

Notice of Agency Rule-making Proposal

AGENCY: **01-672 MAINE LAND USE PLANNING COMMISSION**, *Department of Agriculture, Conservation and Forestry*

CHAPTER NUMBER AND TITLE: **01-672 CHAPTER 13**, Proposed Rule Amendment to the Commission’s Chapter 13, “*Metallic Mineral Exploration, Advanced Exploration and Mining*” for Certification of Advanced Exploration and Mining Permitted by the Department of Environmental Protection, as Required by §29, sub-§3 of Public Law 2011, Chapter 653 (LD 1853).

PROPOSED RULE NUMBER (*leave blank; assigned by Secretary of State*):

CONTACT PERSON FOR THIS FILING: Marcia Spencer Famous, Maine Land Use Planning Commission, Department of Agriculture, Forestry and Conservation, 22 State House Station, Augusta, Maine 04333-0022. Telephone: 207-287-4933. TTY: 888-577-6690. Email: marcia.spencer-famous@maine.gov

CONTACT PERSON FOR SMALL BUSINESS INFORMATION (if different):

PUBLIC HEARING: 1:00 pm; November 13, 2013; Jeff’s Catering, 15 Littlefield Way, Brewer, Maine

COMMENT DEADLINE: Written comments November 25, 2013; rebuttal comments December 2, 2013

BRIEF *SUMMARY: The Land Use Planning Commission is seeking public comment on a proposed rule change to amend the Commission’s Chapter 13, “*Metallic Mineral Exploration, Advanced Exploration and Mining*” by repealing and replacing Subchapter 3 to add standards for certification by the Commission of metallic mineral advanced exploration and mining projects in the jurisdiction of the Commission that will be permitted by the Department of Environmental Protection, in accordance with PL 2011 Ch.653 (LD 1853, 125th Legislature). This rule change also changes the name of Chapter 13 to “*Metallic Mineral Exploration, and Certification of Advanced Exploration and Mining*”.

IMPACT ON MUNICIPALITIES OR COUNTIES (if any): None

STATUTORY AUTHORITY FOR THIS RULE: 12 M.R.S.A. §684; §685-A,3; §685-C, 5; and Public Law 2011 Chapter 653, LD 1853, 125th Legislature

SUBSTANTIVE STATE OR FEDERAL LAW BEING IMPLEMENTED (if different): None

E-MAIL FOR OVERALL AGENCY RULE-MAKING LIAISON: mari-wells@maine.gov

* Check one of the following two boxes.

The above summary is for use in both the newspaper and website notices.

The above summary is for the newspaper notice only. A more detailed summary / basis statement is attached.

Please approve bottom portion of this form and assign appropriate AdvantageME number.

APPROVED FOR PAYMENT _____ DATE: _____
(authorized signature)

FUND	AGENCY	ORG	APP	JOB	OBJT	AMOUNT
------	--------	-----	-----	-----	------	--------

Notice of Agency Rule-making Proposal

DETAILED BASIS STATEMENT / SUMMARY:

The proposed rulemaking amends the Land Use Planning Commission's (the Commission) Chapter 13, "*Metallic Mineral Exploration, Advanced Exploration and Mining*". The Commission's corresponding routine technical rule-making to amend its Chapter 13 rules for exploration and advanced exploration is being undertaken concurrently with these proposed rules for certification. This rule change will repeal Chapter 13, and replace sub-chapter 3 with the subchapter entitled "*Requests for Certification of Advanced Exploration and Mining*". The proposed subchapter 3 establishes the standards for certification by the Commission to the Department of Environmental Protection (the Department) that any metallic mineral mining activity located in the unorganized or deorganized areas of Maine being reviewed by the Department meets any land use standard established by the Commission that is not considered in the Department's review. The proposed rulemaking also amends the title of Chapter 13 to "*Metallic Mineral Exploration, and Certification of Advanced Exploration and Mining*".

Prior to 2012, the Commission regulated metallic mineral mining in its jurisdiction in accordance with its Chapter 13 rules, which were jointly promulgated by the Commission and the Department (Chapter 200) in 1991. The passage of PL 2011 Ch. 682 (LD 1798) in 2011 (effective August 2012) shifted regulation of any project triggering the site location of development laws located in the Commission's jurisdiction to the Department, including metallic mineral mining.

In 2012, the Legislature passed PL 2011 Ch. 653 (LD 1853), "*An Act To Improve Environmental Oversight and Streamline Permitting for Metallic Mineral Mining in Maine*", creating laws for the Department to regulate metallic mineral mining in Maine. Starting June 1, 2014, regulation of metallic mineral mining in Maine will no longer be regulated by the Department under the site location of development laws, but will be regulated by the Department under the *Maine Metallic Mineral Mining Act*. Ch. 653 directs the Commission to amend its rules regulating metallic mineral exploration, advanced exploration and mining, and to establish rules for certification by the Commission. Ch. 653 determined that the rules for certification require major substantive rulemaking, to be provisionally adopted by the Commission and submitted to the Legislative Council by January 10, 2014.

Proposed Change

The proposed rule amendment to the Commission's Chapter 13, "*Metallic Mineral Exploration, Advanced Exploration and Mining*" adds standards for certification of advanced exploration and mining permitted by the Department of Environmental Protection, as required by §29, sub-§3 of Public Law 2011, Chapter 653. Chapter 13 will be repealed and subchapter 3 will be replaced with "*Requests for Certification of Advanced Exploration and Mining*". The name of Chapter 13 will be amended as "*Metallic Mineral Exploration, and Certification of Advanced Exploration and Mining*".

A copy of the above proposed rule changes may be viewed at the Commission's main office at 18 Elkins Lane, Harlow Building, Augusta, Maine or may be downloaded from the agency's web site at <http://www.maine.gov/doc/lupc/>. To view the proposed rule changes at the Augusta office, please call the office in advance at 207-287-2631.

Proposed Rule Amendment
to the Commission's Chapter 13,
“Metallic Mineral Exploration, Advanced Exploration and Mining”
for Certification of Advanced Exploration and Mining
Permitted by the Department of Environmental Protection,
as Required by §29, sub-§3 of Public Law 2011, Chapter 653 (LD 1853)

- DRAFT -
October 9, 2013

The following amendment proposes to amend the title of Chapter 13 to “*Metallic Mineral Exploration, and Certification of Advanced Exploration and Mining,*” repeal the contents of Chapter 13, and replace certain portions of the Chapter.

CHAPTER 13
METALLIC MINERAL EXPLORATION, AND CERTIFICATION OF
ADVANCED EXPLORATION AND MINING

TABLE OF CONTENTS

Sub-Chapter 3:	REQUESTS FOR CERTIFICATION OF ADVANCED EXPLORATION AND MINING.....	1
3.1	Certification of Metallic Mineral Mining.....	1
3.2	Acceptance of Requests for Certification.....	2
3.3	Request for Certification Content.....	3
3.4	Notice of Intent to File a Request for Certification.....	3
3.5	Notice of Filing of a Request for Certification.....	3
3.6	When to Hold a Public Hearing.	3
3.7	Notice of Hearings on Requests for Certification.	3
3.8	Contents of Notice of Hearings.	4
3.9	Cancellation or Change of Hearing.	5
3.10	Comment Period Without Hearing.....	5
3.11	Procedures and Time Limits for Issuing a Certification.....	5
3.12	Appeals.....	5
3.13	Effective Date of Certification Determination.	6
3.14	Criteria for Approval of Certification of a Mining Permit.	6

CHAPTER 13

METALLIC MINERAL EXPLORATION, AND **CERTIFICATION OF ADVANCED EXPLORATION AND MINING**

SUMMARY: This rule establishes requirements for exploration, and for certification to the Department of Environmental Protection (the Department) of projects involving advanced exploration and mining of metallic minerals. The rule contains requirements for application, environmental review and siting of exploration projects; and for requests to the Land Use Planning Commission (the Commission) for certification of advanced exploration and mining activities being conducted in the unorganized and deorganized areas of the State and reviewed by the Department under Title 38.

Sub-Chapter 3: REQUESTS FOR CERTIFICATION OF ADVANCED EXPLORATION AND MINING

3.1 Certification of Metallic Mineral Mining.

Pursuant to 12 M.R.S.A. § 685-B(1-A)(B-2) and 38 M.R.S.A. § 490-NN(2), the Commission certifies metallic mineral mining and advanced exploration permitted by the Department. For the purposes of this subchapter, the term mining permit shall be considered to include both permits to mine and permits for advanced exploration, unless expressly indicated otherwise. All Commission certification determinations will conform with the following:

- A. The Commission will consider receipt, by the Commission, of a notice of intent to mine and develop and map indicating the location of the proposed mining and development, required by 12 M.R.S.A. § 685-B(1-A)(B-2), as a request for certification. The notice and map may be provided by the person proposing mining and development directly to the Commission or to the Department for the Department to provide to the Commission.¹
- B. A Commission certification determination will be issued solely to the Department for inclusion in the Department's mining permitting decision.
- C. A Commission determination to approve a request for certification may include reasonable terms and conditions that the Commission determines appropriate in order to fulfill the requirements and intent of the Commission's statute, rules, and plans. After the inclusion of the certification determination in the Department's mining permitting decision, the Commission retains, pursuant to 12 M.R.S.A. § 685-B(1-A)(B-2), the authority to enforce the land use standards certified to the Department, including through the enforcement of terms and conditions that are a part of a certification determination.
- D. The Commission may conduct its certification review and issue its determination as a single certification determination or in two parts. If provided in two parts, the first part will include a determination of whether to certify that the proposed mining and development is an allowed use

¹ The Commission encourages persons requesting a certification to involve Commission staff in pre-application meetings either together with the Department or separately.

within the subdistrict or subdistricts for which it is proposed. The second part will include a determination of whether to certify that the proposed mining and development meets the land use standards established by the Commission that are not considered in the Department's review.

- E. The Commission will not independently evaluate title, right, or interest and shall condition any certification on the Department finding, in its permit review, that the person requesting certification has the necessary title, right or interest.
- F. A Commission determination to approve a request for certification, or to deny a request for certification when the request is associated with a proposal being reviewed by the Department as part of a mining permit application that is pending at the time of the determination, is not final agency action. Pursuant to 5 M.R.S.A. §§ 11001 et seq., a person aggrieved by a Department mining permit decision containing a certification determination may appeal the Department's final agency action to state court in accordance with applicable state laws and court rules. As part of such an appeal, a person aggrieved may seek judicial review of any of the components of the Department's final agency action, including the Commission's certification determination that is incorporated into the Department's permitting decision.
- G. A Commission determination to deny a request for certification, when the request is not associated with a proposal being reviewed by the Department as part of a mine permit application that is pending at the time of the determination, is final agency action subject to judicial review in state court by a person aggrieved in accordance with applicable state laws and court rules.
- H. If a mine permittee submits a request to amend or revise its mining permit to the Department, the permittee shall provide the Commission a copy of the permit amendment or minor revision documentation provided to the Department. Within 15 days of receiving a copy of these materials, the Commission shall determine whether a certification amendment is required or request additional information needed to make this determination. Modifications proposed by the permittee that the Commission determines would alter any finding or the basis for any finding in the existing certification will trigger the need for an amended certification. The Commission will process a request for a certification amendment in the same manner as a request for certification.

3.2 Acceptance of Requests for Certification.

- A. **Request for Certification Accepted as Complete for Processing.** Upon receipt of a request for certification, the Commission shall determine whether to accept the request for certification as complete for processing based upon whether the request:
 - (1) contains a notice of an intent to develop and a map indicating the location of the proposed development;
 - (2) is accompanied by the proper fee; and
 - (3) contains sufficient information for the Commission to begin its review.

The Commission shall make such determination prior to initiating substantive review. The Commission shall notify the person requesting certification of any deficiency in the request for certification within a reasonable time after it becomes aware of the deficiency. The Commission shall determine whether to accept a request for certification as complete for processing within 15 working days of receipt of the request.

- B. **Additional Information May Be Required.** A determination that a request for certification is accepted as complete for processing is based upon satisfying the factors in Section 3.2(A) above, but does not preclude the Commission from requesting additional information during its review. Even if a request for certification is accepted as complete for processing, the Commission may

deny the certification for failure to provide information necessary to enable the Commission to make necessary findings under applicable review criteria.

3.3 Request for Certification Content.

A person requesting certification shall use the appropriate forms, as coordinated with the Department, but need not complete any portions of a form determined by the Commission to be unnecessary for a specific request for certification.

3.4 Notice of Intent to File a Request for Certification.

At least 30 days prior to filing a request for certification either directly with the Commission, or with the Department for the Department to provide to the Commission, a person requesting certification must provide public notice of the intent to file such a request. The public notice must be provided in the same manner as the Department requires for a mining permit application. The content of the notice shall be same as required by the Department, except that the Commission must be substituted for the Department and the public notice must state the manner in which a person may request that the Commission hold a public hearing. Provided the requirements of this Section are satisfied, with Department approval a person's notice of intent to file a request for certification may be incorporated into its public notice associated with its Department mining permit application.

Separate from the notice provided by the person requesting certification, the Commission may, at its expense, provide additional notice in any other manner it deems appropriate.

3.5 Notice of Filing of a Request for Certification.

Following receipt of a request for certification, the Commission shall generate a list of all requests for certification received on a periodic basis indicating the name of the person making the request and the location and nature of the proposed activity. This list must be made available to the public upon request.

3.6 When to Hold a Public Hearing.

- A. As provided by these rules, interested persons may prepare and submit evidence and argument to the Commission and request a hearing on a request for certification.
- B. The Commission shall consider all requests for a hearing submitted in a timely manner. Hearings on a request for certification are at the discretion of the Commission. In determining whether a hearing is advisable, the Commission shall consider the degree of public interest and the likelihood that information presented at the hearing will be of assistance to the Commission in making its certification determination.
- C. The Commission shall not amend or modify any certification, or refuse to renew a certification, unless it has afforded the person who requested certification, or its successor with regard to the certification, an opportunity for hearing.

3.7 Notice of Hearings on Requests for Certification.

Notice of all public hearings in regard to requests for certification must be given by the Commission or, at the discretion of the Commission, by the person requesting certification, as follows:

- A. By regular mail, or electronic mail with the agreement of the person receiving notice, at least 30 days prior to the initial scheduled hearing, to:
 - (1) The person requesting certification;

- (2) All persons owning or leasing land within 1,000 feet of the proposed project according to the records of Maine Revenue Services or the applicable plantation or municipality;
 - (3) The municipality or plantation where the project is proposed;
 - (4) The county, if the proposed project site is in an unorganized township;
 - (5) The legislators whose districts encompass the project;
 - (6) Intervenor;
 - (7) Persons who have made a timely request to be notified of a specific hearing;
 - (8) Persons who have filed a written request, within the calendar year, to be notified of hearings;
 - (9) Appropriate State and federal agencies, as determined by the Commission; and
 - (10) In any proceeding involving a proposed modification or amendment of a certification that was the subject of an earlier hearing, all persons admitted to formal party status at the earlier hearing.
- B. By publication twice in a newspaper of general circulation in the area affected by the certification request as determined by the Commission.
- (1) Notice must be published in the legal notices section of the newspaper.
 - (2) The date of the initial publication must be at least 30 days before the hearing. The date of the second publication shall be at least 7 days and no more than 13 days before the date of the hearing.
- C. In any other manner the Commission deems appropriate.

3.8 Contents of Notice of Hearings.

Notice of all public hearings must contain the following:

- A. The name and address of the person requesting certification;
- B. The legal authority and jurisdiction under which the proceeding is being conducted;
- C. A reference to statutory and rule provisions involved;
- D. In a short and plain statement, the nature and purpose of the proceeding;
- E. The location and nature of the proposed development and mine;
- F. The location where further information, including a copy of the certification request, may be inspected;
- G. The manner and time period within which evidence and argument may be submitted to the Commission for consideration;
- H. The time and place of the public hearing;
- I. The manner and time within which petitions for intervention under the Commission's Chapter 5 rules may be filed; and
- J. Such other information as the Commission deems appropriate.

3.9 Cancellation or Change of Hearing.

If a scheduled hearing is canceled or postponed to a later date, the Commission shall provide timely notice to the persons described in Section 3.7(A) above. When hearings are continued, the Commission shall provide such additional notice as it deems appropriate to inform the parties and interested persons, but the Commission may continue a hearing to a later date and place as is announced at the hearing.

3.10 Comment Period Without Hearing.

The Commission shall allow a period of not less than 20 days after accepting a request for certification as complete for processing, during which time any interested persons may submit written comments to the Commission. This 20-day period shall not apply to the Commission's determination of whether to certify that the proposed development is an allowed use within the subdistrict or subdistricts for which it is proposed. Additionally, exceptions to this time period may be made in cases involving emergencies, as determined by the Commission, and requests for certifications determined by the Commission to be routine in nature.

3.11 Procedures and Time Limits for Issuing a Certification.

- A. Except where otherwise directed by the Commission or determined by the Director, the staff shall prepare a recommendation for each request for certification brought to the Commission for a determination. Copies of the staff recommendation must be made available to the person requesting certification, intervenors and all other persons requesting to be so notified at least 7 days prior to the date of the expected determination.
- B. Notice of the certification determination shall be sent to the person requesting certification and to any other person having requested such information.
- C. Notice of a certification determination of the staff must indicate that any person aggrieved by the staff determination has the right to a review of the staff determination by the Commission. The request for such review must be made in writing within 30 days of the staff determination.
- D. A copy of each request for certification determination, marked approved or disapproved, shall be retained in the Commission files and shall be available to the public during normal business hours.
- E. The Commission will maintain at its principal office a written record, available for inspection by the public, of the vote of each Commission member on a request for certification it has considered.

3.12 Appeals.

- A. A person aggrieved may request Commission review of a staff certification determination. Such a request must be made within 30 days of the determination. If the determination is made in two parts as provided for in Section 3.1(D) above, the request for review must be made within 30 days of the part of the determination of which review is sought.
- B. A Commission determination to approve a request for certification, or to deny a request for certification when the request is associated with a proposal being reviewed by the Department as part of a mining permit application that is pending at the time of the determination, is not final agency action and is not appealable except as part of the Department permit decision. In the event a person aggrieved appeals a Department permit decision that includes a certification

determination to state court, the Commission certification determination record shall be considered part of the Department permit record for the purpose of the appeal. A Commission determination to deny a request for certification, when the request is not associated with a proposal being reviewed by the Department as part of a mining permit application that is pending at the time of the determination, is final agency action subject to judicial review in state court by a person aggrieved in accordance with governing laws and court rules.

3.13 Effective Date of Certification Determination.

- A. **Staff Decisions.** Any person aggrieved by a certification determination of the staff has a right to a review of that determination by the Commission. A request for such a review must be made in writing in accordance with Section 3.12(A), above. The staff decision is effective on the date it is rendered, unless a request for Commission review is made.
- B. **Commission Decisions.** A certification determination of the Commission is effective beginning on the date the determination is rendered by the Commission.

3.14 Criteria for Approval of Certification of a Mining Permit.

Pursuant to 12 M.R.S.A. §685-B(1-A)(B-2) and 38 M.R.S.A. §490-NN(2), the Commission must review whether the proposed mining and development meets any land use standard established by the Commission and applicable to the project that is not considered in the Department's review. A person requesting certification must demonstrate to the Commission that the proposed projects satisfy the following land use standards.

- A. Sections 10.11 Nonconforming uses and structures;
- B. Section 10.25(A)(7) as it regards apportionment of development rights through the Commission's subdistrict regulations;
- C. Sections 10.25(B)(1) and (3) regarding dimensional standards and building layout in prospectively zoned areas;
- D. Sections 10.24(B) and 10.25(D) regarding transportation loading, parking, circulation, congestion or unsafe conditions, except that the Commission will not apply Section 10.25(D)(3)(b) because stormwater runoff will be reviewed by the Department;
- E. Section 10.25(F)(2) Lighting;
- F. Section 10.25(Q) Subdivision and Lot Creation;
- G. Section 10.25(T) Activities in Flood Prone Areas to the degree necessary to comply with the Commission's land use standards adopted in accordance with the National Flood Insurance Program;
- H. Sections 10.26(A)-(G) Dimensional Requirements;
- I. Section 10.27(B) Vegetation Clearing except in areas that are regulated as jurisdictional resources under the Natural Resources Protection Act or are within the limits of excavation permitted by the Department;
- J. Section 10.27(E) Timber Harvesting; and

K. Section 10.27(J) Signs.

STATUTORY AUTHORITY: 38 M.R.S.A. § 349-A

EFFECTIVE DATE: August 26, 1991

EFFECTIVE DATE (ELECTRONIC CONVERSION): May 4, 1996

NON-SUBSTANTIVE CHANGES: September 2, 1997 - minor spelling, formatting and layout.

EFFECTIVE DATE: June 1, 2014