



Comments of Trout Unlimited Before  
The Maine Board of Environmental Protection  
Regarding:  
**Draft Chapter 200 Metallic Mineral Mining Rules**

September 15, 2016

**Chairman Parker and Members of the Board of Environmental Protection:**

My name is Jeff Reardon. I reside in Manchester, Maine, and am employed as Maine Brook Trout Project Director for Trout Unlimited. On behalf of Trout Unlimited (TU) and our 1800 members in Maine, I am commenting on proposed substantive changes to the Chapter 200 Metallic Mineral Exploration, Advanced Exploration, and Mining Rules. Mining is an inherently risky activity with a long history of environmental problems that shift clean-up costs onto the public. As the BEP members who have been here during review of previous proposed Chapter 200 Rules know, TU believes that any rules based on the flawed 2012 statute will be inadequate to protect important public values, including Maine's nationally significant and unique wild brook trout resource. Although the current proposed rules include some changes to respond to criticism that we and an overwhelming majority of those who have commented on previous versions of these rules have raised, fundamental problems remain. Primary concerns for TU include:

1. The definition of mining area remains vague and should be improved. It refers to both individual "activity areas" within a given mining project and to the total footprint of a mine. Because the statute and these rules allow contamination of groundwater within the "mining area", this uncertainty is meaningful. It is not at all clear how large an area (the "mining area") will, allow groundwater contamination. The larger this area is, the more likely it is that contaminated groundwater will spread and contaminate surface water. Although DEP staff assert otherwise, and show a diagram to explain that the intent of these rules is to define a series of "mining areas" within the overall mine footprint, we do not see this clarity in the statute. Since 2012, we have consistently argued that the statute and rule must include two separate terms—one that defines the individual mining activity areas and another that defines the entire footprint of the mine. The rules would then need to be revised to reflect which of these is the appropriate reference for various standards in the rules. Of greatest importance is to ensure that the statutory allowance that groundwater can be contaminated under the "mining area" is limited to very discrete areas. (Please note, however, that we continue to object to the 2012 statutory change that allows any contamination of groundwater.) We have again proposed language for these definitions and they appear at the end of my written testimony. We believe these will limit but not prevent contamination of surface water by contaminated groundwater. We appreciate DEP staff's attempt to address this concept, but we frankly believe a change in statute is required to make this clear, and we think DEP should have requested that statutory change. Since they have not, we are asking the Board to do so.
2. Specifically authorizing groundwater contamination is wrong. Even if our suggested clarification to the definition of mining area is made, it will serve only to reduce the areas

within which groundwater is allowed to be contaminated. Again, this is a problem with the 2012 statute, and one we wish that DEP staff had asked the Legislature to correct. We believe it is not possible to allow contamination of groundwater and simultaneously prevent discharge to surface water, as these rules require. We are unaware of any other activity that has specific statutory authority to contaminate groundwater. There is good reason for this—groundwater in Maine is closely connected to surface water, and any contamination of groundwater will lead to contaminated surface waters. Again, we appreciate DEP staff’s attempt to craft rules that minimize the amount of groundwater contamination and make clear that groundwater contamination is not allowed to create surface water contamination. We understand that the statute required them to craft the rule this way. But again, we believe the DEP—and now the Board—should ask the Legislature to fix this problem in the statute, treat mining like other activities, and not grant specific authorization for groundwater contamination.

3. Public lands and public waters need more protection. The rules appear to provide a high level of protection to surface waters, by prohibiting removal of ore under rivers, brooks, streams and coastal wetlands. But they go on to defer to “another state or federal agency with management authority” if it “determines mining is allowed in, on or under” a list of state and federal conservation lands. DEP appears to cede its authority to another agency that wants to promote mining. Former versions of these rules provided clear prohibitions on mining in many of these areas. To protect the public land and water resources that make Maine special, this is essential. This problem alone should be enough for you to reject these rules. Again, if DEP feels it lacks the legal authority to protect these resources—which seems strange given the protection it affords them under statutes like the Site Law of Development and the Natural Resources Protection Act—it should ask the Legislature to clarify its authority. The public deserves to know whether public lands and waters are or are not protected by these rules. And potential mine developers deserve to know where they are or are not allowed to mine. In addition, even the protections that MAY exist are limited. For example, why do the rules protect great ponds with outstanding scenic resources, but not those with outstanding fish or wildlife resources?
4. The rules should prohibit mining development in flood plains and flood hazard areas. Mine pits, waste rock piles, and tailings ponds don’t belong where they might be flooded. This is another issue about which TU has been commenting since 2012—but which is still not resolved.
5. These rules should ban use of “wet mine waste units” altogether, not just post-closure. It is not clear what a wet mine waste unit is, or how it differs from a tailings pond. We don’t see how a mine could use “wet mine waste units” during mining, covering potential acid-generating waste with water to prevent acid formation, and then at some point convert to dry waste storage post closure. At some point in that process the water cover will need to be removed, exposing the saturated waste to air, allowing generation of large amounts of acid, and generating a large volume of contaminated water that will need to be treated and disposed of. If the DEP’s intent is to require dry stacking of tailings and other reactive mine waste, that should be planned and designed from the beginning, as some other mines in wet, cold environments are doing. Even temporary storage of mine tailings under a water cover risks the kind of catastrophic failure that occurred two

summers ago in British Columbia at the Mount Polly mine, which occurred prior to closure, and therefore would not be prevented by rules that allow wet mine waste units until closure. The transition from wet storage of reactive waste to dry storage as a permanent solution is inherently risky, involving the management of large amounts of contaminated water, and will not encourage long planning for dry storage of mining wastes.

6. The requirement for financial assurance should require a third-party estimate of the potential “worst-case” failure at each mine site. Sufficient funds to cover the clean-up and other costs of such a disaster should be made available by the applicant before a permit is issued, and maintained as long as the risk exists. For storage of highly reactive mine wastes, where integrity of containment structures is essential, that requirement may be permanent.
7. At the September 15 public hearing, there was no public testimony in favor of these rules. A primary impetus the statutory changes in 2012 that require the need for these rules was that there were mining sites in Maine that could be developed, but that Maine’s 1991 rules were too strict and stood in the way of the development of a new jobs in Maine. There no longer appears to be any interest in developing new mining sites in Maine, and there is therefore no rush to finalize these rules to facilitate that development.
8. Maine’s 1991 rules remain in place until the BEP adopts new rules consistent with the 2012 statute. The 2012 statute clearly states:
  - [R]ules regulating metallic mineral mining adopted by the Department of Environmental Protection and the Maine Land Use Regulation Commission prior to the effective date of this section remain in effect until the Legislature approves major substantive rules provisionally adopted by the Department of Environmental Protection pursuant to this Act.

Although the DEP staff point out some areas where the new proposed rules appear to offer more protection than the 1991 rules, on balance, these new rules are less protective, particularly because they specifically authorize contamination of groundwater and prevent an alternatives analysis that includes “no mining” during consideration of a permit application. DEP staff point out that those weaknesses are statutory, and that they cannot address them in proposed rules. We believe the DEP staff should instead have SUGGESTED statutory changes to solve those problems. Since they have failed to do so, we believe the Board should.

DEP staff also suggest that Maine runs the risk of approving a mining permit under the “less protective” 1991 rules, and assert that this proposal is intended to avoid that risk. We note that since adoption of the 1991 rules, no mining permit has been issued or even applied for. The statutory changes adopted in 2012 were proposed by mining interests, who argued that the 1991 rules amounted to “a virtual ban on mining”, and testified to legislators that no mine could ever be permitted in Maine under those rules. There is little risk that taking the time to get these rules right will open a huge loophole.

## Conclusion

While we appreciate some of the changes that DEP staff have made in these proposed rules, these proposals do not go far enough to address our concerns that the rules, if adopted, would directly authorize contamination of groundwater; that the area within which this contamination is allowed remains vague; that important public lands and public waters are not sufficiently protected; that tailings ponds will be allowed; and that the public may end up covering the costs of clean-up from a failed mine. Although DEP staff have attempted to address some of these issues, their ability to do so is limited by the statute. With respect to protection of public lands, these rules considerably weaken what was proposed—and rejected by the Legislature—last year. We believe you need to reject these rules and ask for a more protective statute that could be the basis for protective rules.

Thank you for your service on the Board of Environmental Protection, and for your attention to my comments. Please contact me if you have any questions. I can be reached at 207 430 8441, 207 615 9200 (cell), or via email at [jreardon@tu.org](mailto:jreardon@tu.org).

Sincerely,



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Jeff Reardon, Maine Brook Trout Project Director  
Trout Unlimited

Proposed Clarification of Definitions for “Mining Area” and “Mining Activity Unit”.

We suggest the BEP add a definition of “Mining Activity Area” and that the definition of “Mining Area” be amended as follows:

***Mining activity unit.*** “Mining activity unit” means an area of land within a mining area where a particular mining activity takes place, including, but not limited to, an area from which earth material is removed; an area where overburden, waste rock and ore are stored; a tailings impoundment or other tailings storage area; an area where ore is processed; an area where groundwater and surface water management treatment systems are located; a waste disposal area; and an area where any other activity associated with mining occurs.

***Mining area.*** “Mining area” means an area of land described in a permit application and approved by the department, including but not limited to land from which earth material is removed in connection with mining, the lands on which material from that mining is stored or deposited, the lands on which beneficiating or treatment facilities, including groundwater and surface water management treatment systems, are located or the lands on which water reservoirs used in a mining operation are located. A mining area may include more than one activity unit.