



**THE MAINE SENATE**  
131st Legislature

**Testimony of Senator Richard A. Bennett**  
**LD 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”**  
**15 March 2023**

Senator Brenner, Representative Gramlich, and honorable members of the Joint Standing Committee on Environment and Natural Resources. I am Senator Rick Bennett of Oxford, and I have the honor of serving the people of 14 communities in Western Maine in the State Senate. I am here to introduce LD 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.”

The 125<sup>th</sup> Legislature passed LD 1, “An Act to Ensure Regulatory Fairness and Reform”. A special joint committee was then appointed to handle the bill. Multiple public hearings were held throughout the state to gather public input on how to accomplish the bill’s intent.

After those hearings, a special subcommittee was appointed to look at the environmental concerns. Member of this committee included Senators Saviello and Goodall and Representatives Deschene, Parker and Carey. This small group continued to gather information from the public. One thing that became very clear to this subcommittee was that the public and regulated community were very concerned that the Board of Environmental Protection (BEP) was overwhelmed with dealing with minor but time-consuming issues. Then Governor LePage’s solution was to establish a Court and abolish the BEP.

After gathering information and listening to public concerns, the subcommittee suggested the following changes:

- Reduce the BEP in size from 10 to 7 members, and
- Ensure in statute that the BEP only took up environmental issues of statewide concern.

The legislation ultimately passed in the House 147-3 and in the Senate 34-0. However, one section was not properly changed.

Interestingly, the first trial of this LD 1-created statute did not come until a recent project familiar to us all, the New England Clean Energy Connect (“NECEC”). While this project revealed issues with this law that I believe need to be addressed, I want to be clear that this bill is not intended to, nor will it, impact that project. This bill aims to look forward, learning from this first major test of that LD 1 from the Legislature 12 years ago, and make certain corrections. I believe this is important and timely: there may soon be other projects commanding the public’s attention, like mining, that will be of statewide significance requiring BEP jurisdiction.

Common sense and overwhelming public opinion would suggest that the NECEC project was not of statewide significance. Yet, reading the law, the DEP Commissioner at the time said: “[T]he Board has discretion as to whether to assume jurisdiction, but is not required to do so.” The Commissioner was referring to 38 M.R.S. § 341-D(2): “The board may vote to assume jurisdiction of an application if it finds that at least 3 of the 4 criteria of this subsection are met.”

I point out that in all other parts of the statute the word “shall” appears rather than “may”. Please note the cognitive dissonance between the first line of this paragraph 2 and the last:

- “Except as otherwise provided in this subsection, the board shall decide each application for approval of permits and licenses that in its judgment represents a project of statewide significance.”
- “The board may vote to assume jurisdiction of an application if it finds that at least 3 of the 4 criteria of this subsection have been met.”

And what are these four criteria, of which three are required to be met? For reference, the statute is below:

**Title 38: §341-D.** Board responsibilities and duties reads:

**2. Permit and license applications.** Except as otherwise provided in this subsection, 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 a project that meets at least 3 of the following 4 criteria:

A. [PL 2011, c. 304, Pt. H, §6 (RP).]

B. [PL 2011, c. 304, Pt. H, §6 (RP).]

C. [PL 2011, c. 304, Pt. H, §6 (RP).]

D. [PL 2011, c. 304, Pt. H, §6 (RP).]

E. Will have an environmental or economic impact in more than one municipality, territory or county; [PL 2011, c. 304, Pt. H, §6 (NEW).]

F. Involves an activity not previously permitted or licensed in the State; [PL 2011, c. 304, Pt. H, §6 (NEW).]

G. Is likely to come under significant public scrutiny; and [PL 2011, c. 304, Pt. H, §6 (NEW).]

H. Is located in more than one municipality, territory or county. [PL 2011, c. 304, Pt. H, §6 (NEW).]

The board shall also decide each application for approval of permits and licenses that is referred to it jointly by the commissioner and the applicant.

The board shall assume jurisdiction over applications referred to it under section 344, subsection 2-A when it finds that at least 3 of the 4 criteria of this subsection have been met.

The board may vote to assume jurisdiction of an application if it finds that at least 3 of the 4 criteria of this subsection have been met.

Again, the last sentence of this part of the statute reads:

“The board **may** vote to assume jurisdiction of an application if it finds that at least 3 of the 4 criteria of this subsection have been met.” I believe this was an oversight that needs correcting.

LD 865 also addresses other issues that became apparent during the permit issuance that are, frankly, unacceptable. This legislation corrects those deficiencies:

1. It took the BEP two and a half years to hear a permit appeal. I realize the pandemic had an effect on the timeline, but two and a half years? This does not meet the statutory demand of “timely”<sup>1</sup> consideration. I hope the committee would agree this is unacceptable. This legislation better defines the timeline for such an appeal.
2. During a recent appeal the BEP ignored what was actually going on in the field during that period of time. They hid behind the “record” being closed. They did not allow actual field conditions to be considered. I visited the project in the field and saw this destruction firsthand along with Senator Black, Representative Gramlich, and Representative Landry. Despite the long lapse in time and new information being available, the BEP would not allow additional testimony when the final appeal was ultimately heard. The BEP and its assigned Assistant Attorney General (AAG) made it very clear that if appellants continued to argue this point they would be told to sit down. Yet, when the appeal was denied, the BEP directed the DEP to modify the permit in question to reflect what was actually happening in the field. In fact, one modification was worked out in 10 minutes during the hearing.

My colleagues and I wrote a letter to the BEP providing evidence of the devastation taking place. We were admonished by the Executive Director for doing so. This proposed legislation addresses this injustice by requiring real time field conditions be considered as part of the record.

3. What information gets to the Board is currently controlled by the BEP Chair and the Assistant Attorney General. This legislation corrects this by ensuring the Board, not the Chair or the AAG, will make the decision on what the Board should see or not see on appeal.
4. Some of those who testified on LD 1 wanted to require a cost-benefit analysis be done for certain projects. However, financing this effort was not made clear. LD 865 makes it clear if this analysis is done it will be by a third party being paid by the applicant. One amendment may be necessary to ensure the benefactor is the State of Maine. I do believe projects of statewide significance need this kind of analysis. To use the NECEC as an example: a lot of promises were made on how Maine would benefit. This kind of analysis would have provided accountability to the assumed benefits and costs so that Maine people can assess whether those benefits would come to fruition.

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<sup>1</sup> <https://legislature.maine.gov/statutes/38/title38sec341-B.html>. “The purpose of the Board of Environmental Protection is to provide informed, independent and timely decisions on the interpretation, administration and enforcement of the laws relating to environmental protection and to provide for credible, fair and responsible public participation in department decisions.”

Those in opposition to this bill might argue these changes will “bog” down the Board and lengthen the permitting process. I disagree. Indeed, I believe it will encourage thoroughness and timeliness. Any project with statewide significance would go to BEP and any appeal would go to the Superior Court. Presently, if this LD 865 is not passed and the AAG hides behind the “may” a project like mining would go to DEP, possibly being appealed to BEP and then to the courts. Lawyers get rich, permittees are left in limbo, and the people of Maine lose.

In closing let me be clear again that nothing you do today will affect the final disposition of the NECEC project. However, I fully expect there will be projects in the near future that will be of statewide significance and caught up in this process. It is time to fix this statute to what was originally intended. Thank you.