



## BOARD OF ENVIRONMENTAL PROTECTION INFORMATION SHEET

### Guidance on Request for Board Jurisdiction

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### What is the significance of 'Board jurisdiction'?

The majority of license applications are processed at the DEP staff level and the decision is issued by the Commissioner; however, some applications are referred directly to the Board for processing and a decision. This could happen because: (1) state law requires that the Board decide the matter (e.g. an application for a commercial hazardous waste facility); (2) the Commissioner determines that the application meets one or more of the criteria listed below (Section II); or (3) the Board determines on its own authority that the statutory requirements for Board jurisdiction are met.

Applications processed at the staff level within the DEP typically do not include a public hearing process. However, an individual may participate in the licensing process as an interested person and provide comment on the application in accordance with the Department's Chapter 2, Rules Concerning the Processing of Applications and Other Administrative Matters. (*For more on this, please see DEP Information Sheet – Public Participation in the Licensing Process, January 2004*)

When the Board assumes jurisdiction over an application, the Board becomes the decision maker and will hold a public hearing on the application unless it explicitly votes not to hold a hearing. If the Board decides to hold a public hearing, individuals who want to provide detailed technical information and expert testimony at the hearing may petition to intervene in the process. Persons granted intervenor status by the Board are formally recognized as parties in the proceeding and have certain rights and responsibilities. These include the right to present evidence and witnesses at the hearing and to participate in cross-examination of the witnesses presented by the other parties. They also have an obligation to attend certain meetings and comply with schedules for the submission of documents in preparation for the hearing.

### **I. Pathways to Board Jurisdiction**

There are several pathways to Board jurisdiction: (a) the Commissioner may refer an application to the Board in response to a written request from a member of the public; (b) the Commissioner may recommend that the Board assume jurisdiction based upon his or her assessment of the issues raised by the application; or (c) the Board may assume jurisdiction on its own initiative.

- a) **Public request.** Any member of the public may submit a written request for Board jurisdiction.

A written request for the Board to assume jurisdiction over an application must be submitted to the Commissioner of the Department of Environmental Protection no later than 20 days after the application is accepted as complete for processing. [Chapter 2, section 17(A)].

- The request must be received by 5:00 p.m. on a regular business day either by:
  - Mail (U.S. Postal Service)
    - Dept. of Environmental Protection, Attn Commissioner  
#17 State House Station, Augusta, Maine 04333
  - In-hand delivery
    - Dept. of Environmental Protection, Attn Commissioner  
28 Tyson Drive, Augusta, Maine 04330
  - Fax (*if followed by receipt of an original within five (5) working days*), or
    - (207) 287-2814
  - Electronic mail (*if followed by receipt of an original within five (5) working days.*)
    - [David.P.Littell@maine.gov](mailto:David.P.Littell@maine.gov) copy to [Lynn.A.Boutilier@maine.gov](mailto:Lynn.A.Boutilier@maine.gov)

Although not required by law, it is recommended that a written request for Board jurisdiction contain the following information:

- (1) *The basis for the request.* State the statutory criteria (*see Section II*) that you believe apply and explain why you think the Board should review the application and decide the matter.
- (2) *Evidence to be examined.* Describe briefly the evidence you would bring to the process that may not already be included in the application in order to fully evaluate whether the proposed project would comply with environmental laws and rules, and why you believe a public hearing is needed.
- (3) *Visual aids.* If possible include maps or photos of the resource believed to be impacted by the proposed project.

The Commissioner reviews all requests for Board jurisdiction and makes a preliminary determination concerning whether to recommend that the Board take jurisdiction over the application and the licensing process. The Commissioner's determination is based on an assessment of whether the statutory criteria for Board jurisdiction (*See Section II*) are likely to be met.

In instances where the Commissioner determines that the criteria for Board jurisdiction are likely to be met, the Commissioner prepares a written recommendation for the Board's consideration. The Commissioner's recommendation is provided to the Board, the person requesting jurisdiction, the applicant, interested governmental agencies and other interested persons<sup>1</sup>. The Commissioner's recommendation is considered by the full Board at a Board meeting.

In instances where the Commissioner determines that the criteria for Board jurisdiction are not met, a letter stating the Commissioner's determination is sent to the person requesting jurisdiction, the applicant, interested governmental agencies, and other interested persons. The Chair of the Board and its Executive Analyst also receive a copy of the Commissioner's determination, and the full Board is advised of the Commissioner's determination at a Board meeting.

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<sup>1</sup> Interested person. "Interested Person" means any person who submits written comments on an application or who requests, in writing, receipt of materials related to a particular application. [Chapter 2, section 1(I.)]

- b) Commissioner Initiated. In the absence of a public request, the Commissioner may initiate a recommendation for Board jurisdiction over an application if the Commissioner determines, based upon the Department's review of an application and its assessment of the issues involved, that the application meets one or more of the criteria for jurisdiction (*See Section II*). In these cases, the Commissioner will prepare a written recommendation for the Board's consideration at a Board meeting.
- c) Board Initiated. The Board may assume jurisdiction over an application on its own initiative if it finds that one or more of the criteria for jurisdiction (*See Section II*) is met. In these cases, the Board will notify the Commissioner of its interest in considering Board jurisdiction over a particular application, and the matter will be considered by the Board at a Board meeting.

Recommendations regarding Board jurisdiction over a licensing matter are considered at a regularly scheduled meeting of the Board. At the meeting, the Board will provide an opportunity for the applicant, interested governmental agencies and interested persons to comment on the request. Following discussion, the Board will deliberate on a motion and vote on the matter. The Board's decision on a request for Board jurisdiction is not subject to appeal.

## **II. When does the Board assume jurisdiction over an application? Criteria for Board Jurisdiction**

State law specifies the types of applications that are appropriate for Board jurisdiction. In order for the Board to assume jurisdiction over an application, the Board must find that the application meets certain criteria. These criteria are contained in 38 M.R.S.A., section 341-D, subsection 2. In relevant part this section establishes 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.

The Board may not assume jurisdiction over an application for an expedited wind energy development as defined in Title 35-A, section 3451, subsection 4 or for a certification pursuant to Title 35-A, section 3456.”

Chapter 2, section 17(C)(4) provides that: “An application is of substantial public interest if the project has the potential to affect a broad geographic area or a natural resource of statewide significance, or has generated more than local interest.”

### **III. Roles of Board and Staff in Licensing Proceedings under ‘Board Jurisdiction’**

DEP employees are staff to the Board. As such, staff reviews the application, conducts technical analyses (when appropriate, this includes consultation with other State agencies), provides a policy context and makes recommendations to the Board through a written draft decision. At the public hearing, DEP staff’s primary role is to gather facts on behalf of the Board to clarify issues or obtain further relevant information. DEP staff may ask questions of any witness and may respond to questions from the Board concerning information in the record.

The Board’s role is to convene and preside over the public hearing, gather facts, evaluate data and testimony, weigh the evidence against relevant review criteria and render a written decision based upon the facts in the record before it.

For review of a Board license decision, individuals have two methods available: (1) petition the Board for reconsideration in accordance with Chapter 2 of the Department’s rules or (2) petition for judicial review in Maine’s Superior Court in accordance with Title 5, section 11001 et seq. and M.R.Civ.P. 80C. (*For more information on license review, please see DEP Fact Sheet – Board Reconsideration and Judicial Review, September 1998*).

**Note: The Department provides this INFORMATION SHEET for general guidance only; it is not intended to be legally binding or to be used as a legal reference.**