



# 127th MAINE LEGISLATURE

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Legislative Document

No. 1244

S.P. 449

In Senate, April 7, 2015

### An Act To Amend Environmental Permitting Standards

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Submitted by the Department of Environmental Protection pursuant to Joint Rule 204.  
Reference to the Committee on Environment and Natural Resources suggested and ordered printed.

A handwritten signature in cursive script that reads "Heather J.R. Priest".

HEATHER J.R. PRIEST  
Secretary of the Senate

Presented by Senator SAVIELLO of Franklin.  
Cosponsored by Representative HANLEY of Pittston and  
Representatives: CAMPBELL of Orrington, HARLOW of Portland.

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

2 **Sec. 1. 38 MRSA §344, sub-§2-A, ¶A**, as amended by PL 2011, c. 304, Pt. H,  
3 §18, is further amended to read:

4 A. Except as otherwise provided in this paragraph, the commissioner shall decide as  
5 expeditiously as possible if an application meets 3 of the 4 criteria set forth in section  
6 341-D, subsection 2 and shall request that the board assume jurisdiction of that  
7 application. If an interested person requests that the commissioner refer an  
8 application to the board and the commissioner determines that the criteria are not  
9 met, the commissioner shall notify the board of that request. If at any subsequent  
10 time during the review of an application the commissioner decides that the  
11 application falls under section 341-D, subsection 2, the commissioner shall request  
12 that the board assume jurisdiction of the application.

13 (1) The commissioner may not request the board to assume jurisdiction of an  
14 application for any permit or other approval required for an expedited wind  
15 energy development, as defined in Title 35-A, section 3451, subsection 4, a  
16 certification pursuant to Title 35-A, section 3456 or a general permit pursuant to  
17 section 480-HH or section 636-A. Except as provided in subparagraph (2), the  
18 commissioner shall issue a decision on an application for an expedited wind  
19 energy development within one year of the date on which the department accepts  
20 the application as complete pursuant to this section, and the commissioner shall  
21 issue a decision for an offshore wind power project or a hydropower project, as  
22 defined in section 632, subsection 3, that uses tidal action as a source of electrical  
23 or mechanical power within 185 days of the date on which the department  
24 accepts the application as complete pursuant to this section or within 270 days of  
25 the department's acceptance of the application if the commissioner holds a  
26 hearing on the application pursuant to section 345-A, subsection 1-A.

27 (2) The expedited review periods of 185 days and 270 days specified in  
28 subparagraph (1) do not apply to the associated facilities, as defined in Title  
29 35-A, section 3451, subsection 1, of the development if the commissioner  
30 determines that an expedited review time is unreasonable due to the size,  
31 location, potential impacts, multiple agency jurisdiction or complexity of that  
32 portion of the development. If an expedited review period does not apply, a  
33 review period specified pursuant to section 344-B applies.

34 The commissioner may stop the processing time with the consent of the applicant for  
35 a period of time agreeable to the commissioner and the applicant.

36 **Sec. 2. 38 MRSA §344, sub-§2-A, ¶D**, as enacted by PL 2013, c. 325, §4, is  
37 repealed and the following enacted in its place:

38 D. For an application for a permit for a grid-scale wind energy development, as  
39 defined in Title 35-A, section 3451, subsection 6, the following procedures apply.

40 (1) The commissioner shall accept public comment on an application during the  
41 course of processing the application. The commissioner shall set a deadline for  
42 receiving public comments.

1                   (2) The commissioner may not issue the final decision until 10 business days  
2                   after the close of the public comment period. The commissioner's final decision  
3                   must include responses to the public comments.

4                   **Sec. 3. 38 MRSA §480-C, sub-§5** is enacted to read:

5                   **5. Small-scale wind energy development.** A person may not construct or cause to  
6                   be constructed a wind energy development requiring certification under Title 35-A,  
7                   section 3456 without first obtaining a permit from the department.

8                   **Sec. 4. 38 MRSA §480-II** is enacted to read:

9                   **§480-II. Small-scale wind energy development; permit requirements**

10                  **1. Definitions.** As used in this section, unless the context otherwise indicates, the  
11                  following terms have the following meanings.

12                  A. "Decommissioning" means the physical removal of all components of a small-  
13                  scale wind energy development, including, but not limited to, wind turbines and  
14                  associated foundations to a depth of at least 24 inches; structures, roads, cabling,  
15                  electrical components and any other associated facilities and foundations to a depth  
16                  of at least 24 inches to the extent they are not otherwise in or proposed to be placed  
17                  into productive use; the grading and reseeded of all earth disturbed during  
18                  construction and decommissioning; and restoration of any disturbed wetlands or  
19                  critical wildlife habitat.

20                  B. "Small-scale wind energy development" means any wind energy development that  
21                  is not a grid-scale wind energy development as defined in Title 35-A, section 3451,  
22                  subsection 6, and that has a total generating capacity of at least 100 kilowatts.

23                  **2. Permit requirements.** An applicant for a permit to construct a small-scale wind  
24                  energy development shall demonstrate that the proposed project:

25                  A. Will be constructed with setbacks and other considerations adequate to protect  
26                  public safety, including, but not limited to, a fire protection plan. In making a finding  
27                  pursuant to this paragraph, the department shall consider the recommendation of a  
28                  professional licensed civil engineer as well as any applicable setback recommended  
29                  by a manufacturer of any equipment to be installed on or in support of the small-scale  
30                  wind energy development;

31                  B. Will be constructed using the best practical mitigation techniques for mitigating  
32                  impacts to endangered and threatened species, essential wildlife habitat and other  
33                  protected resources from all aspects of construction and operation, in accordance with  
34                  rules adopted under Title 35-A, section 3459; and

35                  C. Will not significantly compromise views from a scenic resource of state or  
36                  national significance, as considered under the criteria and methodologies set forth in  
37                  Title 35-A, section 3452.

38                  A person proposing to construct a small-scale wind energy development must  
39                  demonstrate adequate financial capacity to decommission the development at any time  
40                  during construction or operation of the development, or upon termination of development

1 operations for any reason. The obligation to decommission the development must be  
2 transferred to any future owner of the development in the event of a transfer of title.  
3 Decommissioning is required if the development's purpose or use is abandoned for a  
4 period of one year at any time after construction begins. Demonstration of financial  
5 capacity to decommission must include documentation of financial assurance that the  
6 decommissioning costs will be fully funded prior to the start of construction. Financial  
7 assurance may be demonstrated in the form of a performance bond, surety bond, letter of  
8 credit or other form of financial assurance acceptable to the department.

9 A public informational meeting must be held in accordance with department rules for  
10 permit application for a small-scale wind energy development.

11 **Sec. 5. 38 MRSA §632, sub-§4** is enacted to read:

12 **4. Microhydropower project.** "Microhydropower project" means a hydropower  
13 project with the capacity to produce up to 100 kilowatts of electricity or the mechanical  
14 equivalent. In determining whether a hydropower project is a microhydropower project,  
15 generation capacity is calculated as the total of all hydropower generation at a site.

16 **Sec. 6. 38 MRSA §634, sub-§3**, as amended by PL 2011, c. 655, Pt. MM, §21  
17 and affected by §26 and amended by c. 657, Pt. W, §5 and c. 682, §38, is further  
18 amended to read:

19 **3. Application review.** Within 10 working days of receiving a completed  
20 application, the commissioner shall notify the applicant of the official date on which the  
21 application was accepted.

22 ~~The~~ Except as provided in subsection 5, the commissioner shall circulate the application  
23 among the Department of Environmental Protection, Department of Agriculture,  
24 Conservation and Forestry, Department of Inland Fisheries and Wildlife, Department of  
25 Marine Resources, Department of Transportation, Maine Historic Preservation  
26 Commission, Governor's Energy Office, Public Utilities Commission and the municipal  
27 officials of the municipality in which the project is located. The Governor's Energy  
28 Office and the Public Utilities Commission shall submit written comments on section  
29 636, subsection 7, paragraph F. For projects within the jurisdiction of the Maine Land  
30 Use Planning Commission, the director may request and obtain technical assistance and  
31 recommendations from the staff of the department. The Commissioner of Environmental  
32 Protection shall respond to the requests in a timely manner. The recommendations of the  
33 Commissioner of Environmental Protection must be considered by the commission in  
34 acting upon a project application.

35 **Sec. 7. 38 MRSA §634, sub-§5** is enacted to read:

36 **5. Microhydropower.** A microhydropower project may not have an undue adverse  
37 effect on the natural environment and may not violate applicable water quality standards.  
38 The commissioner shall adopt rules to establish standards for microhydropower projects  
39 to ensure that a project will not have an undue adverse effect on the natural environment  
40 and will not violate applicable water quality standards. Rules established for  
41 microhydropower project standards are routine technical rules as defined in Title 5,  
42 chapter 375, subchapter 2-A. Notwithstanding subsection 3, the commissioner may

1 review and approve or deny an application for a microhydropower project based on  
2 standards established under this subsection without review and comment from other state  
3 agencies.

4 **Sec. 8. 38 MRSA §635-A**, as amended by PL 1989, c. 890, Pt. A, §40 and Pt. B,  
5 §185 and PL 2011, c. 682, §38, is further amended to read:

6 **§635-A. Time limits for processing applications**

7 Whenever the commissioner receives a properly completed application, the  
8 department shall make a decision as expeditiously as possible.

9 When the proposed project lies within the jurisdiction of the Maine Land Use  
10 Planning Commission, decisions ~~shall~~ must be made within 105 working days except that  
11 decisions delegated to the director ~~shall~~ must be made within 60 working days.  
12 Following one extension of up to 45 working days, the director may waive the time limit  
13 requirements of this section only at the request of the applicant.

14 The department shall make a decision on a proposed microhydropower project within  
15 60 working days.

16 **Sec. 9. 38 MRSA §636, first ¶**, as affected by PL 1989, c. 890, Pt. A, §40 and  
17 amended by Pt. B, §187, is further amended to read:

18 The department shall approve a hydropower project that is not a microhydropower  
19 project when it finds that the applicant has demonstrated that the following criteria have  
20 been met.

21 **Sec. 10. 38 MRSA §840, sub-§1**, as amended by PL 2011, c. 653, §25 and  
22 affected by §33, is further amended to read:

23 **1. Power.** The commissioner may on the commissioner's own motion and shall, at  
24 the request of ~~the owner, lessee or person in control of a dam,~~ the Commissioner of  
25 Inland Fisheries and Wildlife or the Commissioner of Marine Resources, ~~or upon receipt~~  
26 ~~of petitions from the lesser of at least 25% or 50 of the littoral or riparian proprietors or~~  
27 ~~from a water utility having the right to withdraw water from the body of water for which~~  
28 ~~the water level regime is sought,~~ or, in cases where a public water supply is threatened, at  
29 the request of a water utility having the right to withdraw water from the body of water  
30 for which the water level regime is sought, conduct an adjudicatory hearing for the  
31 purpose of establishing a water level regime and, if applicable, minimum flow  
32 requirements for the body of water impounded by any dam that is not:

33 A. Operating with a license or exemption issued by the Federal Energy Regulatory  
34 Commission or determined by the Federal Energy Regulatory Commission to be  
35 subject to the jurisdiction of that commission;

36 D. Operating with a permit setting water levels issued under the protection of natural  
37 resources laws, sections 480-A to 480-S; the site location of development laws,  
38 sections 481 to 489-E; the small hydroelectric generating facilities laws, sections 631

1 to 636; the land use regulation laws, Title 12, sections 681 to 689; or any other statute  
2 regulating the construction or operation of dams;

3 E. A dam regulated by one or more municipalities by ordinance or interlocal  
4 agreement pursuant to Title 30-A, chapter 187, subchapter ~~¶~~ 6; or

5 F. Regulated by the International Joint Commission.

6 Notwithstanding the provisions of this subsection or subsection 1-A, after an order  
7 establishing a water level regime or minimum flow ~~requirement~~ requirements has been  
8 issued pursuant to this section or former Title 12, section 304, the commissioner is not  
9 required to hold a hearing to establish a new water level regime or minimum flow  
10 ~~requirement~~ requirements for the same body of water in response to a petition from  
11 littoral or riparian proprietors unless the commissioner determines that there has been a  
12 substantial change in conditions or other circumstances materially affecting the impact of  
13 water levels and minimum flows on the public and private resources identified in  
14 subsection 4 since the order was issued.

15 **Sec. 11. 38 MRSA §840, sub-§1-A** is enacted to read:

16 **1-A. Petition.** Upon receipt of a petition from 25% or 50 of the littoral or riparian  
17 proprietors, whichever is less, or from a water utility having the right to withdraw water  
18 from the body of water for which the water level regime and, if applicable, minimum  
19 flow requirements are sought, or at the request of the owner, lessee or person in control of  
20 a dam, the department shall review any submissions to determine the standing of any  
21 group or individual making such petition or request, and to determine the eligibility of the  
22 dam and body of water for regulation under the criteria in subsection 1.

23 A. Prior to the department's initiating a hearing for establishing a water level regime  
24 and, if applicable, minimum flow requirements in response to a petition or request  
25 under this subsection, the parties named in the petition or request must attempt to  
26 establish a water level management plan through mediation by an independent 3rd-  
27 party mediator. The department is not required to take part in the mediation. The  
28 department shall place the request or petition to establish a water level regime and, if  
29 applicable, minimum flow requirements on hold for a period of up to one year from  
30 the date of acceptance to allow mediation to occur. The on-hold period may be  
31 extended upon written agreement between all parties to a petition or request and the  
32 department. If mediation results in a water level management plan acceptable to all  
33 parties to a petition or request, that water level management plan must be recorded at  
34 the appropriate registry of deeds and is binding and civilly enforceable on the  
35 affected parties, unless and until the department issues a subsequent order  
36 establishing a water level regime and, if applicable, minimum flow requirements for  
37 the body of water in question. Establishment of a water level management plan  
38 through mediation relieves the department of any obligation it has to hold an  
39 adjudicatory hearing and issue an order in response to a petition or request, and the  
40 department shall return the petition or request to the submittor.

41 B. A petition or request under this subsection for establishing a water level regime  
42 and, if applicable, minimum flow requirements must be accompanied by a processing  
43 fee established by the department. If the department holds an adjudicatory hearing as  
44 a result of a petition or request, the department may charge petitioners or requestors

1           an appropriate licensing fee sufficient to cover costs incurred in conducting the  
2           hearing and reviewing evidence, including the time spent by state employees and  
3           necessary consultants and contractors in preparing, presenting and reviewing  
4           testimony, and in preparation of a department order establishing a water level regime  
5           and, if applicable, minimum flow requirements. All fees must be established in  
6           accordance with section 352.

7

## SUMMARY

8           This bill requires the Commissioner of Environmental Protection to issue a decision  
9           on an application for an expedited wind energy development within one year of the date  
10          the department accepts the application as complete. It repeals procedures related to the  
11          review of an application for a grid-scale wind energy development. It provides  
12          permitting requirements for small-scale wind energy developments. It requires parties to  
13          a water level dispute to attempt to resolve the matter through mediation before the  
14          department proceeds with an adjudicatory hearing. It establishes standards for  
15          microhydropower projects and requires the department to adopt rules ensuring that a  
16          microhydropower project will not have an undue adverse effect on the natural  
17          environment and will not violate water quality standards.