to this chapter.

This section makes the Executive Director a major policy-influencing position (i.e., serves at the pleasure of the Chair and an employee retains the ability to return to a classified position within one year of taking the job.)

A. Executive Director:

Proposed Changes

Comments

Sec. X. 5 MRSA §12004-D, sub-§2 is amended to read:

This changes a cross-reference in the statutes from §341 to §341-A and increases compensation of board members to \$100 per day. A subcommittee minority recommends \$200 per day for regulary scheduled board meetings and \$100 per day for hearings.

2. Board of Environmental Protection ~~Legislative~~ 38 MRSA §341
~~Per-Diem~~
\$100 per day §341-A
plus expenses

Sec. X. 38 MRSA § 341 is repealed.

This included general language setting up the department. Paragraph 1 is reenacted in §341-A, paragraph 2 is reenacted as §342, sub-§ 12.

Sec. X. 38 MRSA § 341-A is enacted to read:

§341-A. Department of Environmental Protection. There is established a Department of Environmental Protection, hereinafter in this Title called the "department".

1. Purpose. The department, exercising the police powers of the State, shall control, abate and prevent the pollution of the air, water and land and preserve, and prevent dimunition, of the natural environment of the State.

New purpose section adapted from the language that set forth the purpose of the board in repealed §361.

2. Composition. The department shall consist of the Board of Environmental Protection hereafter in this Title called "board" and of a Commissioner of Environmental Protection, hereafter in this Title called "commissioner".

Existing language

3. Commissioner. The commissioner shall be appointed by the Governor, subject to review by the Joint Standing Committee of the Legislature with jurisdiction over energy and natural resources and to confirmation by the Legislature.

Existing language

A. The commissioner shall serve at the pleasure of the Governor.

B. When the State receives authority to issue permits under the Federal Water Pollution Control Act, no person may serve as commissioner who receives, or during the 2 years prior to appointment has received, a significant portion of income directly or indirectly from license or permit holders or applicants for a license or permit under the Federal Water Pollution Control Act.

Because the Commissioner will now be able to approve licenses for water discharges, the Commissioner must comply with requirements under the Federal Water Pollution Control Act if the State receives authority to issue permits.

Proposed ChangesComments

C. The commissioner may delegate duties assigned to the commissioner under this Title to department staff.

4. License and permits. For purposes of this Title, licenses or permits issued by the department may be issued by either the commissioner or the board pursuant to section 341-D, subsection 2.

Sec. X. 38 MRS § 341-B is enacted as follows:

§341-B. Purpose of the board.

The purpose of the Board of Environmental Protection 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 rule-making, decisions on selected permit applications, review of the commissioner's licensing and enforcement actions and recommending necessary statutory changes to the Legislature.

§341-C. Board membership. Membership of the Board of Environmental Protection shall be governed by this section.

1. Appointments. The board shall consist of 10 members appointed by the Governor, subject to review by the joint standing committee of the Legislature having jurisdiction over energy and natural resources matters and to confirmation by the Senate.

2. Qualifications and requirements. Members of the board shall be chosen to represent the broadest possible interest and experience which can be brought to bear on the administration and implementation of this Title and all other laws which the board is charged with administering. At least 4 members shall be residents of the First Congressional District and at least 4 members shall be residents of the Second Congressional District. The boundaries of the congressional districts are defined in Title 21-A, chapter 15.

The purpose of the board has been restated to better reflect the role of an independent policy-making board.

No substantive changes to this section

Proposed ChangesComments

3. Terms. The members shall be appointed for staggered 4-year terms, except that a vacancy shall be filled for the unexpired portion of the term. No member may serve more than 2 consecutive 4-year terms.

4. Chair. The Governor shall appoint one member to serve as chair.

5. Expired terms. Any member who has not been renominated by the Governor within 90 days of the expiration of that member's term shall not continue to serve on the board unless the Governor notifies the Legislature, in writing and within 90 days of the expiration of that member's term, that extension of the member's term is required to ensure fair consideration of specific major applications pending before the board. That member's term shall terminate upon final board actions on the specific applications identified in the Governor's communication.

6. Compensation. Members shall be compensated according to the provisions of Title 5, §12004-D.

Subcommittee divided

7. Conflict of interest. Members are governed by the conflict of interest provisions of Title 5, section 18.

8. Federal Water Pollution Control Act Requirements. When the State receives authority to grant permits under the Federal Water Pollution Control Act, no person may serve as a board member who receives, or during the 2 years prior to appointment has received, a significant portion of income directly or indirectly from license or permit holders or applicants for a license or permit under the Federal Water Pollution Control Act.

§341-D. Board responsibilities and duties. The board is charged with the following duties and responsibilities.

This section sets out all the duties of the board, and is the most important section of the bill

BEP STUDY

Proposed ChangesComments

1. Rule-making. Subject to the Maine Administrative Procedures Act, Title 5, chapter 375, the board shall adopt, amend or repeal reasonable rules and emergency rules necessary for the interpretation, implementation and enforcement of any provision of law that the department is charged with administering. The board shall also adopt, amend and repeal rules as necessary for the conduct of its business.

Existing law, repealed § 343-A

A. In addition to requirements under the Maine Administrative Procedure Act, Title 5, chapter 375, any rules or rule revisions proposed for final adoption by the board shall be submitted to the board and available to the public at least 14 days prior to the scheduled board meeting at which a vote for final adoption is scheduled to take place. The board shall consider any written public comments submitted during this period. Emergency rules are not subject to this requirement.

New requirement to allow for public comment on proposed rules before they are finally adopted by the board.

2. Permit and license applications. The board shall decide each application for approval of permits and licenses that in its judgment:

- A. Involves a policy, rule or law that the board has not previously interpreted;
- B. Involves important policy questions that the board has not resolved;
- C. Involves important policy questions that require re-examination; or
- D. Have generated substantial public interest.

All routine permits and licenses will be decided by the Commissioner.

The Board will decide permits that meet these tests

The board shall assume jurisdiction over applications referred to it under section 344, subsection 2 when it finds that the criteria of this subsection have been met.

The board shall on its own motion assume jurisdiction of an application if it finds that one or more of the criteria in this subsection have been met.

The Board may assume jurisdiction over an application on its own motion.

Proposed ChangesComments

The board shall make a decision on an application within 105 working days after the acceptance of the application under section 344, subsection 1. The board may waive this time limit requirement upon a vote of 2/3 of the board members.

Existing time requirements from §344 sub-§3, waiver provision from sub-§4. Both of these will be repealed.

3. **Modification, revocation or suspension.** After written notice and opportunity for a hearing pursuant to the Maine Administrative Procedure Act, Title 5, chapter 375, subchapter IV, the board may modify in whole or in part any license, or issue an order prescribing necessary corrective action, or may act in accordance with the Maine Administrative Procedure Act to revoke or suspend a license, whenever the board finds that:

This subsection is from § 347-B, existing law. That section will be repealed and reenacted here within the duties and responsibilities of the Board.

A. The licensee has violated any condition of the license;

B. The licensee has obtained a license by misrepresenting or failing to disclose fully all relevant facts;

C. The licensed discharge or activity poses a threat to human health or the environment;

D. The license fails to include any standard or limitation legally required on the date of issuance;

E. There has been a change in any condition or circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the license; or

F. The licensee has violated any law administered by the department.

For the purposes of this subsection, the term "license" includes any license, permit, order, approval or certification issued by the department and the term "licensee" means the holder of the license.

Proposed ChangesComments

4. Reviews. The board shall review, may hold a public hearing at its discretion, and may affirm, amend or reverse any of the following license or permit decisions:

A. Final decisions made by the commissioner if a person aggrieved by a decision of the commissioner appeals that decision to the board within 30 days of the next regularly scheduled board meeting following written notification of the board of the decision. The board may supplement the record if it finds that the evidence offered is relevant and material and that:

(1) An interested party seeking to supplement the record has shown due diligence in bringing the evidence to the licensing process at the earliest possible time; or

(2) the evidence is newly discovered and could not, by the exercise of diligence, have been discovered in time to be presented earlier in the licensing process.

The board may adopt, modify or reverse findings of fact or conclusions of law established by the commissioner. Any changes made by the board under this paragraph shall be based upon the board's review of the record, any supplemental evidence admitted by the board and any adjudicatory hearing held by the board.

B. Decisions of the commissioner that the board wishes to review on its own motion within 30 days of the next regularly scheduled board meeting following written notification of the board of the commissioner's decision. The procedures for review shall be the same as provided under paragraph A; and

C. Decisions that may be appealed to the board under another statute. Unless the statute provides otherwise, the procedures for review shall be the same as provided under paragraph A.

The Board may decide to review decisions of the commissioner on its own.

(§347-A sub-§3, §1365 and others)

Proposed ChangesComments

5. Requests for reconsideration. Within 30 days of a board decision, any person aggrieved by the decision may petition the board, in writing, for:

Existing law, § 344 sub-§ 5, reorganized.

A. Correction of any part of the decision which the petitioner believes to be in error and not intended by the board;

B. An opportunity to present new or additional evidence to secure reconsideration of any part of the decision; or

C. A challenge to any fact of which official notice was taken.

The petition shall set forth in detail the findings, conclusions or conditions to which the petitioner objects, the basis of the objections, the nature of any new or additional evidence to be offered, and the nature of the relief requested.

The board shall, within 30 days of receipt of a reconsideration petition and after appropriate notice, grant the petition in full or in part, order a public hearing or dismiss the petition. Any public hearing held under this subsection shall be held within 45 days of its receipt of the petition and is at the board's discretion. The board shall provide reasonable notice to interested persons.

The running of the time for appeal under section 346, subsection 1 is terminated by a timely petition for reconsideration filed under this subsection. The full time for appeal commences and is to be computed from the date of the final board action dismissing the petition or another final board action as a result of the petition.

This paragraph provides for the restart of the appeals period during reconsideration proceedings.

The filing of a petition for reconsideration shall not be an administrative or judicial prerequisite for the filing of an appeal under section 346, subsection 1.

This is included in existing law and specifies that a party need not exhaust its remedies before appealing to court.

Proposed ChangesComments7. Enforcement. The board shall:

A. Advise the commissioner on enforcement priorities and activities;

B. Advise the commissioner on the adequacy of penalties and enforcement activities;

C. Approve administrative agreements pursuant to section 347-A, subsection 1; and

D. Hear appeals of emergency orders pursuant to section 347-A, subsection 3.

Changes to the board's enforcement charge include removal of the board's duty to initiate enforcement actions and the inclusion of the responsibility to advise the commissioner on enforcement priorities and the adequacy of penalties.

8. Reports to the Legislature. The board shall report to the joint standing committee of the Legislature with jurisdiction over energy and natural resources matters by January 15 of each year of the first regular session of a Legislature on the effectiveness of Maine's environmental laws and any recommendations for amending those laws or the laws governing the board.

Reporting requirements for the board have been streamlined to one report. The commissioner will be assigned all the department's reporting requirements.

9. Other duties. The board shall carry out other duties as required by law.

§341-E. Board meetings. Board meetings held under section 341-D, subsections 1 through 7 shall be governed by the following provisions.

1. Quorum. Six members of the board shall constitute a quorum for a vote of the board, 6 members shall constitute a quorum for rule-making hearings held by the board and 3 members shall constitute a quorum for other hearings held by the board.

Increased quorum requirements for hearings

Proposed ChangesComments

2. Record proceedings. All proceedings before the board shall be electronically recorded.

New requirement

§341-F Administration. Responsibility for the administration of the board lies with the chair.

This section sets out the administrative details of the board and staff

1. Staff. Staff of the board shall be hired by the the chair with the consent of the board.

2. Unclassified employees. Professional staff of the board shall be unclassified and may be removed by the chair with consent of the board only for cause.

3. Conflict of interest. Notwithstanding Title 5, section 18, subsection 1, each professional staff member of the board is deemed an "executive employee" solely for the purposes of Title 5, section 18.

4. Budget. The board shall prepare and adopt a biennial operating budget. This budget shall be submitted to the commissioner for inclusion in the department's budget.

5. Consultants. The board may obtain the services of consultants on a contractual basis or otherwise as may be necessary to carry out the responsibilities under this Title.

6. Cooperation with other agencies. The board is authorized to cooperate with other state or federal departments or agencies to carry out the responsibilities under this Title.

Sec. X. 38 MRS 342 sub-§ 1-A, and 2 are amended to read:

1-A. Administration of department. He The commissioner is the chief administrative officer of the department ~~Department of Environmental Protection~~ and responsible for all administrative matters of the department except as otherwise specified. ~~It is the responsibility of the~~ The commissioner ~~to~~ shall assure that all determinations made by the staff of the department are promptly rendered. ~~It is the responsibility of the~~ The commissioner ~~to~~ shall

This language changes inconsistencies and clarifies that the board staff does not report to the commissioner.

Proposed ChangesComments

resolve disputes between department staff and applicants with respect to any questions regarding requirements, interpretation or application of the laws, rules or department policy. In resolving disputes, the commissioner shall attempt to reach a fair and appropriate result given all of the circumstances of the issue before him and may utilize the services of such consultants or experts as he the commissioner determines would be helpful to resolve any disputed issue. For purposes of this subsection, staff of the department does not include staff of the board.

2. **Employment of personnel.** He The commissioner may employ, subject to the Civil Service Law, such personnel for the department and prescribe the duties of such these employees, except persons occupying the positions defined in Title 5, section 938, subsection 1, as he the commissioner deems necessary, to fulfill the duties of the department and of the board Board of Environmental Protection. For purposes of this subsection, personnel for the department does not include staff of the board.

Sec. X. 38 MRS §342, sub-§ 3 is repealed.

The language in sub§ 3 referred to delegations.

Sec. X. 38 MRS §342, sub-§3-A is enacted to read:

3-A. Negotiating agreements. The commissioner may negotiate and enter into agreements with federal, state and municipal agencies.

This new subsection adapted from subsection 3 eliminates any reference to delegation and eliminates the requirement that the commissioner have the approval of the board to make inter-agency agreements.

Sec. X. 38 MRS §342 sub-§8 and 9 are enacted to read:

8. Data base. The commissioner shall develop and maintain a data base of license applications received and decisions made by the department. The data base shall include information on all applications pending or received after January 1, 1990. For each application the data base shall include:

This new requirement will help to track the consistency of permit decisions.

The department is currently putting this data base together.

Proposed ChangesComments

- A. The type of license sought;
- B. The name and address of applicant and the name of a natural person who is the representative of the applicant;
- C. The location of the project;
- D. The date of acceptance of the application for processing;
- E. The expected date of final decision on the application;
- F. The current processing status of the application;
- G. An indication of whether the commissioner or the board will decide the application;
- H. A brief description of the project, including any substantial issues raised during the licensing process; and
- I. A brief description of the final action taken by the department, either by the commissioner or the board, on the application.

The commissioner shall maintain a central archive of all applications received and licenses issued by the department.

Proposed ChangesComments

9. Rules. The commissioner may submit to the board new or amended rules for their adoption. The commissioner shall publish notice of intent to propose a rule or rule revision no less than 30 days prior to the commissioner's submission of the proposed rule or rule revision to the board for the initiation of rule-making under section 341-D, subsection 2. The commissioner shall solicit public comment on the proposed rules during this 30 day period.

New requirement

10. Consultants. The commissioner may contract with or otherwise employ consultants for services necessary to carry out duties under this Title.

Language allowing the commissioner to hire consultants is repealed in §361, so is reenacted here. However, approval of the Board is not required.

11. Administrative duties for the board. The commissioner shall meet the administrative requirements of the board including bookkeeping, expense reimbursement and payroll matters.

The commissioner will continue to cover the administrative needs of the board.

12. Coordination and assistance for state environmental permits. The commissioner shall establish procedures to assist the public and applicants and coordinate actions for all environmental permits issued by agencies of the State for activities within the organized municipalities. Such procedures shall, to the extent practicable, ensure:

Repealed §341, paragraph 2 slightly reorganized and placed under the duties of the commissioner.

A. The availability to the public of necessary information concerning these environmental permits;

B. The provision of assistance to applicants in obtaining environmental permits from state agencies; and

Proposed ChangesComments

C. The coordination of application procedures, time schedules, application forms and similar requirements to reduce delay and duplication of effort by the applicant and the issuing agencies.

State agencies issuing environmental permits shall cooperate with the commissioner in developing and implementing procedures under this subsection.

Sec. X. 38 M RSA §343-A is repealed.

This is enacted as § 341-D, sub-§ 1
Rulemaking by the board

Sec. X.38 M RSA, §344, sub-§1 is amended to read:

1. **Acceptance and notification.** The ~~Commissioner~~ Environmental Protection commissioner shall, within 10 working days of receipt of an application, determine whether the application is in a form acceptable for processing and shall notify the applicant of the official date on which the application was accepted or the reasons why the application was not accepted. The commissioner shall notify the board of all applications accepted as complete.

This section is amended to remove any references to delegation

~~Notice shall be provided~~ The commissioner shall provide notice to the public for each application for a permit or license accepted by the commissioner. ~~Comments shall be solicited~~ The commissioner shall solicit comments from the public for each application in a manner prescribed by the board in the ~~regulations~~ rules.

~~As for those applications delegated to the commissioner under subsection 2 which do not fall under the permit by rule provisions of subsection 7, the commissioner shall, if requested by the applicant or any interested party, issue a draft permit or license and shall give reasonable notice to the applicant and to any other person who has notified the commissioner of his interest in the application before he takes final action on the application. The draft permit or license shall be made available to the applicant and to all interested persons at the Augusta office of the department at least 5 working days before the commissioner takes final action on the application.~~

This is reenacted under sub-§4-A.

Proposed ChangesComments

~~B. For those applications not delegated to the commissioner under subsection 2, the commissioner shall provide a summary of the application to the board and all interested governmental agencies and other interested parties in a manner prescribed by the board in the regulations. At least 10 working days shall be provided for the receipt of comments on the application prior to the preparation of a draft permit or license. The commissioner shall, if requested by the applicant or any interested party, prepare a draft permit or license and shall give reasonable notice to the applicant and to any other person who has notified the commissioner of his interest in the application of the date the board will act on the application. The draft permit or license shall be made available to the applicant and to all interested persons at the Augusta office of the department at least 15 working days before the board acts on the application.~~

All correspondence notifying the applicant of board or commissioner decisions shall be by certified mail, return receipt requested.

Sec. X. 38 M RSA section 344 sub-§2 is repealed.

This section referred to delegations.

Sec. X. 38 M RSA §344 sub-§§2-A and 2-B are enacted to read:

2-A. Processing time limits, decisions, and appeals. After the commissioner accepts an application for processing, the commissioner may approve, approve with conditions, disapprove or refer the application as follows:

This section replaces the language referring to delegation and gives the commissioner licensing authority for all routine permits and licenses.

A. The commissioner shall decide as expeditiously as possible if an application meets one or more of the criteria set forth in section 341-D, subsection 2, and shall request that the board assume jurisdiction of such an application. If at any subsequent time during the review of an application by the commissioner, the commissioner decides that the application falls under section 341-D, subsection 2, the commissioner shall request that the board assume jurisdiction of the application.

Existing law

This clarifies the commissioner must send an application to the board if the commissioner realizes, during the process, that the criteria of section 341-D, sub-§2 are satisfied.

Proposed Changes

Comments

B. The commissioner shall decide whether an application meets the permit by rule provisions of subsection 7 within 20 working days after notifying the applicant of acceptance of the application.

Existing law

C. For those applications which do not fall under the permit by rule provisions of subsection 7, the commissioner shall decide upon the application within 80 days after notifying the applicant of acceptance of the application.

Existing law

The commissioner may waive the time limit requirements of this subsection at the request of the applicant.

Any person aggrieved by a license or permit decision of the commissioner may appeal that decision to the board. The filing of an appeal with the board shall not be a prerequisite for the filing of a judicial appeal.

Existing law

2-B. Conflict with federal requirements. The commissioner may waive the provisions of this section for those activities which require a federal permit or license when those provisions are inconsistent with federal law.

Existing law

Sec. X. 38 MRS 344, sub-§§3, 4 and 5 are repealed.

Sub-§§3 and 4 are incorporated above and sub-§5 is picked up in §341-D, sub§5.

Sec. X. 38 MRS 344, sub-§4-A is enacted to read:

4-A. Draft decisions and commissioner recommendations. Draft permits and licenses and commissioner recommendations shall be subject to the following provisions:

This is the former §344 sub-§1 1A & B enacted here. It makes more sense within the logical sequence of this section to place it here.

A. For those applications to be decided by the commissioner which do not fall under the permit by rule provisions of subsection 7, the commissioner shall, if requested by the applicant or any interested party, issue a draft permit or license and shall give reasonable notice to the applicant and to

Proposed ChangesComments

any other person who has notified the commissioner of an interest in the application before the commissioner takes final action on the application. The draft permit or license shall be made available to the applicant and to all interested persons at the Augusta office of the department at least 5 working days before the commissioner takes final action on the application.

B. For those applications to be decided by the board, the commissioner shall provide a summary of the application to the board and all interested governmental agencies and other interested parties in a manner prescribed by the board by rule. The rule shall provide at least 10 working days for the receipt of comments on the application prior to the preparation of a draft permit or license. The commissioner shall, if requested by the applicant or any interested party, prepare a draft permit or license and shall give reasonable notice to the applicant and to any other person who has notified the commissioner of an interest in the application of the date the board will act on the application. The draft permit or license shall be made available to the applicant and to all interested persons at the Augusta office of the department at least 15 working days before the board acts on the application.

Sec. X. 38 MRS 344, sub-§8 and 9 are enacted to read:

8. Effective date of license. Except as provided in this subsection, a license granted by the commissioner is effective when the commissioner signs the license. The commissioner may attach a condition to the license requiring up to a 30 day delay in any physical alteration of the project area and any construction activity authorized by the license. A license granted by the board is effective when the chair of the board signs the license.

This language reflects the committee's intent that the commissioner may delay the effective date of a license under certain circumstances.

9. License renewals or transfers. For purposes of this section, a request for a license or permit renewal or transfer shall be considered an application.

Proposed ChangesComments

Sec. X. 38 MRS A § 345-A, sub-§ 1 is repealed.

Quorum requirements for public hearings and hearings on delegated permits

Sec. X. 38 MRS A §345-A, sub-§1-A is enacted to read:

1-A. Department hearings. The board and commissioner may hold public hearings as necessary to carry out responsibilities under this Title.

Sec. X. 38 MRS A §345-A, sub-§2 is amended to read:

2. Maine Administrative Procedure Act. Except as provided in section 347, subsection 3 elsewhere, all hearings of the Board of Environmental Protection department shall be conducted in accordance with the procedural requirements of the Maine Administrative Procedure Act, Title 5, chapter 375.

Sec. X. 38 MRS A § 347-A sub-§ 1 is amended to read:

1. General procedures. Whenever it appears to the department commissioner, after investigation, that there is or has been a violation of this Title, of rules promulgated under this Title or of the terms or conditions of any Department of Environmental Protection or Board of Environmental Protection license, permit or order, the department commissioner may do one or more of the following, including, but not limited to:

A. Resolve the violation through an administrative agreement approved by the board and the Attorney General;

Clarifies that the board does not have a role in initiating enforcement proceedings.

BEP STUDY

Proposed Changes

Comments

B. Refer the violation to the Attorney General for prosecution;

C. Schedule and hold an enforcement hearing on the alleged violation pursuant to subsection 2; or

D. With the prior approval of the Attorney General, initiate a civil action pursuant to section 342, subsection 7.

Sec. X. 38 MRS § 347-A, sub-§2 ~~13~~ is amended to read:

After hearing, or in the event of a failure of the alleged violator to appear on the date set for a hearing, the ~~department~~ commissioner shall, as soon as practicable, make findings of fact based on the record and, if ~~it~~ the commissioner finds that a violation exists, shall issue an order aimed at ending the violation. The person to whom an order is directed shall immediately comply with the terms of that order.

Clarifying role of the commissioner in enforcement proceedings

Sec. X. 38 MRS § 347-A, sub-§ 4 and 5 are enacted to read:

4. Administrative agreements. Any administrative agreements entered into by the commissioner shall be open to public inspection for 7 days prior to approval by the board to allow for written public comments to the board.

New requirement to allow for written public comment to the board on consent agreements before they are approved

5. Enforcement. All orders of the department may be enforced by the Attorney General. If any order of the department is not complied with the commissioner, shall immediately notify the Attorney General.

From repealed §347-B, placed here to reflect general application in enforcement.

Sec. X. 38 MRS § 347-B is repealed.

Revocation, modification and suspension authority of board enacted as new §341-D, sub-§3

Sec. X. 38 MRS § 361 is repealed

Old statute setting up the Board, incorporated throughout this bill. Some language requiring notification of sewer expansions is included in new §411-A and §412-B.

Sec. X. 38 MRS § 366 is repealed

Planning requirements

Proposed ChangesComments

Sec. X. 38 MRS A § 411-A is enacted to read:

§411-A. Planning

The department is authorized to establish and conduct a continuous planning process in cooperation with federal, state, regional and municipal agencies consistent with the requirements of the Federal Water Pollution Control Act as amended.

This replaces language that was repealed as part of §361

Sec. X. 38 MRS A § 412-B is enacted to read:

§412-B. Consultation on waste water disposal

1. Consultation on disposal methods. The commissioner shall consult with and advise any person proposing or operating drainage, sewerage or industrial waste systems as to the best methods of disposal. The commissioner shall consider the needs of the municipality, other municipalities and other affected persons in making any recommendations.

This replaces language that was repealed as part of §361

2. Consultation on water pollution abatement and prevention. The commissioner may consult with and advise persons or corporations who are licensed or apply for a license under this subchapter on water pollution abatement and prevention.

3. Submission of plans for waste disposal. Any person who proposes a new system of drainage, sewage disposal, sewage treatment or industrial waste disposal into any waters of the state shall submit plans and specifications for the system to the commissioner for approval. Purely storm water systems located in or on or draining from public ways and any alterations in existing facilities are exempt from this requirement.

Sec. X. 38 MRS A §554 is repealed

Reporting requirement in oil discharge prevention law. Not relevant

BEP STUDY

Proposed ChangesComments

Sec. X. By January 15, 1991, the board shall adopt rules pursuant to this section and shall report to the Joint Standing Committee of the Legislature with jurisdiction over energy and natural resources matters on the following:

This section requires the board to adopt rules addressing adjudicatory hearings, ex parte communication and public comment periods.

1. **Ex parte contacts.** Criteria governing what constitutes a prohibited ex parte contact for matters subject to rule-making, hearings and matters on the board agenda. The criteria shall address contacts between members of the board and its staff, and staff of the commissioner, the applicant, other parties and interested members of the public.

2. **Adjudicatory proceedings.** Criteria for when an adjudicatory hearing will be held by the board, procedures for requesting an adjudicatory hearing, procedures governing requests for intervention and intervention rights.

3. **Public participation.** Procedures governing public participation in adjudicatory hearings. These procedures shall provide for the public to comment initially after a brief presentation by each party during an adjudicatory hearing. This public comment period shall precede presentation of witnesses and cross examination by the parties. A final public comment period shall also be allowed after the parties have presented their case.

APPENDIX E
BIBLIOGRAPHY

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BIBLIOGRAPHY

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