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S.P. 449

In Senate, April 7, 2015

An Act To Amend Environmental Permitting Standards

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

