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TESTIMONY OF

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MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

SPEAKING IN SUPPORT OF L.D. 2210

**AN ACT TO CLARIFY BOARD OF ENVIRONMENTAL PROTECTION PROCEDURES
REGARDING APPEALS OF LICENSING OR PERMITTING DECISIONS OF THE
COMMISSIONER OF ENVIRONMENTAL PROTECTION**

SPONSORED BY REP. DOUDERA

**BEFORE THE JOINT STANDING COMMITTEE
ON
ENVIRONMENT AND NATURAL RESOURCES**

DATE OF HEARING:

FEBRUARY 25, 2026

Senator Tepler, Representative Doudera, and members of the Committee, I am Bill Hinkel, the Executive Analyst for the Board of Environmental Protection. I am speaking in support of L.D. 2210 on behalf of the Department.

L.D. 2210 would amend the statute that governs Board appeals of licensing decisions made by the DEP Commissioner. Because the bill clarifies key points, increases the efficiency of appeal processes, better aligns the Board's administrative appeal procedures with judicial procedures, and promotes the submission of information about

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proposed projects during the review of license applications, the Department supports L.D. 2210.

The proposed amendments to Section 4 would clarify what constitutes the record the Board uses when deciding appeals. This new language is based on an existing section of the Department's Chapter 2 rule that outlines appeal procedures. While a statutory change is not required for the Board to maintain its current practice regarding the record used in appeals, adding this detail in statute would add clarity, especially given that the existing statute provides for consideration of supplemental evidence.

The first substantive proposed amendment to Section 4(A) would specify that each appellant must include all the information required to be submitted to the Board when an appeal is filed. Although a statutory change is not required for the Board to maintain its current practice under Chapter 2 to require each appellant to include the minimum information necessary for the Board to understand the merits of the appeal and to determine whether the appellant has standing to bring the appeal to the Board, the proposed amendment would support this Chapter 2 requirement and strengthen the Board's authority to dismiss appeals that fail to provide the required contents.

The second substantive proposed amendment to Section 4(A) would clarify who is permitted to submit proposed supplemental evidence to the Board. Typically, the Board makes its decision on an appeal based on the same record of information that was available to and considered by the DEP Commissioner before the license decision was issued. However, the statute allows the Board to consider supplemental evidence that was not considered by the Commissioner, provided the supplemental evidence is relevant and material to the appeal and was presented to the Department at the earliest possible time. The Department interprets the current statute to allow persons who are neither the licensee nor the appellant—including people who would not have standing to appeal the decision—to offer supplemental evidence during an appeal proceeding. Anytime a person offers proposed supplemental evidence, it slows the appeal process.

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As currently structured, this provision could be abused to intentionally delay a Board decision on appeal, which is wasteful of Department resources and reduces regulatory certainty for licensees. Furthermore, allowing a person to submit proposed supplemental evidence to the Department during an appeal proceeding discourages participation in the licensing process while the application is pending before the Commissioner. L.D. 2210 clarifies that the appellant and the licensee may submit proposed supplemental evidence. If the Legislature is satisfied with the current structure, which may result in licensees having to potentially wait well over a year to have a license upheld, no changes to this aspect of the statute are necessary. However, if the intention is to make the overall permitting process faster and allow licensees to proceed with major investments, the Legislature should make the changes proposed in L.D. 2210.

The last substantive proposed amendment to Section 4(A) adds language incorporating the Board's long-held practice of allowing the licensee to submit a written response to the merits of the appeal. Although a statutory change is not required for the Board to maintain its current practice under Chapter 2, clarifying this due process right of the licensee in statute strengthens the provision that is currently only specified in rule.

The other proposed amendments included in L.D. 2210 are for language consistency and conciseness and are supported by the Department.

The Department suggests additional language changes for consistency and clarity regarding references in the statute to the record on appeal. I have circulated to the Committee a mark-up of L.D. 2210 with those additional proposed changes shown in double strikethrough and double underline.

In conclusion, L.D. 2210 would result in important and helpful clarifications regarding the Board's appeal procedure, incorporate practices of the Board that are outlined in the

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DEP's Chapter 2 rule, encourage early participation in DEP licensing proceedings, and ensure due process and improve regulatory certainty for appellants and licensees.

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

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

Sec. 1. 38 MRSA §341-D, sub-§4, as amended by PL 2023, c. 512, §2, is further amended to read:

4. Appeal or review. The record for appeals decided by the board is the administrative record relied upon by the commissioner in the commissioner's review of a license or permit application, including the record of any adjudicatory hearing held by the department, any supplemental evidence admitted by the board on appeal and, if the board holds a hearing on the appeal, any additional evidence obtained by the board from that hearing. The board shall review, may hold a hearing at its discretion on and may affirm, amend, reverse or remand to the commissioner for further proceedings any of the following:

A. Final license or permit decisions made by the commissioner when a person aggrieved by a decision of the commissioner appeals that decision to the board within 30 days of the date of the decision. An appellant shall identify in the appeal the licensing or permitting criterion or standard the appellant believes was not satisfied in the commissioner's final license or permit decision and shall include in the appeal all information required to be submitted by rules adopted pursuant to this section. Any proposed supplemental evidence offered by an appellant must be included with the filing of the appeal. The board staff shall issue to the appellant; the licensee or permittee, if the licensee or permittee is not the appellant; interested persons; and to any other persons who have requested to be notified of the license or permit decision written notice of the filing of the appeal and, which must identify any proposed supplemental evidence offered by the appellant. For the purposes of this paragraph, "interested person" means any person that submitted written comments on the application that is the subject of the appeal. Within 30 days of the issuance of the written notice by the board staff of the filing of the appeal by the board staff, the licensee or permittee, if the licensee or permittee is not the appellant, and any interested parties identified by the commissioner pursuant to section 344, subsection 4-A, paragraph B may submit proposed supplemental evidence to the board and the appellant addressing the issues raised in the appeal. The chair of the board may allow admit proposed supplemental evidence into the record to be supplemented when it the chair finds that the evidence offered is relevant and material to the appeal and that:

- (1) An interested party seeking to supplement the record The person that submitted the proposed supplemental evidence has shown due diligence in bringing the evidence to the licensing or permitting 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 or permitting process.

The board shall admit into the record additional evidence and analysis submitted by department staff in response to issues raised in the appeal and any supplemental evidence allowed by the board in accordance with this paragraph. The licensee or permittee, if the licensee or permittee is not the appellant, may submit to the board a written response to the merits of the appeal. The board is not bound by the commissioner's findings of fact or conclusions of law but may adopt, modify or reverse findings of fact or conclusions of law established by the commissioner. Any changes to a final license or permit decision of the commissioner made by the board under this paragraph must be based upon the board's review of the administrative record on appeal relied upon by the commissioner in the commissioner's

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~~review of the application, any supplemental evidence admitted by the board on appeal and, if the board holds a hearing on the appeal, any other additional evidence obtained by the board through any from that hearing on the appeal held by the board.~~

If the board modifies or reverses a final license or permit decision of the commissioner pursuant to this paragraph, the licensee or permittee shall implement any changes to the project necessary to comply with the decision of the board, which may include, but are not limited to, deconstruction and site restoration, and the department may initiate enforcement actions pursuant to section 347-A and impose penalties pursuant to section 349 if the licensee or permittee fails to satisfactorily implement those changes;

C. License or permit decisions appealed to the board under another law. Unless the law provides otherwise, the standard of review is the same as provided under paragraph A;

D. License or permit decisions regarding an expedited wind energy development as defined in Title 35-A, section 3451, subsection 4 or a general permit pursuant to section 480-HH or section 636-A. In reviewing an appeal of a license or permit decision by the commissioner under this paragraph, the board shall base its decision on the ~~administrative record on appeal of the department relied upon by the commissioner in the commissioner's review of the application, including the record of any adjudicatory hearing held by the department, and any supplemental information allowed evidence admitted by the board for supplementation of the record on appeal and, if the board holds a hearing on the appeal, any additional evidence obtained by the board from that hearing.~~ The board may remand the decision to the department for further proceedings if appropriate. The chair of the Public Utilities Commission or the chair's designee may serve as a nonvoting member of the board and is entitled to fully participate but is not required to attend meetings and hearings when the board considers an appeal pursuant to this paragraph. The chair's participation on the board pursuant to this paragraph does not affect the ability of the Public Utilities Commission to submit information to the department for inclusion in the record of any proceeding before the department; and

E. Decisions on insurance claims-related matters heard under section 568-A, including but not limited to decisions on eligibility for coverage, eligibility of costs and waiver and amount of deductible. Except as provided in board rules, an applicant must file the appeal not later than the 30th day after the applicant receives the decision made under section 568-A. If the board overturns the decision made under section 568-A, the department must pay reasonable costs, including reasonable attorney's fees, incurred by the aggrieved applicant in pursuing the appeal to the board from the Maine Ground and Surface Waters Clean-up and Response Fund established under section 551. Reasonable attorney's fees include only those fees incurred from the time of an insurance claims-related decision forward. Decisions of the board are subject to judicial review pursuant to Title 5, chapter 375, subchapter 7.

SUMMARY

This bill, which is reported out by the Joint Standing Committee on Environment and Natural Resources pursuant to the Maine Revised Statutes, Title 3, section 955, subsection 4, implements recommendations resulting from the committee's review of the Board of Environmental Protection under the State Government Evaluation Act. The bill amends procedures of the Board of Environmental Protection regarding appeals of licensing or permitting decisions of the Commissioner of Environmental Protection as follows.

1. It specifies the composition of the record to be considered by the board in deciding an appeal of a final license or permit decision of the commissioner.

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2. It clarifies that an appellant to a final license or permit decision must include in the appeal all information required by rule of the board.

3. It clarifies the persons that may offer proposed supplemental evidence in an appeal proceeding before the board and the circumstances under which that evidence may be submitted to the board and provides that it is the chair of the board that determines the admissibility of that evidence.

4. It codifies a longstanding practice of the Department of Environmental Protection to allow a licensee or permittee, if the licensee or permittee is not an appellant to a final license or permit decision, to submit to the board a written response to the merits of the appeal.

The committee has not taken a position on the substance of the bill and, by reporting this bill out, the committee is not suggesting and does not intend to suggest that it agrees or disagrees with any aspect of this bill. The committee is reporting the bill out for the sole purpose of obtaining a printed bill that can be referred to the committee for a public hearing and subsequent committee action in the normal course.