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STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION



JANET T. MILLS
GOVERNOR

Mark C. Draper, Chair

Cynthia S. Bertocci
Executive Analyst

Ruth Ann Burke
Board Clerk

January 29, 2019

Senator Brownie Carson
Representative Ralph L. Tucker
Members of the Joint Standing Committee on Environment and Natural Resources
100 State House Station
Augusta, Maine 04333-0100

RE: Board of Environmental Protection
Report to the Legislature

Dear Senator Carson, Representative Tucker, Committee Members:

The Board of Environmental Protection is providing the Committee with the attached summary of the matters that the Board addressed in 2019. While statute at 38 M.R.S. § 341-D(7) does not require that the Board submit a report to the second regular session of the Legislature, the Board has historically produced an annual report to keep the Committee and the public apprised of the Board's activities and decisions on major matters.

If the Committee would like to discuss this report, I am available to meet with you at your convenience. I can be reached by contacting the Board's Executive Analyst, Cynthia Bertocci, at 287-2452 or cynthia.s.bertocci@maine.gov.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Mark C. Draper'.

Mark C. Draper, Chair
Board of Environmental Protection

cc: Jerry Reid, DEP Commissioner

Report to the Joint Standing Committee on Environment and Natural Resources

Board of Environmental Protection Summary of Activities in Calendar Year 2019

January 2020

Contact: Cynthia Bertocci, Board Executive Analyst
Phone: (207) 287-2452



MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION
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**Board of Environmental Protection
Report to the Joint Standing Committee on
Environment and Natural Resources**

Summary of Activities in 2019

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A. Board of Environmental Protection Members

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

Summary of Activities in Calendar Year 2019

I. Introduction

Title 38 § 341-D(7) requires the Board of Environmental Protection to report to the joint standing committee having jurisdiction over natural resource matters 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.” Although not required this year, the Board customarily reports on its activities annually.

Section II of this report provides an overview of the Board’s membership and responsibilities, and highlights a concern regarding the federal recusal requirements incorporated in Maine law at 38 M.R.S. § 341-C which impact Board membership and member participation in certain matters.

Section III briefly summarizes other matters before the Board for decision in 2019, and the status of pending matters at year’s end including proposed Chapter 890 Designation of PFOS as a Priority Chemical.

II. Board Membership and Responsibilities

A. Membership. The Board of Environmental Protection is a seven-member citizen board whose members are appointed by the Governor and approved by the Legislature. (38 M.R.S. § 341-C). Its purpose is to “provide informed, independent and timely decisions on the interpretation, administration and enforcement of the laws relating to environmental protection and to provide for credible, fair and responsible public participation in department decisions.” (38 M.R.S. § 341-B). Biographical information on the current Board members is found in Attachment A.

The Board notes that participation by some Board members in certain proceedings before the Board is limited by the federal recusal requirements under the Federal Water Pollution Control Act and the Clean Air Act, incorporated in Maine law at 38 M.R.S. § 341-C(8). It is our view that these limitations are overly restrictive and unnecessarily deprive the Board of the expertise of some of its members in major proceedings. The Board has been advised that there is little or no discretion in the application of the law. Therefore, while we urge

the Committee to consider these limitations when appointing persons to serve on the Board so that the Board will have sufficient members to act on important matters, we also urge that such consideration be balanced so as not to preclude service by, for example, municipal employees who bring a valuable perspective to the work of the Board.

B. Responsibilities. The Board’s responsibilities as set forth in 38 M.R.S. § 341-D and § 341-H are summarized below. These duties were amended by Public Law 2019, c. 315 “An Act to Restore the Authority of the Board of Environmental Protection” (effective September 19, 2019) which, among other things, returned all agency rulemaking (both routine technical and major substantive) to the Board and modified the Board’s enforcement authority to include approval of Administrative Consent Agreements negotiated by the Department to resolve violations of environmental laws administered by the Department.

- Rulemaking. The Board has authority to adopt, amend or repeal reasonable rules and emergency rules necessary for the interpretation, implementation and enforcement of the laws administered by the Department. The Board also has authority to adopt, amend and repeal rules as necessary for the conduct of the Department’s business.
- Appeals of Commissioner Licensing and Enforcement Actions. An aggrieved person may appeal a final license or permit decision of the Commissioner to the Board. The Board also hears appeals of emergency orders and other unilateral compliance and clean-up orders issued by the Commissioner.
- Decisions on Certain Permit Applications. The Board makes the original licensing decision on applications for projects of statewide significance as defined in statute. Additionally, the Department’s statutes specify that certain applications such as those pertaining to commercial hazardous waste facilities must be reviewed and decided by the Board.
- License Modification or Corrective Action. At the request of the Commissioner and after written notice and opportunity for hearing, the Board may modify in whole or in part any license, or issue an order prescribing necessary corrective action, when it finds that certain criteria set forth in statute are met.
- Administrative Consent Agreements. The Board reviews and approves administrative consent agreements negotiated by the Commissioner pursuant to 38 M.R.S., section 347-A(1) to resolve violations of environmental laws administered by the Department.
- Recommendations to the Legislature. The Board is charged with making recommendations to the Legislature on the implementation of environmental laws.

- Other Duties. The Board shall carry out other duties as required by law. Other duties specified in statute include, among other things, holding hearings on, and making recommendations regarding, the water quality classification of Maine waters.

Proceedings before the Board are governed by the Maine Administrative Procedure Act, the Board's procedural statutes and rules governing the various types of proceedings (e.g., rulemaking, appeal proceedings, adjudicatory hearings, etc.), and by program-specific statutes and rules governing matters such as the control of air emissions, waste management, and land use. All meetings of the Board are noticed and open to the public. The Board maintains a webpage with biographical information on Board members, meeting materials, information on pending matters of broad public interest, and guidance to facilitate public participation in matters pending before the Board. The Board provides audio-streaming of Board meetings and hearings.

III. Summary of Matters before the Board for Decision in 2019

The Board held 12 regular meetings in 2019 and acted on the following matters.

A. Rulemaking

Major Substantive Rules.

- Chapter 692 Siting of Oil Storage Facilities. The amendments to Chapter 692 provided additional flexibility to municipalities and facility owners with respect to siting oil storage facilities (primarily gas stations) in wellhead protection areas and over certain groundwater aquifers if certain standards are met. Following public hearing, the Board provisionally adopted the proposed amendments to the rule at its meeting on December 6, 2018. Following legislative review, the amendments were finally adopted in June 2019.

Routine Technical Rules.

- Chapter 584 Surface Water Quality Criteria for Toxic Pollutants / Amendments. This rule establishes ambient water quality criteria for toxic pollutants in the surface waters of the State and establishes procedures that may be used to determine alternative statewide criteria or site-specific criteria adopted as part of a licensing proceeding. The purpose of the proposed amendments is to implement Human Health Criteria based on updates to 38 M.R.S. 466, sub-10-A for the designated use of sustenance fishing, institute water effect ratios (WERs) for the Androscoggin and St. Croix rivers, and promulgate new ambient water quality criteria (AWQC) for copper in the Little Androscoggin River. It also updates

AWQC for human health using methodology from the U.S. Environmental Protection Agency. A public hearing was held on November 21, 2019; decision is anticipated in early 2020.

- Chapter 890 Designation of PFOS as Priority Chemical. The proposed rule would establish reporting requirements for manufacturers and distributors of certain children's products that contain intentionally added amounts of PFOS (perfluorooctane sulfonic acid) and its salts. The proposed rule was posted for public comment in September 2019. In response to subsequent requests by more than five persons for a public hearing, a hearing has been scheduled for January 2020. Persons interested in this rule have commented that, in order to effectively limit exposure to PFOS, the rule must also regulate the chemical precursors which form PFOS through decomposition, degradation or metabolism. The Board has urged the Department to explore this issue.

B. Appeals of Commissioner Licensing Decisions

If an applicant or other person is aggrieved by a licensing decision of the Commissioner, the Commissioner's decision may be appealed to the Board. Under provisions of 38 M.R.S. §341-D(4), the Board may affirm, amend, or reverse the Commissioner's decision, or remand the matter to the Commissioner for further proceedings. In an appeal proceeding, the Board is not bound by the Commissioner's findings of fact or conclusions of law. The Board's decision on appeal may be appealed to Superior Court (or the Law Court in the case of an expedited wind energy development). In addition to deciding appeals, the Board encourages parties to pursue various forms of alternative dispute resolution in an effort to reach a resolution that is satisfactory to all parties by staying its proceedings upon request of the parties to allow time for productive negotiations. Appeals of Commissioner licensing decisions considered by the Board in 2019 are summarized below.

Appeals Decided. The following appeals were decided by the Board:

- Mary Kudasoski, NRPA Permit-by-Rule #66005, Kennebunkport / Appeal by Robert and Virginia Almeder. This appeal involved the reconstruction of an open rail fence in a coastal sand dune. Following oral argument, the Board denied the appeal and affirmed the Commissioner's decision.
- Clary Lake Dam, Transfer of Water Level Order to Clary Lake Association / Appeal by Richard Smith/Aquafortis Associates, LLC. This appeal challenged the transfer of the water level order for the Clary Lake Dam located in Jefferson and Whitefield. Following oral argument, the Board denied the appeal and affirmed the Commissioner's decision.

- Whole Oceans, LLC, Wastewater Discharge License #W-009190-6F-A-N, Bucksport / Appeal by Holly Faubel. This appeal sought modifications of the wastewater discharge license issued to Whole Oceans for its proposed land-based Atlantic salmon aquaculture facility. The appeal was dismissed by the Board with a finding that the appellant was not an aggrieved person as defined in statute and rule and therefore lacked standing to appeal the Commissioner's decision.
- Universal Recycling Technologies. Universal Recycling Technologies appeal the Department's denial of URT's application to provide consolidator services under Maine's e-Waste program. Following oral arguments, the Board voted to deny the appeal and affirm the Commissioner's decision denying the application.

Appeals Withdrawn. The following appeals were withdrawn:

- Martel, Acton. This was an appeal of a permit-by-rule for a rock crib dock on Great East Lake in Acton. Following negotiations among the permittee and the appellants, the permit-by-rule was surrendered, and the appeals withdrawn.
- Marquot Drive, Freeport. This was an appeal of a Permit-by-Rule for replacement of a timber crib retaining wall adjacent to a coastal wetland which impacted commonly owned land. The larger project was subsequently modified to eliminate the contested work. The permit-by-rule was surrendered, and the appeal withdrawn.

Appeals Pending. There was one appeal pending at year's end.

- KEI (Maine) Power Management (III) has appealed the Water Quality Certification issued to KEI by the Department for the Lower Barker Project which is located on the Little Androscoggin River in the City of Auburn. In its appeal KEI objects to certain provisions pertaining to fish passage requirements.

C. Appeals of Administrative Orders Issued by the Commissioner

A number of the Department's program-specific statutes provide for appeals to the Board of a Commissioner's administrative order, such as an order to remediate a site contaminated by oil or hazardous substances. These are unilateral orders through which the Commissioner seeks to correct serious environmental conditions. Due process is afforded through the right of appeal to the Board, and then Superior Court.

- Beal's Linen Designation of Uncontrolled Hazardous Substance Site and Order. On October 18, 2018, the Board held an evidentiary hearing on the appeal of the

Commissioner's Designation of Uncontrolled Hazardous Substance Site and Order issued to Sultan Corp. pursuant to 38 M.R.S. § 1365 for contamination at the Beal's Linen Site in Auburn. The site is currently developed with a multi-unit apartment building. A laundry facility reportedly operated on a portion of the site from approximately 1914 to 1948. Soil vapor and indoor air sampling conducted by Department staff and its consultant contained elevated levels of volatile organic compounds associated with dry cleaning, including levels of trichloroethylene (TCE) and perchloroethylene (PCE) in indoor air above health-based standards. The Department undertook remedial measures to reduce exposure to contaminants above health-based standards. The Commissioner's order directed the owner of the property to take additional steps to remediate contamination at the site. The owner appealed the order to the Board. At the hearing, witnesses for the Department and witnesses for Sultan Corp. testified and were subject to cross-examination by the other party and questioning by Board members, Board staff, and Board counsel. The Board held a deliberative session at its meeting on December 6, 2018 and issued a decision on January 17, 2019 upholding the Commissioner's decision with modifications to the deadlines in the order to account for the passage of time. Sultan Corp. has appealed to Superior Court.

D. Permit and License Applications

Statute (38 M.R.S. § 341-D(2)) provides that the Board shall decide each application for approval of permits and licenses that in its judgment represents a project of statewide significance. A project of statewide significance is defined as a project which meets at least three of the four following criteria:

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

Additionally, the Board shall decide all applications referred to it jointly by the Commissioner and the applicant.

Nordic Aquafarms, Inc. Application for Land-Based Atlantic Salmon Aquaculture Facility in Belfast and Northport. Nordic Aquafarms, Inc. (Nordic) has applied for the following licenses for its proposed facility: Site Location of Development, Natural Resources Protection Act, Chapter 115 Minor Source Air Emissions, and Maine Pollution Discharge Elimination/Waste Discharge License. In June 2019, the Commissioner and Nordic requested that the Board assume licensing jurisdiction over Nordic's applications for the proposed facility. The Board subsequently assumed jurisdiction over Nordic's applications and published notice of opportunity for persons to apply for intervenor status in the proceeding. The Board granted

intervenor status to eight entities. Following technical review of the applications by Department staff and sister review agencies and an opportunity for Nordic to respond to those comments, the Board set a schedule for submission of testimony. Direct and rebuttal testimony have been submitted by the applicant and intervenors, and a public hearing is scheduled for the week of February 10, 2020.

Additional Applications Subject to Board Approval. Statute also provides that the Board shall decide all applications for commercial hazardous waste facilities (38 M.R.S. § 1319-R(3)). The Board acted on one such application in 2019.

- NRC Environmental of Maine, South Portland / License Renewal for Hazardous Waste Storage and Transfer Licenses and Waste Oil Storage and Treatment License. The facility is a combined commercial hazardous waste and waste oil handling facility that was originally constructed in 1982 by Jet-Line Services, Inc. for the storage and treatment of waste oil and industrial wastewater. The Board approved the renewal application which authorized the transfer of the license, the construction of building for the handling of special wastes including oily debris, and the installation of an additional trailer for short-term hazardous waste storage.

E. Administrative Consent Agreements.

As noted above, PL 2019, c. 315, effective September 2019, The Board received one such agreement for review in 2019.

- Town of York. The administrative consent agreement resolved violations associated with the construction, repair and alteration of a seawall by the Town of York without first obtaining a permit from the Department.

F. Petitions to Modify a License or Order Corrective Action

The petition process is a mechanism to re-open a final license that was issued by the Department if certain conditions are found to exist. There were no such petitions referred to the Board by the Commissioner in 2019.

G. Other Duties

Special Area Management Plan for Vernal Pools (SAMP) – Application by Town of Orono for Partial Delegation of Permit-Granting Authority under NRPA for Impacts to Vernal Pools.

Title 38 M.R.S. § 480-F *Delegation of permit-granting authority to municipality; home rule* provides that: “A municipality may apply to the board for authority to issue all permits under

this article [Natural Resources Protection Act] for partial authority to process applications for permits involving activities in specified protected natural resources or for activities included in chapter 305 of the department's rules, addressing permit by rule" and specifies criteria to be assessed.

The Maine Vernal Pool SAMP was approved by the U.S. Army Corps of Engineers, New England District in August of 2016, and by Maine DEP Commissioner Paul Mercer in September of 2016. The primary purpose of the Maine Vernal Pool SAMP is to increase the compensation/mitigation options available to address proposed impacts to vernal pools by allowing a municipality to permit impacts to vernal pools in municipally designated development areas (DDA's) in exchange for compensation in municipally identified rural areas. Implementation of the VP SAMP is intended to increase protection of the natural resource functions and values of vernal pools at the landscape scale while supporting municipal goals for growth.

The Town of Orono filed an application with the Board for partial delegation of permit-granting authority under NRPA for impacts to vernal pools. Following opportunity for public comment and presentations by the Town of Orono and its consultant, the Board approved the application at its meeting on April 4, 2019. Orono was the second municipality to request such authority; the first was Topsham, which was granted partial delegation under NRPA for impacts to vernal pools in May 2018.

Clean Air Act Petition and Proposed Revisions to the State Implementation Plan. The Board held a public hearing on a proposed Clean Air Act petition and proposed amendments to the State's air quality Implementation Plan (SIP). The Section 176A(a)(2) Petition proposes to remove portions of the state from the Ozone Transport Region because they are in attainment for National Ambient Air Quality Standards (NAAQS) and do not negatively impact other jurisdictions' ability to meet air quality standards. The State is also proposing amendments to the Portland and Midcoast Ozone Maintenance Areas to demonstrate that these areas will continue to maintain compliance with the 1997 8-hour ozone NAAQS; the Section 110(a)(1) and (2) Infrastructure SIP which demonstrates that Maine has the program infrastructure in place to ensure that it will meet the CAA requirements for the 2015 ozone NAAQS, and the Section 110(a)(2)(D)(i)(I) "Good Neighbor" SIP which demonstrates that emissions from sources in Maine do not significantly contribute to non-attainment in, or interfere with maintenance by, any other state with respect to the 2015 ozone standard. A vote is anticipated in early 2020.

Informational Sessions. The Board held two informational sessions which are open to the public, one on Maine's Product Stewardship Program, the other on changes to the Board's authority enacted by P.L. 2019, c. 315.

IV. Closing

As noted above, this report is submitted in fulfillment of the provisions of 38 M.R.S. § 341-D(7). I would be happy to meet with the Committee and respond to any questions members may have regarding the Board's work and the specific recommendations in this report.

Respectfully submitted,



Mark C. Draper, Chair
Board of Environmental Protection

Attachments:

A. Board of Environmental Protection Members: Biographical Information

Attachment A: Board of Environmental Protection Members



Mark C. Draper, Chair
Caribou, 2nd Term

Mr. Draper is the Solid Waste Director for Aroostook Waste Solutions (formerly Tri-Community Recycling and Sanitary Landfill) in Fort Fairfield, a position he has held since 2003. Mr. Draper previously held the position of Senior Environmental Engineer at the former Champion International Corporation/International Paper mill in Bucksport where he was responsible for oversight of the mill's landfill operation, waste reduction and recycling activities, and hazardous waste management. Mr. Draper also served as plant engineer for the mill's 290-MW co-generation power plant from 2001-2003. Mr. Draper served on the Board of the Maine Resource Recovery Association for 14 years, and is currently Chairman of the Northern Maine Solid Waste Management Committee. He was appointed to the Board by Governor Paul R. LePage in October 2014, and appointed for a second term in June 2018. Governor Janet T. Mills appointed Mr. Draper Chair in March 2019.



James W. Parker
Veazie, 2nd Term

Mr. Parker is a professional engineer and former State Representative for District 18. Mr. Parker served in the 125th Legislature and was a member of the Joint Standing Committee on Environment and Natural Resources and the Special Select Committee for Regulatory Fairness and Reform. Mr. Parker graduated from the University of Maine with a degree in civil engineering. Following employment with James W. Sewall Company, he founded Civil Engineering Services, Inc. (CES, Inc.), an engineering consulting firm providing services in a variety of areas including water supply, wastewater, solid and hazardous waste management, and site development. Mr. Parker retired from the firm in 2009, and now spends summers as a charter captain for whale and sightseeing tours on the downeast coast. Mr. Parker was appointed to the Board by Governor Paul R. LePage in June 2013; he was appointed for a second term in May 2017. Mr. Parker served as Chair from December 2014 to March 2019.



Alvin K. Ahlers
North Yarmouth,
2nd Term

Mr. Ahlers is a retired Registered Professional Engineer. He served as Environmental Manager for Fairchild Semiconductor Corporation in South Portland from 1993 to 2004 where he was responsible for managing environmental compliance for the facility and was an active member of Maine DEP's Environmental Leadership program for Fairchild. Prior to joining Fairchild, Mr. Ahlers was employed by ABB Environmental Services (formerly E.C. Jordan Co.) of Portland. Since retiring he has been active in town government, currently serving on the Town of North Yarmouth's Budget Committee and on the town's Economic and Sustainability Committee. He was appointed to the Board by Governor Paul R. LePage in September 2011. Mr. Ahlers was appointed to a second term in May 2017.



Mark Dubois
Falmouth, 1st Term

Mr. Dubois, a professional geologist, is the Natural Resources Manager for springs and land in Maine for Poland Spring / Nestle Waters North America. He was previously employed by Woodard & Curran Engineers and Atlantic Geoscience, Inc. Mr. Dubois has worked on a variety of projects in Maine and elsewhere in the Northeast related to drinking water, site characterization, and remediation of contaminated sites. Mr. Dubois received his Bachelor's Degree in Geology from the University of Maine and his Master's Degree in Hydrogeology and Glacial Geology from the University of Cincinnati. He also conducted research on glacial geology in the Antarctic, and is a recipient of the Antarctic Service Medal. Mr. Dubois's community service includes coaching youth baseball and soccer. Mr. Dubois resides in Falmouth with his wife and two children. Mr. Dubois was appointed to the Board by Governor Paul R. LePage in January 2018.



Susan M. Lessard
Bucksport, 1st Term

Ms. Lessard is the Town Manager for the Town of Bucksport. She previously served as the Town Manager for the communities of Hampden, Vinalhaven, Fayette, and Livermore Falls. Over her career in municipal government, Ms. Lessard has gained extensive experience in solid waste management issues, municipal financial management, and community development. She is a past president of the Maine Municipal Association, and has served on the Municipal Review Committee and the Maine Rural Development Council. Ms. Lessard has received several awards including the Governor's Environmental Excellence Award (2002), Maine Engineering Excellence Award (1998), and Maine Town and City Manager's Association Leadership Award (1999). Ms. Lessard was appointed to U.S. EPA's Local Government Advisory Committee in 2018. Ms. Lessard resides in Bucksport with her husband Dan. She was appointed to the Board by Governor Paul R. LePage in January 2018.



Robert S. Duchesne
Hudson, 1st Term

Robert Duchesne is a former State Legislator and radio show broadcast host. During his radio career, Mr. Duchesne was active in charity and public service organizations in the Bangor area, including Downeast Big Brothers Big Sisters, Maine Audubon, and the Maine Association of Broadcasters. He also served on several economic and business development boards. In 2005, Mr. Duchesne was elected to the Maine House of Representatives, where he served six non-consecutive terms. While in the Legislature, he chaired both the Environment and Natural Resources Committee and the Inland Fisheries and Wildlife Committee. Mr. Duchesne is owner and operator of Maine Birding Trail. Mr. Duchesne also shares his birding expertise in a weekly birding column for the Bangor Daily News and the Woods and Waters column for Bangor Metro magazine. Robert Duchesne resides at Pushaw Lake in Hudson with his wife, Sandi. He was appointed to the Board by Governor Janet T. Mills in March 2019.



Robert M. Sanford
Gorham, 1st Term

Robert Sanford is Chair of the Department of Environmental Science & Policy at the University of Southern Maine, a position he has held since 2010. Mr. Sanford obtained an M.S. and Ph.D. in Environmental Science from the State University of New York College of Environmental Science and Forestry. He is the author of numerous books and journal articles on environmental planning and policy, applied archeology, instruction, and civic engagement. Prior to joining the faculty of the University of Southern Maine in 1996, Mr. Sanford served 10 years as an Environmental Board District Coordinator for the State of Vermont administering a land-use permitting program for one of Vermont's nine environmental districts. In addition to his teaching and academic research responsibilities, Mr. Sanford has served on numerous advisory committees including the Maine Water Resources Committee, the Maine Farmland Project, the Friends of the Presumpscot River, and the Town of Gorham's Municipal Recycling Committee. He lives in Gorham with his wife and son. Robert Sanford was appointed to the Board by Governor Janet T. Mills in July 2019.
