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To: [DEP, MiningComments2016](#)
Subject: Revised written comments of Hendrik D. Gideonse before Maine BEP
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Testimony September 15, 2016 (REVISED) before Maine's Board of Environmental Protection by Hendrik D. Gideonse, 119 Old County Road, Brooklin, ME 04616 359-8510 gideonse@midmaine.com

I am Hendrik Gideonse of Brooklin, ME, at the southeastern tip of the Blue Hill Peninsula. The infamous Callahan mine is at its southwestern tip.

I'm a twenty-year-retired Emeritus Professor of Education and Policy Science (University of Cincinnati). As an undergrad I majored in political science. My graduate training was in history and philosophy. Within a year of receiving my doctorate (that year spent teaching at Bowdoin College) I went to Washington, DC. For six years I served the U.S. Office of Education and then a year as professional staff in the U.S. Senate Subcommittee on Executive Reorganization and Government Research. Those seven years were the equivalent of a post-doctorate in long range futures and policy science (hence that part of my academic title). Policy science is the study and explication of the conditions and requirements for how knowledge can constructively impact public policy. It has been the guiding theme of the public advocacy I've engaged in here in Maine since retiring here in 1998.

It is disheartening and dismaying to me, therefore, that you would be bringing to the Legislature, its committees, and public advocates like me the exact same mining issues before us for the third time in three years, but . . . "Here we go again!" We invested hundreds of hours on this a year and a half ago. Now we seem poised to have to repeat the commitment.

A quick review of how we got here. First, the statutory language adopted in 2012 was hastily advanced (hence my 'flown by the Legislature as if on an F-14 jet' metaphor) and only very briefly considered. Second, the original mining legislative proposals were not adequately vetted by impartial professionals and scientists. The upshot was that the members of the 125th Legislature passed the statute quite literally not knowing what they had been asked to do.

In fact, it was the much deeper and more sustained attention through the first and second reviews of the regulations that changed legislators' minds. The *lopsided 3-to-1 bipartisan* No-votes in both the *Republican* Senate and the *Democratic* House the second time around clearly demonstrated the Legislature understood its original mistake. **Why can't all of you see that, too?**

Let me go back to the policy science idea, how knowledge can serve public policy.

Knowledge takes many forms and has many foundations. I want to speak to the knowledge of the functions of policy, statute, regulations, and administrative performance:

1. Policy is expressed through legislation. (For example, abetted by the act being drafted by those who wanted to mine, the haste with which it was considered, and the understandably very low level of background information and understanding among them, the citizen legislators of the 125th unwittingly accepted a policy, for example, that discharge of waste into the ground within the mining area was permissible. For a whole host of reasons drawn from the scientific fields of chemistry, geology, and ecology, for example, that is abysmally weak environmental policy. Given your particular responsibilities as a Board of Environmental Protection you should be jumping all over it.)

2. Statutes must be transformed into regulatory language before they can be administered.
3. In Maine, and for this statute, regulations must receive legislative approval before program can be implemented.
4. If legislative approval is not granted, however, the new statute remains in limbo. Implementation may not proceed under that circumstance.
5. Furthermore, if the old statute has been repealed, the old regulations are effectively null because the authorization for them is gone.
6. The approval of the first draft of regulations for the 2012 law has failed twice. Given that failure, *any* application for mining is moot and unactionable, because the agency has no basis on which to even *consider* an application let alone *approve* it.
7. Though I am not a lawyer, my practical experience of administrative law over the years is that if an agency's staff were even to make motions in the direction of attempting to review applications improperly submitted during a statute/regulatory impasse, they would be acting improperly even if so directed by their administrative superiors.

The angst we heard staff express, therefore, over the agency's projected trials and tribulations over administrative difficulties caused by old regs and a new statute are empty concerns.

That is why I was critical of those portions of the staff argument to the effect that they were facing an impossible interpretive nightmare with old regs and a new statute. What they said was misleading, misdirected, and an unnecessary confusion.

The Governor has advanced proposals to weaken standards and visit risky mining on Maine. The public *doesn't* want that, and the Legislature acted accordingly. It realized the mistake that had been imposed on them and the risks the Governor was taking with Maine's precious natural environment. All the staff – and you – have to do is recognize that as far as mining statutes and regulations are concerned, you're at an impasse, and therefore, nothing need be done.

You, in fact, have the statutory authority to do what is necessary. Title 38, section 341-B defining the purpose of the BEP includes at its end "recommending changes in the law to the Legislature". You can make such recommendations, and you should. It really is the only professionally appropriate action for you to take at this time. You are the only proper official body to address this disconnect between the current statute and the proposed rules, and unlike the DEP staff which, in essence can say "we were forced to write the rules this way because of the statutory limitations", the BEP has the explicit authority to recommend changing the statute.

The profound and easily grasped truth, whether old technology, present technology, or some unknown future (pig in a poke??) technology, is that mining leaves behind vast powdered sulfide residues, millions and millions of tons of it. Two things must be assured. Those residues must be protected from air and water *in perpetuity*. Second, if the protection provisions should ever fail, the mining company shall have provided insurance/ assurance that it will be equal to both the perpetuity of the risk *and* its size and that the *public will never have to assume responsibility for the cost of any failure*. Mining exposes Maine to the risk of cataclysmic environmental disaster. The law and the regulations should thoroughly protect Maine from same. (Right now last year's picture of Colorado's bright-yellow Animas River should be flashing before your eyes!)

Crawford's cover memo on the proposed new Chapter 200 language is completely silent on the prior need to fundamentally change the statute. The original legislative flaws remain, and that's just not

tolerable. You cannot make a silk purse out of a sow's ear. An unsound law can only mean unsound regulations.

As the legislative regulation debate made clear, it is the law which needs changing (you all might want to look at Rep. Ralph Chapman's original LD 750 for the 127th for a proper template). Regulations from the weakened statute will not do. The staff complaints over their difficult interpretive responsibilities caused by a new statute and old regulations must be dismissed out of hand. An impasse is an impasse; their situation isn't difficult at all. To even receive an application let alone consider it under such a circumstance would be improper and illegal. It would exceed the limits of their authority and responsibility. (If an aggrieved potential applicant wants to go to court over the consequence of the impasse, they would be welcome to try. A statute without regs is effectively in limbo.)

Why, then, are these draft regulations coming forward for the flawed statute yet again? What is it you hope to gain when you have other options? Why does so little seem to have been learned from the failure of the legislative reviews in the years following initial passage?

These days democracy is threatened in so many ways – appeals to fears rather than aspirations, bigotry, ill temper, lack of transparency, undue corporate influence, narrow partisanship and obstructionism, failure to address overwhelming public sentiment for constructive action. And yet here you are either unwilling or unable to justify – not just to us but to *yourselves* – taking the risks the statute runs. I have to say it. This playing with the earnest efforts and the grounded convictions of the citizenry and state legislators feels just plain disrespectful, not only of those of us who have assumed the direct load of addressing these issues but to the very values underlying democracy itself. It's hard for me to believe you intended to be, but rest assured it is definitely motivating.

Thank you for your attention. You've certainly engendered ours.