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**Board of Environmental Protection
Recommendations and Summary of Activities
Calendar Year 2006**

Maine Department of Environmental Protection
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January 2007

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**Board of Environmental Protection
Report to the Joint Standing Committee on Natural Resources**

Recommendations and Summary of Activities for Calendar Year 2006

I. Introduction

Title 38 section 341-D(7) requires the Board of Environmental Protection to report to the Joint Standing Committee on Natural Resources by January 15 of the first regular session of each Legislature on the “effectiveness of the environmental laws of the State and any recommendations for amending those laws or the laws governing the board”. In addition to providing recommendations, it is also customary for the Board to provide a summary of its activities for the calendar year.

II. Membership

In 2006, there were the following changes in Board composition.

Chairmanship

On December 27, 2006 Matthew Scott resigned the Chairmanship for personal reasons, but will remain on the Board as a regular member. Governor John E. Baldacci accepted Mr. Scott’s resignation with thanks for his guidance of the Board since his appointment as Chair in June 2005. Governor Baldacci appointed Virginia Plummer of Turner as Chair for the remainder of her term on the Board, citing Ms. Plummer’s seven years of experience on the Board and her demonstrated leadership skills.

Appointments

Governor Baldacci appointed Nancy C. Ziegler of South Portland to a second term on the Board. Ms. Ziegler is an attorney who resides in South Portland. Ernest Hilton, an attorney and engineer from Starks, was appointed to complete the unexpired term of Richard Wardwell, who resigned in August of 2005 to accept a position in Washington, D.C.

New appointees were former State Legislator Richard Gould of Greenville, and M. Wing Goodale of Falmouth. Mr. Gould served five terms in the Maine House of Representatives (1986-1996) and was a member of the Joint Standing Committee on Energy and Natural Resources, including a term as co-chair of the Committee. After leaving the State House, Mr. Gould was employed by Great Northern Paper Company as the company’s legislative liaison.

He currently serves as the Code Enforcement Officer for the Town of Greenville and is in his second term on the Greenville School Committee.

Mr. Goodale is a research biologist and seabird program director for Biodiversity Research Institute, a Maine-based nonprofit ecological research group with offices in Gorham. In addition to conducting bird surveys and a variety of research projects, including one examining mercury in seabirds, Mr. Goodale manages the Institute's web site and oversees the live eagle and loon web cameras. Prior to joining the Biodiversity Research Institute, Mr. Goodale studied wildlife throughout the United States and in Central and South America.

The Board is fortunate at this time to be working with a full complement of members to address the many important issues that come before the Board for consideration. However, the terms of several members will expire in 2007. Virginia Plummer from Turner and Ernest Hilton of Starks will complete their second terms and will not be eligible for re-appointment. In addition, Nancy Anderson of Cumberland Foreside, Denis Culley of Mercer, Donald Guimond of Fort Kent, and Matt Scott of Belgrade will complete their first terms.

III. Recommendations and Issues for Consideration

As summarized below in Section V, the Board considers a significant number of matters each year. While each presents important issues for consideration and resolution, the Board would like to comment on the following issues.

Solid Waste Management

As discussed in prior reports to the Committee, solid waste management is a controversial and divisive issue in communities throughout the State, and it has been the subject of considerable debate before the Board and the Legislature again this past year. In March 2006 the Board adopted revisions to the Department's Beneficial Use Rules (Chapter 418). These amendments included provisions governing the use of wood from construction and demolition debris as a fuel. Issues raised in that proceeding, and others, were examined by the Blue Ribbon Commission on Solid Waste Management this past year. The Board provided comments to the Commission on some of these matters for their consideration (see Attachment A). We look forward to reviewing the Commission's report in the near future. The Board may wish to elaborate upon this issue following review of that report.

Funding for Environmental Infrastructure

This past year the Board approved five separate Administrative Consent Agreements and Enforcement Orders for violations of the Protection and Improvement of Waters Act at municipal wastewater treatment facilities including the facilities serving Calais, Bar Harbor, Castine, Presque Isle and Kennebunk, Kennebunkport and Wells. These violations were due, in part, to inadequate or aging equipment leading to discharges of untreated or inadequately treated wastewater to the waters of the State. These violations of our water quality laws highlight the fact that many of our wastewater treatment facilities are old and will require an

infusion of money to replace failing or inadequate equipment to meet not only ongoing, but increasing demands placed upon them by communities. We urge the Legislature to act favorably on proposals to increase funding for such environmental infrastructure projects that are relied upon to protect public health, the environment, and Maine's quality of life.

IV. Noteworthy Events

The Board would like to take this opportunity to highlight two significant events.

Redesignation of the Portland and Midcoast 8-Hour Ozone Nonattainment Areas to Attainment.

The redesignation of these ozone nonattainment areas to attainment is the result of years of hard work by Department staff, concerned citizen groups and the regulated community to reduce emissions of ozone forming pollutants, primarily nitrogen oxides (NOx) and volatile organic compounds (VOCs). While work remains to be done, redesignation means that Maine has made significant improvements in air quality which should contribute to improvements in public health and an improved quality of life for many Maine residents.

Decision in S.D. Warren Co. v Board of Environmental Protection et al. In May 2006, the Supreme Court of the United States unanimously affirmed the judgment of the Supreme Judicial Court of Maine which upheld the decision of the Board requiring water quality certifications under Section 401 of the Clean Water Act for five dams on the Presumpscot River. The case was argued by Attorney General G. Steven Rowe, with the assistance of Assistant Attorney General Carol Blasi and Department Project Manager, Dana Murch. S.D. Warren challenged the authority of the State to require federally licensed hydropower projects to comply with State water quality standards through the issuance of a water quality certification. The Court ruled that the operation of a dam involves potential "discharges" and therefore triggers the need for a State issued water quality certification in connection with a federal license application.

V. Summary of Matters before the Board in 2006

The Board's statutory responsibilities are established in 38 M.R.S.A. section 341-D. These responsibilities include the following: rulemaking; decisions on selected permit applications; review (appeals) of Commissioner licensing decisions; review of enforcement actions; issuance of emergency orders; consideration of petitions to revoke, modify or suspend a license; and recommendations to the Legislature for changes to law. This section summarizes the major actions of the Board in 2005.

A. Rulemaking

During 2006, the Board conducted 13 rulemaking proceedings which are summarized below. Of these, 10 rules (or rule amendments) have been adopted or provisionally adopted and 3 are remain pending. Chapter 587 In-Steam Flow and Water Level Standards was provisionally adopted and is being forwarded to the Committee under separate cover for your consideration.

This rule was controversial and we anticipate considerable discussion before the Committee. In particular, water utilities argued that regulation of their water withdrawals under Title 38 water quality standards constitutes a major policy shift that bears closer scrutiny. However, the Board concluded that the rule comports with the Legislative directive and that any such policy concerns are best addressed by the Committee.

- Chapter 305 Permit by Rule and Chapter 310 Wetlands and Waterbodies Protection Rules (amendments): Amendments to Chapter 305 included a new PBR section for certain activities in, on or over significant vernal pool habitat; and a new PBR section for activities in existing developed areas that are in, on or over high or moderate value inland waterfowl and wading bird habitat, or shorebird nesting, feeding or staging areas. Changes were also made to ensure consistency with Chapter 355 Coastal Sand Dune Rules. A public hearing was held on October 5, 2006. The amendments were adopted on November 16, 2006.
- Chapter 335 Significant Wildlife Habitat (new) and Chapter 375 section 15 Protection of Wildlife and Fisheries (amendment): The purpose of the amendment was to establish standards for the protection of significant vernal pools. The rule also included a provision establishing a 250 foot wide zone adjacent to high or moderate value shorebird nesting, feeding and staging areas. A public hearing was held on October 20, 2005. The Board provisionally adopted Chapter 335, and adopted amendments to Chapter 375, on December 1, 2005. The Board approved final adoption of the Chapter 335 amendments on April 20, 2006
- Chapter 355 Coastal Sand Dune Rules (amendments): The amendments addressed a number of controversial issues including: reconstruction of seawalls and storm damaged structures in frontal dunes, identification of areas at high risk for storm damage and flooding, wildlife habitat protection, and development of a State beach nourishment program. A public hearing was held on August 11, 2005. The proposed amendments were provisionally adopted on November 17, 2005. The amendments were finally adopted on April 20, 2006.
- Chapter 378 Variance Criteria for the Excavation of Rock, Borrow, Topsoil, Clay and Silt and the Performance Standards for the Storage of Petroleum Products (amendments): The proposed amendments update the standards to ensure consistency with the Stormwater Management Rules; allow the use of double-walled tanks as secondary containment for petroleum products; and update Spill Prevention, Control and Countermeasures requirements to ensure consistency with other Department programs. The proposed amendments were posted to public comment on December 21, 2006. Board action on the proposed amendments is anticipated in early 2007.
- Chapter 418 Beneficial Use; Chapter 402 Transfer Stations and Storage Sites for Solid Waste; Chapter 405 Water Quality Monitoring, Leachate Monitoring and Waste Characterization; and Chapter 409 Processing Facilities (amendments): The amendments established, among other things, standards for use of construction and demolition debris as

a fuel. A public hearing was held on November 17, 2005. The amendments were provisionally adopted on March 16, 2006; with final adoption on May 4, 2006.

- Chapter 500 Storm Water Management and Chapter 502 Direct Watersheds of Lakes Most at Risk from New Development and Urban Impaired Streams (amendments): The amendments provided for, among other things, greater flexibility in the standards for large redevelopment projects provided there is not an increase in stormwater impacts leaving the site. There were five lakes added to the list of Most at Risk Lakes (Abrams Lake, Eastbrooke; Androscoggin Lake, Wayne; Great Moose Lake, Hartland; Long Pond, Belgrade; and Messalonskee Lake, Belgrade). One stream (Bobbin Mill Brook, Auburn) was removed from the list of Urban Impaired Streams because it is now meeting its water quality classification. The Board held a public hearing on the proposed amendments on October 5, 2006. The amendments were adopted on December 7, 2006.
- Chapter 531 Regulations for Wastewater Operator Certification (amendment): The rule set forth certification requirements for persons who operate public and private wastewater treatment facilities. The rule was last amended in 1987 and needed to be updated. The proposed amendments included a new classification for small facilities using spray irrigation for treatment. A public hearing was held on December 15, 2005. The amendments were adopted on March 16, 2006.
- Chapter 543 Rules to Control the Subsurface Discharge of Pollutants (repeal and replace): The amended rule incorporated new federal requirements regarding the Underground Injection Control Program. The proposed rule was posted for public comment on June 15, 2006. The revised rule was adopted on September 7, 2006.
- Chapter 587 In-Stream Flow and Water Level Standards (new): The rule would establish in-stream flow and water level standards for surface water bodies to protect aquatic life and other designated uses of Maine's waters. The rule also establishes a framework for regulating surface water withdrawals as authorized by 38 MRSA section 470-H. The Board held a public hearing on the proposed rule on August 3, 2006. The rule was provisionally adopted by the Board on November 16, 2006.
- Chapter 691 Rules for Underground Oil Storage Facilities (amendments): The proposed amendments would allow certified underground storage tank (UST) inspectors to do minor repairs found during inspections; enact minimum safety standards for excavations at UST facilities to protect against fire, explosion, etc.; incorporate recent changes in statute; and make the rule consistent with recent updates to national and industry standards. The amendments were posted to public comment on December 21, 2006. It is anticipated that the Board will act on the proposed amendments in early 2007.
- Chapter 870 Labeling of Mercury-Added Products (amendments): The rule was amended to provide for the labeling of mercury-added lamps in accordance with P.L. 2005, c. 148. The amendments were posted for public comment on July 20, 2006. The amendments were adopted on October 5, 2006.

- Chapter 872 Exemptions from the Ban on Sale of Mercury Switches, Relays and Measuring Devices (new): The proposed rule establishes the procedure by which the manufacturer or user of a mercury relay, switch, instrument or measuring device may apply for an exemption from the sales prohibition authorized under Title 38, section 1661-C(6) and (7). The proposed rule was posted for public comment on October 5, 2006. It is anticipated that the Board will act on the proposed rule in early 2007.
- Chapter 1000 Guidelines for Municipal Shoreland Zoning (amendments): Department staff undertook a comprehensive review of the Guidelines, which were last amended in 1990. The Guidelines set forth minimum standards for activities within the shoreland zone, which includes all lands within 250 feet of the normal high water mark of a great pond, river or tidal water; within 250 feet of a freshwater or coastal wetland; or within 75 feet of a stream. The Guidelines incorporated the new statewide timber harvesting standards. A public hearing was held on September 8, 2005. The amendments were adopted by the Board on February 16, 2006.

State Implementation Plan (Amendments): While the Board's role here is not rulemaking as such, the federal Clean Air Act Amendments of 1990 require that the Department provide an opportunity for a public hearing on, and formally adopt, any changes to the State's program for implementation of the Clean Air Act. The State Implementation Plan was amended to redesignate the Portland and Midcoast 8-Hour Ozone Nonattainment Areas to attainment, and to modify the requirements for Section 110 Maintenance Plans. The Board held a public hearing on the proposed amendments on July 6, 2006. They were adopted on August 3, 2006.

B. Major Applications and Other Licensing Matters

Title 38 section 341-D, subsection 2 provides that: "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 or interpretations of a rule or law that require reexamination; or
- D. Have generated substantial public interest."

An application of substantial public interest is further defined in rule as a project which has "the potential to affect a broad geographic area or a natural resource of statewide significance, or has generated more than local interest" [06-096 CMR Chapter 2]. In addition, its statute requires that the Board decide certain applications directly.

Major applications before the Board in 2006 included:

- Dragon Products, Thomaston. In October 2005, the Board voted to assume jurisdiction and hold a public hearing on the applications by Dragon Products for closure and reclamation of

the facility's cement kiln dust and waste clinker piles. Area residents had expressed concerns about the piles including potential impacts to ground and surface water and air quality in the vicinity of the plant. The piles in question have been in existence since prior to enactment of the State's solid waste statutes and rules, but have never been licensed. Following the Board's decision to assume jurisdiction over the waste piles, the facility proposed to modify its applications. The Board delayed its proceeding in order to allow the applicant to amend its applications. The facility is now proposing to close the piles and to recover, over a period of years, material from the piles for use in its cement manufacturing process. Reuse of the waste material was made possible by modifications to the cement manufacturing process instituted in 2004. A public hearing on the applications was held in September 2006. The public record was held open following the September hearing to allow for further modification of the proposed clinker pile leachate management system to address concerns raised during the review and hearing process. The Board will hold an additional session of the public hearing to review these changes in February 2007. A decision on the applications is expected in the spring of 2007.

- Application for a Private Recreational Dock in Bar Harbor. In April 2002 the Board granted an appeal and denied the application of Anthony and Erin Uliano finding that the proposed project would unreasonably interfere with existing scenic, aesthetic, recreational and navigational uses, the cumulative impact would be significant, and there was a practicable alternative that would be less damaging to the environment. The decision was appealed to Superior Court, which upheld the Board's decision. The applicants then appealed to Maine's Supreme Court (Law Court). The Law Court vacated the Superior Court's judgment and remanded the case to the Board for further proceedings consistent with its opinion. The Board subsequently voted to reopen the record to receive evidence on the standards cited by the Law Court. Board members visited the site in October 2005. A public hearing on the new evidence was held on March 2, 2006. A final decision on the application is expected in early 2007.

The Board denied the following petition for Board jurisdiction finding that it did not meet the statutory requirements:

- Maine Central Railroad, Embden Quarry. Application for variance for externally drained pit.

Other significant licensing proceedings included:

- Central Maine Power Company Closure Plan: Bridgton Service Center. CMP submitted a plan to close its facility for the storage of PCB (polychlorinated biphenyl) contaminated materials. CMP has consolidated its interim storage of hazardous wastes at its North Augusta Service Center. The closure plan was approved.
- Portsmouth Naval Shipyard Commercial Hazardous Waste Storage Facility: License Renewal. In May 2001, the Board approved construction of a commercial hazardous waste storage facility which was licensed to accept wastes from other Department of Defense

facilities located in New England. The term of such licenses is limited to five years. In January 2006, Portsmouth Naval Shipyard applied for a license renewal. In accordance with licensing procedures for such facilities, on December 7, 2006 the Board posted a draft order for a 45 day public comment period. It is anticipated that the Board will take final action on this renewal application in the spring of 2007.

C. Appeal of Department Decisions

The Board decided four appeals of Commissioner decisions. Three appeal proceedings remain pending, including the proceeding regarding discharges to the Androscoggin River. In the Androscoggin River proceeding the Board has consolidated twelve appeals filed by six parties contesting the wastewater discharge licenses issued to Verso Paper, Rumford Paper Company and Livermore Falls publicly owned treatment works (POTW) and the water quality certification for Gulf Island Pond. The Board has been meeting with the parties in this matter to prepare for a public hearing, currently scheduled for May 2007 in Auburn. The appeals are summarized below.

- Fort James Operating Company, Old Town. Appeal of Solid Waste license for beneficial use of wood chips from construction and demolition debris as a fuel. The appellants argued, among other things, that burning of wood from construction and demolition debris will emit pollutants which pose a hazard to public health and the environment. The Board denied the appeal and affirmed the Department's approval of the license.
- Appeal of Commercial Wharf Expansion, Cushing. The application was for expansion of a commercial fishing wharf. The appellants argued that the expansion would have an unreasonable adverse impact on water quality, aquatic habitat, and the scenic and aesthetic uses of the harbor. The Board denied the appeal and affirmed the Department's decision granting the wharf expansion.
- Appeal of Site Location of Development Subdivision License Condition, Naples. The Department granted a request to modify a condition which applied to a single lot in the subdivision, allowing a reduction in the width of the required natural buffer along the shorefront from 250 feet to 100 feet. The Department's decision was appealed by a resident of Naples. The Board found that the appellant did not have standing to bring the appeal, and the appeal was dismissed.
- Appeal of Denial of Natural Resources Protection Act Permit, Damariscotta. The applicant requested an after-the-fact permit for construction of a retaining wall and placement of fill adjacent to and in Paradise Pond. The after-the-fact application was denied by the Department. The Board denied the appeal and affirmed the Department's decision.

Pending Appeals

- Verso (formerly International Paper Company), Jay; Rumford Paper Company, Rumford; Livermore Falls Waste Water Treatment Plant; and FPL Energy Maine Hydro Gulf Island

Pond / Deer Rips Hydro Project. Appeal of Maine Pollutant Discharge Elimination System Permits and Maine Waste Discharge Licenses, and the Water Quality Certification for Gulf Island Pond. The Board received 11 separate appeals of these licenses and certifications. The matter is pending before the Board. A public hearing on the appeals is scheduled for May 2007.

- Appeal of Natural Resource Protection Act Permit, Beals Island. The application is for the expansion of a commercial fishing wharf. The appellants contend that the proposed expansion will have an unreasonable adverse impact upon marine habitat, aquatic life, and the scenic and aesthetic uses of the cove. The appeal is pending before the Board and will be considered at the Board's January 18, 2007 meeting.
- Appeal of Stormwater Permit for Residential Subdivision, Cape Elizabeth. The appellants contend that the proposed project requires a Site Location of Development Act permit and was not adequately reviewed by the Department. The matter is pending before the Board and will be considered at the Board in early 2007.

D. Petitions to Revoke, Modify or Suspend

Title 38 MRSA section 341-D(3) provides that "...the board may modify in whole or in part any license, or may issue an order prescribing necessary corrective action, or may act in accordance with the Maine Administrative Procedure Act to revoke or suspend a license" under certain specified circumstances. The Board considered the following petitions in 2006.

- Kennebec and Androscoggin Rivers Hydropower Projects: In October and November 2005, the Board received two separate petitions seeking modifications of water quality certifications issued for four dams on the Kennebec River: Weston, Shawmut, Hydro-Kennebec and Lockwood. The Board also received two petitions for modification of the water quality certifications for eleven dams on the Androscoggin River: Brunswick, Pejepscot, Worumbo, Lewiston Falls, Upper Androscoggin, Gulf Island Pond/Deer Rips, Livermore/Jay/Riley, Barker Lower Mills, Barker Upper Mills, Hacketts Mills, and Marcal Dam. The petitions requested modification of the water quality certifications to require immediate upstream and downstream passage for eel and anadromous fish at each of the facilities.

Kennebec Petition: On January 19, 2006, the Board voted to hold a public hearing on the petitions for modification of the certifications for the four Kennebec River projects. The hearing was held in abeyance at the request of the parties while Department staff discussed eel and fish passage options with the licensees. Since not all issues were resolved by these discussions and subsequent Condition Compliance Orders, the Board voted on December 7, 2006 to proceed to hearing. The public hearing is scheduled for March 15, 2007.

Androscoggin Petitions: On February 2, 2006, the Board voted to dismiss the petitions for modification of the water quality certifications for the hydropower projects on the

Androscoggin and Little Androscoggin Rivers. The Board's decision was appealed to Superior Court by one of the petitioners. The Board's decision was upheld by the Court.

- Androscoggin River Petition II: Following the Board's decision to dismiss the 2005 petitions, Friends of Merrymeeting Bay filed a second petition again seeking to modify the water quality certifications for a number of dams on the Androscoggin and Little Androscoggin Rivers including: Brunswick, Pejepscot, Worumbo, Lewiston Falls, Upper Androscoggin, Gulf Island Pond/Deer Rips, Livermore/Jay/Riley, Otis, Rumford Falls, Barker Lower Mills, Barker Upper Mills, Hacketts Mills, and Marcal Dam. The petition seeks immediate upstream and downstream passage for American eel. This petition was held in abeyance pending the Court's decision on the appeal of the Board's decision on the 2005 petitions. This petition will be before the Board for consideration in early 2007.

E. Enforcement Actions

During 2006, the Board approved 96 Administrative Consent Agreements and/or Enforcement Orders. These enforcement actions, listed by statute or rule with the number of each type indicated in parentheses, are as follows:

Air

- Air emission standards and license conditions (8), one of which also involved violations of the Solid Waste Management laws and rules.
- Gasoline Dispensing Facilities Vapor Control rule, Chapter 118 (1).
- New Motor Vehicle Emission Standards, Chapter 127 (5).
- Portable Fuel Container Spillage Control, Chapter 155 (1).

Hazardous Waste, Solid Waste, Oil Discharge

- Asbestos Management Regulations (4).
- Hazardous Waste Management Regulations (8).
- Lead Management Regulations (1).
- Toxics Use and Hazardous Waste Reduction Law (1).
- Underground Oil Storage statutes and rules (4), one of which also involved a violation of Chapter 118 Gasoline Dispensing Facilities Vapor Control.

Land and Water

- Erosion and Sedimentation Control Law: Violations of this law occurred in 24 of the other enforcement cases listed in this section, primarily in conjunction with NRPA violations.
- Natural Resources Protection Act (32): Violations of the NRPA were frequently accompanied by violations of the Erosion and Sedimentation Control Law (22 of 32), the Protection and Improvement of Waters Act (6 of 32), and the Storm Water Management Law (3 of 32).
- Performance Standards for Excavations (gravel mining) (5); four of the five violations also involved violations of the NRPA (1), Site Law (1), Protection and Improvement of Waters

Act (2), the Open Burning Rules Chapter 102 (1), and/or the Solid Waste Management Rules (1).

- Performance Standards for Quarries (rock) (4); three of the four violations also involved violations of the Site Law (1), Stormwater Management law (1), Protection and Improvement of Waters Act (1), and/or Oil Discharge Prevention laws (1).
- Protection and Improvement of Waters Act (14): In addition to the 14 cases where it was the primary violation, violations of this law occurred in 12 of the other enforcement cases listed in this section, often in association with violations of the Erosion and Sedimentation Control Law.
- Siting and Operation of Road Salt and Sand-Salt Storage Areas, Chapter 574 (1).
- Site Location of Development Law (2).
- Site Location of Development Law and Natural Resources Protection Act (2).
- Stormwater Management Law (3): In addition, three of the NRPA violations and one of the quarry violations cited above also included violations of the Stormwater Law.

F. Informational Workshops

Department staff provides informational workshops at regularly scheduled Board meetings throughout the year for the benefit of Board members and any members of the public who wish to attend. Workshops in 2006 addressed: the Department's Enforcement Policy, Liquefied Natural Gas facilities, Tidal Power technologies, and the work of the Solid Waste Task Force.

V. Closing

We appreciate this opportunity to update you on our work, and welcome any comments you may have.

Respectfully submitted,



Virginia N. Plummer, Chair

Attachments:

- A. Letter to Blue Ribbon Commission on Solid Waste Management, August 7, 2006
- B. Board Members: List and Biographical Information
- C. 2006 Meeting Agendas