STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

SPEAKING IN OPPOSITION TO L.D. 865

AN ACT TO CLARIFY THE ROLES AND RESPONSIBILITIES OF THE BOARD OF ENVIRONMENTAL PROTECTION BY ADJUSTING THE REQUIREMENTS FOR CERTAIN HEARINGS AND FOR CERTAIN AGENCIES BY ADJUSTING THE REQUIREMENTS FOR COST-BENEFIT ANALYSIS

SPONSORED BY SEN. BENNETT

BEFORE THE JOINT STANDING COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

DATE OF HEARING:

MARCH 15, 2023

Senator Brenner, Representative Gramlich, and members of the Committee, I am Bill Hinkel, the Executive Analyst for the Board of Environmental Protection, which is part of the Department of Environmental Protection. I am speaking in opposition to L.D. 865 on behalf of the Department.

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L.D. 865 would revise two statutes: the Maine Administrative Procedure Act in Title 5 and the Board of Environmental Protection's responsibilities and duties in Title 38.

Bill Section 1, Cost-benefit analysis

The proposed amendments to Maine's Administrative Procedure Act, or MAPA, in Section 1 of the bill would change the cost-benefit analysis requirements of all state agency rulemaking activities and are not specific to the DEP. Currently, MAPA provides state agencies with discretion to conduct an analysis of the benefits and costs of a proposed rule if the agency has sufficient staff expertise and budgeted resources to complete the analysis. The proposed amendments instead shift the costs of the analysis onto "the applicant." However, there is no *applicant* in a rulemaking process; rulemaking is initiated by an authorized agency or by petition. Therefore, the proposed amendments to Title 5 would shift the costs of a rulemaking cost-benefit analysis to an entity that does not exist in a rulemaking proceeding.

Bill Section 2

The proposed amendment identified in Section 2 of the bill appears to be only a minor clarification.

Bill Section 3

Sections 3 and 4 of the bill would revise the statutory provisions that govern when the Board assumes jurisdiction for a license application. As a matter of background, when the Board assumes jurisdiction over a permit or license application, Department staff serve as staff to the Board and present all technical, scientific, and engineering reviews of the application materials to the Board. Department staff draft proposed decision documents for the Board's consideration and present recommendations to the Board for their consideration. All decisions regarding an application are subject to a majority vote of the Board and must occur at a meeting open to the public. When the Board assumes jurisdiction over an application, it will hold a hearing unless it votes otherwise at the time

it assumes jurisdiction. Board hearings on license applications are adjudicatory hearings conducted in accordance with MAPA. Any person may request intervenor status in a licensing hearing, and the applicant, any intervenors and governmental agencies may testify in hearings.

The proposed amendments identified in Section 3 of the bill would require the Board to review every license application filed with the Department to determine whether each meets the criteria as a "project of statewide significance" for which the Board would then be required to assume jurisdiction and decide. A project of statewide significance is defined in statute as a project that meets at least three of the following four criteria:

1. Will have an environmental or economic impact in more than one municipality, territory or county;
2. Involves an activity not previously permitted or licensed in the State;
3. Is likely to come under significant public scrutiny; and
4. Is located in more than one municipality, territory or county.[1]

The Department receives approximately 4,000 license applications per year. Currently, the responsibility to review each application to determine whether any is a project of statewide significance falls to the Commissioner under Title 38, section 344(2-A), which states that "the [C]ommissioner shall decide as expeditiously as possible if an application meets three of the four criteria set forth in section 341-D, subsection 2 and shall request that the [B]oard assume jurisdiction of that application."

If the Commissioner determines that three of the four criteria are met, the application is referred to the Board for review. Any interested person, including an applicant, can also request that Board assume jurisdiction over an application. In either case, the Board

[1] 38 M.R.S. § 341-D(2)(E-H).

applies the same statutory criteria to the application and makes an independent determination as to whether the proposed project is one of statewide significance for which the Board may choose to assume jurisdiction. In contrast, the bill would require the Board to make a formal decision by vote for all license applications, which would require the Board to convene frequent public meetings and may require restructuring the Board's membership to support the additional demand on this volunteer citizen board.

The statute does not provide any further description for how to assess economic impact for the variety of project types that require a license, or how to predict if a project is likely to come under significant public scrutiny, including how to measure if the level of predicted scrutiny would be *significant*. The vast majority of license applications do not rise to the level of a project of statewide significance because they do not meet two of the four statutory criteria. Projects typically involve an activity previously licensed in the state and that are located in only one municipality, territory or county. However, there are numerous licensed facilities in Maine that occupy property that spans more than one town, have environmental and economic impacts in more than one town, territory or county. [2] As such, every application submitted by these facilities for license renewals, amendments or revisions, which is expected to generate some level of public interest and scrutiny, automatically meet two of the four criteria (location and impact) for projects of statewide significance. It is rare for the Department to receive an application for an activity that has not previously been permitted, so the determination whether the project is one of statewide significance for which the Board may assume jurisdiction will depend on how Board members analyze anticipated public scrutiny of pending applications. If the Board will be required to make a formal decision for thousands of license applications every year, the Legislature should provide clear parameters for evaluating

[2] Examples include Anson-Madison Sanitary District, Dayton Sand and Gravel, Huhtamaki, MB Bark, Moose River Lumber, and Sappi Somerset.

the economic impact and potential for public scrutiny of those applications to ensure the Board's evaluations are consistent, defensible, and provide a reasonable level of regulatory certainty.

I would note that, regardless of whether the Commissioner refers an application to the Board, the statute currently requires the Commissioner to notify the Board of all applications accepted as complete for processing, and it allows the Board to vote to assume jurisdiction of any application if it finds that at least three of the four criteria are met. 38 M.R.S. § 344(1) and 38 M.R.S. § 341-D(2). Thus, the current structure that requires the Commissioner, and her program-specific staff experts, to screen all applications for their potential to be a project of statewide significance does not prevent the Board from conducting its own evaluation and determination.

Bill Section 4

The proposed changes in Section 4 of the bill would remove language that gives the Board discretion to vote whether to take jurisdiction of a license application. This proposed change reinforces that change in Section 3 that would require that the Board assume jurisdiction and decide applications for all projects that meet three of the four criteria for projects of statewide significance.

This combined effect of Sections 3 and 4 of the bill would require additional staff positions to the Board and the Department. It would also increase costs for license applicants who would likely need to hire technical experts and attorneys to participate in Board hearings and proceedings.

Bill Section 5

Hearings on appeals

The proposed amendments to the Board's responsibilities and duties in Title 38, section 341-D regarding appeals of Commissioner licensing decisions would eliminate the Board's discretion to hold a hearing on an appeal and make hearings on every appeal mandatory. Pursuant to the DEP's Chapter 2 rule, *Rule Concerning the Processing of Applications and Other Administrative Matters*, the Board may conduct a hearing on any appeal of a Commissioner license decision, based on either a request to do so or of the Board's own accord. An appellant may request a hearing at the time an appeal is filed with the Board, and the request must specify the reasons why a hearing is warranted. The Board will hold a hearing on an appeal in those instances where the Board determines there is credible conflicting technical information regarding a licensing criterion, and it is likely that a hearing will assist the Board in understanding the evidence relevant to the issued raised in the appeal. Since 2020, the Board has processed roughly three dozen appeals of Commissioner's licensing decisions.

Not all appellants request or want a hearing on an appeal. The proposed change to Title 38 presented in Section 5 of the bill would significantly increase the processing time for appeals and seems to be in direct conflict with the intent of the other proposed amendment in Section 6 of the bill to require the Board to decide all appeals not more than 180 days after an appeal is filed. A requirement to conduct a hearing on every appeal to the Board, regardless of the desire and circumstances or whether a Department hearing was held on the underlying license application, would significantly increase demands on Board members and Department staff, and force parties to an appeal, including those not represented by counsel, to participate in an adjudicatory proceeding. For all the foregoing reasons, the Department opposes a requirement to make hearings on Board appeals mandatory.

Processing appeals under new laws

The bill proposes to change the way an appeal is processed by requiring that the Board's decisions on appeals must be based on the laws and rules in effect at the time the appeal was filed rather than on those in effect at the time application was submitted to the Department.

The charge of the Board in deciding administrative appeals is to determine whether challenges to any findings of fact or conclusions of law made by the Commissioner in deciding an application should be upheld, modified or reversed based on the administrative record that was developed by Department staff during the processing of the application.

Title 38 currently requires that "[a]n application for a permit, license or approval is processed under the substantive rules in effect on the date the application or request for approval is determined to be complete for processing." 38 M.R.S. § 344(1-A). On appeal, Department rule specifies that "[t]he record for appeals decided by the Board is the administrative record prepared by Department staff in its review of the application, unless the Board admits supplemental evidence or decides to hold a hearing on the appeal." Ch. 2, § 24(D).

The proposed change in Section 5 of the bill would require the Board to review the Department's decision against statutory and regulatory requirements that were not able to be considered by the Department in deciding the application and that were not addressed by applicants in their application materials. This would create significant regulatory uncertainty for any person or business that requires a license from the Department. Further legal analysis is recommended to determine whether the proposed change is congruous with Title 1, Section 302, regarding retroactive application of laws to pending actions.

Supplemental evidence

Section 5 of the bill would shift the responsibility and authority to rule on the admissibility of proposed supplemental evidence from the Board Chair to a majority vote of the full Board. The BEP is a voluntary citizen board that typically convenes twice a month. The Governor appoints one member to serve as chair. The Chair has an added responsibility above and beyond other board members to regulate the course of Board proceedings, including in its appellate capacity the authority to rule on the admissibility of proposed supplemental evidence. The role of the Chair is analogous to that of a presiding officer in a licensing hearing. The Board has experienced a marked increase over the past few years in requests to admit supplemental evidence in appeal proceedings. A shift to requiring a vote of the full Board on all supplemental evidence proffered by appellants and other parties to the appeal would drastically increase the length of time of appeal proceedings. Decisions on these requests are time-consuming and would require additional meetings of the Board. The law establishes the criteria for when supplemental evidence may be admitted to the record, and these criteria are carried through to the Department's Chapter 2 rule. The criteria for admitting supplemental evidence are the same whether the Chair or the full Board make the ruling. In short, the proposed change in the law is not expected to result in an improved process or outcome, and would result in a longer appeal processing time for all involved.

The proposed addition of "or arises from materially changed circumstances" to the criteria for admittance of supplemental evidence in 38 M.R.S. § 341-D, sub-§4, paragraph A appears to expand the scope of supplemental evidence that may be considered for admittance into the record in a manner that is vague and subjective. This change would likely expand the scope of the Board's review of the Commissioner's decision. The existing statutory criteria regarding the admissibility of supplemental evidence are already expansive and the proposed change would not provide the Board with better tools to perform its appellate function.

Bill Section 6, Appeal processing time

Section 6 of the bill proposes a maximum appeal processing time of 180 days after an appeal is filed with the Board. The Board strives, and in fact is required, to decide appeals as expeditiously as possible. However, if an adjudicatory public hearing by the Board is required for all appeals, as proposed in Section 5 of the bill, it will be nearly impossible for the Board to decide an appeal within 180 days.

For example, when an appeal is filed with the Board, Board staff must first determine whether the appeal contains proposed supplemental evidence. If supplemental evidence is offered, the other parties to the appeal proceeding are entitled to comment on the admissibility of that evidence and may offer proposed supplemental evidence in response. The appellant then has the right to comment on the supplemental evidence offered in response. Only after this lengthy process is the Board Chair able to rule on the admissibility of all proposed supplemental evidence. Then the licensee (if the licensee is not the appellant) is entitled to submit a response to the merits of the appeal. The process of evaluating and ruling on proposed supplemental evidence can take a couple of months for straightforward appeals with few parties to several months for complex appeals with multiple appellants. I would also note that, while not specifically contemplated by the appeal rules, parties to an appeal will often submit additional filings with the Board, such as objections to opposing party filings, that require additional time to review.

Once all party filings are complete, Department staff serving as staff to the Board must analyze the merits of the appeal and all record evidence. Staff then drafts a proposed Board Order for the Board's consideration in deciding the appeal and prepares a packet of relevant information from the record for distribution to the Board members. Department staff must incorporate the tasks arising from the filing and processing of an appeal into their existing workload; the Department does not have a separate division dedicated to working appeals.

Setting an arbitrary appeal processing deadline of 180 days would force the Board to conduct rulemaking to significantly decrease the Chapter 2 filing deadlines for appeal participants and is anticipated to result in the hasty filing of documents and unreasonably impact the appeal rights of those involved. A 180-day appeal processing deadline would place the Board in jeopardy of running afoul of the statutory requirement, even in the best of scenarios. The legal ramifications of a missed appeal processing deadline are unclear and should be evaluated before any specific numeric deadlines are established.

Bill Section 7, Information sharing

Section 7 of the bill proposes to add a statutory requirement that all submissions directed to the Board Chair be circulated to all Board members. One function of the Board Chair is to screen submissions to ensure that each is timely and does not contain inappropriate or inadmissible materials that could bias or influence other Board members in evaluating the matter before the Board. For example, a person may submit materials with an appeal that are outside the record and that are ultimately not admitted to the record. Forwarding those extra-record materials to the full Board would present them with information that they should not consider in deciding the appeal and that could prejudice their analysis. It is not uncommon for some appellants, licensees or interested persons to submit filings that are outside of what is allowed to be considered by the full Board in deciding matters.

All materials properly and timely filed with the Board through the Chair are circulated to all Board members in advance of public meetings. Persons who submit information to the Board that is not proper are informed of the impropriety and that they will not be circulated to the full Board.

Conclusion

In conclusions, L.D. 865 does highlight some areas for improvement in the laws that govern the Board's review of license applications. Representatives of the Department are willing to work with the bill sponsor and other interested persons to suggest potential amendments to L.D. 865 that may accomplish the goals of this legislation with less fiscal impact to the State and license applicants.

Thank you for the opportunity to provide testimony. I am available to answer questions of the Committee, both now and at work session.