



JANET T. MILLS
GOVERNOR

423
STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

Mark C. Draper, Chair

William F. Hinkel
Executive Analyst

Ruth Ann Burke
Board Clerk

Memorandum

To: Board of Environmental Protection

From: William F. Hinkel, BEP Executive Analyst

Date: September 16, 2021

Re: Chapter 4: Rule Governing Hearings on Appeals of Certain Emergency or
Administrative Commissioner Orders

The Department is recommending that the Board adopt a new rule, Chapter 4, *Rule Governing Hearings on Appeals of Certain Emergency or Administrative Commissioner Orders*, to govern proceedings in which hearings are held by the Board on appeals of certain emergency or unilateral administrative orders issued by the Commissioner. Some of the types of emergency or unilateral administrative orders issued by the Commissioner in the exercise of the Commissioner's statutory responsibility to protect public health, safety and welfare, and the environment are identified in section 2 of the proposed Chapter 4 rule.

Currently, the Department does not have in place specific procedural rules governing the conduct of such Board hearings. The proposed Chapter 4 rule would establish procedures similar in nature to those set forth in the existing Department rule Chapter 3, *Rules Governing the Conduct of Licensing Hearings*. Chapter 3 does not apply to emergency or unilateral administrative orders issued by the Commissioner.

Public notice of this rulemaking was published on June 2, 2021, to comply with the Maine Administrative Procedure Act. The Board solicited comments on the proposed Chapter 4 rule through July 6, 2021. No comments were submitted to the Department, and no revisions to the version of the rule posted for comment are recommended.

A clean copy of the Chapter 4 rule proposed for adoption and a basis statement for the proposed rule are attached to this memorandum.

Regulatory framework

The proposed Chapter 4 rule would establish standards of practice or procedure for the conduct of business by the Board and therefore would be a routine technical rule pursuant to the Maine Administrative Procedure Act, 5 M.R.S. § 8071(2)(A). The Board is charged with the responsibility to adopt, amend and repeal rules as necessary for the

conduct of the Department's business, including the processing of applications, the conduct of hearings, and other administrative matters. 38 M.R.S. §§ 341-H and 341-D(1-C). The proposed Chapter 4 rule would be consistent with applicable provisions of the Maine Administrative Procedure Act.

Requested action

The Department recommends that the Board adopt the proposed Chapter 4 rule, as presented.

Estimated time of agenda item

5 minutes

Attachments: Proposed Chapter 4 rule
Chapter 4 rulemaking basis statement

ATTACHMENT

Chapter 4: RULE GOVERNING HEARINGS ON APPEALS OF CERTAIN EMERGENCY OR ADMINISTRATIVE COMMISSIONER ORDERS

SUMMARY: This rule governs proceedings in which hearings are held by the Board of Environmental Protection on appeals of certain emergency or unilateral administrative orders issued by the Department of Environmental Protection Commissioner in the exercise of the Commissioner's statutory responsibility to protect public health, safety and welfare, and the environment. Emergency or unilateral administrative orders generally require the person to whom the order was issued to comply immediately to reduce or alleviate environmental or public health risk. This rule sets forth the procedures for a hearing in an appeal to the Board of such an order.

1. **Definitions.** For the purposes of this chapter, the following terms have the following meanings unless the context indicates otherwise.
 - A. **Appellant.** "Appellant" means the person to whom a Commissioner's emergency or unilateral administrative order has been issued and who appeals that order to the Board.
 - B. **Board.** "Board" means the Board of Environmental Protection.
 - C. **Board Chair.** "Board Chair" means the Chair of the Board, or the Chair's designee.
 - D. **Commissioner.** "Commissioner" means the Commissioner of the Department of Environmental Protection, or the Commissioner's designee.
 - E. **Commissioner's Order.** "Commissioner's Order" means the emergency or unilateral administrative order issued by the Commissioner which is the subject of a request for a hearing.
 - F. **Department.** "Department" means the Department of Environmental Protection, which includes the Commissioner and the Board.
 - G. **Hearing.** "Hearing" means an adjudicatory proceeding before the Board during which the parties to the proceeding present testimony and evidence for the purpose of providing facts upon which the Board will adjudicate the appeal of the Commissioner's Order.
 - H. **Party.** "Party" means the specific person to whom the Commissioner's Order was issued, the Commissioner, and, if allowed, an intervenor pursuant to 5 M.R.S. § 9054(1) or (2).
 - I. **Person.** "Person" means an individual, partnership, corporation, governmental entity, association, or public or private organization of any character, other than the Department.
 - J. **Presiding Officer.** "Presiding Officer" means the individual authorized pursuant to 5 M.R.S. § 9062 and Section 7 of this rule to preside over the hearing.

- 2. Applicability.** This rule applies to hearing proceedings conducted by the Board regarding emergency or unilateral administrative orders issued by the Commissioner pursuant to but not limited to the following statutory sections.

38 M.R.S. § 347-A(3):	Emergency orders
38 M.R.S. § 413(11)(F):	Emergency mercury water discharge order
38 M.R.S. § 490-RR(5):	Metallic mineral mining suspension order for failure to provide financial assurance
38 M.R.S. § 490-TT(2):	Metallic mineral mining order
38 M.R.S. § 548:	Oil discharge clean-up order
38 M.R.S. § 565-A:	Order to cease oil delivery to underground oil storage tank
38 M.R.S. § 568(3):	Oil tank discharge clean-up order
38 M.R.S. § 610-B(4):	Outdoor wood boiler order
38 M.R.S. § 1296:	Lead abatement order
38 M.R.S. § 1304(12):	Hazardous waste or waste oil compliance orders
38 M.R.S. § 1310:	Emergency waste handling and transport order
38 M.R.S. § 1316-A:	Tire stockpile abatement order
38 M.R.S. § 1365:	Uncontrolled hazardous substance site order
38 M.R.S. § 1397:	Wellhead protection order

- 3. Relationship to Other Statutes and Rules.** In addition to the procedures set forth in this rule, hearings will be conducted in accordance with the procedural requirements of the Maine Administrative Procedure Act, Title 5, chapter 375, to the extent those requirements are practicable and do not conflict with the requirements set forth in the statute under which the Commissioner's Order was issued. If a conflict exists between this rule and more specific procedural requirements set forth in the statutes and any associated rules under which the Commissioner's Order was issued, those requirements control.
- 4. Service List.** The Presiding Officer will maintain a service list with the contact information of the individual designated by each party to receive service of filings, notices, and other correspondence on its behalf. Unless otherwise indicated in the first document filed by any party in a proceeding, the name and mailing (postal mail or electronic mail) address of the individual filing the first document will be used by the Board and all parties for the purpose of providing service. Any subsequent change of the designated representative must be served on the Board, the Commissioner, and all parties by the party making the change.
- 5. Form of Documents.** Paper documents must be printed on 8.5-inch by 11-inch paper. The first page must have a caption that identifies the name and location of the site that is the subject of the order on appeal, the name of the document (e.g. motion, testimony), and the name and title of the entity filing the document. All pages must be numbered. The last page must be dated and signed by, or on behalf of, the party filing the document and include under the signature line that person's printed name, capacity, mailing address, electronic mail address, and telephone number. Electronic documents should be provided in Portable Document Format (PDF) format when possible.

6. Filing of Documents and Computation of Time.

Filings may be by electronic mail provided the signed original document is received by the Board within three (3) working days, unless the Presiding Officer provides otherwise. Every document or communication filed with the Board by a party must be served upon all parties, unless the Presiding Officer directs otherwise.

- A. **Upon the Board.** The filing of any submission with the Board, in care of the Board Clerk, is complete when the Board receives the submission by the close of business on the due date (5:00 p.m. as determined by the received time stamp on the document, telefax, or electronic mail, unless another time is specified by the Presiding Officer). Submissions not received by the Board by the deadline may be deemed untimely, absent a showing of good cause. The burden to ensure materials are filed in a timely manner rests with the person making the filing, regardless of the method used.
- B. **Upon a Party.** The filing of any submission or the service of any document or communication upon a party to the proceeding is deemed complete when the document or communication is sent to the party or the party's designated representative by mail, in-hand delivery, telefax, or electronic mail.
- C. **Computation of Time.** For the purpose of this rule, "days" are calendar days unless otherwise specified. "Working days" does not include Saturdays, Sundays, holidays observed by the State, and any other day state offices to which submissions must be delivered are closed due to inclement weather or unforeseen circumstances. In computing any period of time prescribed or allowed by the applicable statute or this rule, the day of the action or event that starts the period is not included. The last day of the period so computed is included, unless it is not a working day, in which event the period runs until the close of business (5:00 p.m.) on the next working day.

7. Presiding Officer.

- A. **Designation.** The Presiding Officer is the Board Chair or a Board member who is designated by the Board Chair.
- B. **Authority.** The Presiding Officer has the authority to:
- (1) identify statutes and rules that are applicable to the proceeding;
 - (2) act upon requests for subpoenas;
 - (3) rule on the admissibility of evidence;
 - (4) limit the issues to be heard if the parties and the Presiding Officer agree to such limitation, or if no prejudice to any party will result;
 - (5) grant or deny petitions for intervention which have not previously been ruled upon by the Board in the event that timing of the hearing allows for intervention;
 - (6) administer oaths and affirmations;
 - (7) conduct conferences;
 - (8) regulate the course of the proceeding, set the time and place for the hearing, and fix the time and manner for filing of exhibits, evidence, briefs, and other written submissions;

- (9) rule upon issues of procedure;
- (10) certify questions to the Board for its determination; and
- (11) vary from any procedure prescribed by this rule or the Maine Administrative Procedure Act to if the parties and the Presiding Officer agree to such variation, or if the variance will achieve greater fairness or economy and no prejudice to any party will result.
- C. **Appeal of Presiding Officer Rulings.** Pre-hearing rulings made pursuant to Section 7(B)(1) through 7(B)(5) are appealable to the full Board. Unless determined necessary by the Presiding Officer, the course of a proceeding is not stayed by an appeal of a Presiding Officer's ruling. An appeal of the Presiding Officer's ruling to the full Board is not a prerequisite to preserve a party's objection for the purpose of judicial appeal.
- D. **Modification of Deadlines.** The Presiding Officer may establish an alternate schedule for the hearing, Board vote, and issuance of a Board decision if both the Commissioner and the person named in the order agree to the modification in writing, and if the modification of the procedural statutory deadlines is necessary to ensure fairness and due process and no prejudice will result to any party.
- E. **Notice and Participation.** In the event the statutory deadlines for a hearing and Board decision are modified and a different schedule set by the Presiding Officer, if time allows the Board may provide notice and opportunity for public participation in accordance with 5 M.R.S. § 9054 (Public Participation) and § 9051-A (Notice of Environmental Agency Adjudicatory Proceedings).
8. **Ex-parte Communications.** No Board member participating in the proceeding may communicate directly or indirectly in connection with any issue of fact, law, or procedure with any party, or other persons legally interested in the outcome of the proceeding, except upon notice and opportunity for all parties to participate. This provision does not prevent the Board from having the aid or advice of Board staff, Board counsel, or consultants retained by the Board who have not participated and who will not participate in the proceeding in an advocate capacity.
9. **Impartiality.** The hearing must be conducted in an impartial manner. Upon a timely allegation, made in good faith, of bias or of personal financial interest, direct or indirect, of a Presiding Officer or Board member in the proceedings, requesting that person disqualify themselves, that person must determine the matter as part of the record. If the person alleged to be biased requests, an allegation must be reduced to writing by the person making the allegation with an adequate time for response on the record. The Presiding Officer or Board member to whom the charge of bias or of personal financial interest is directed may consult with the Office of the Attorney General or private counsel concerning the charge.
10. **Rights of Parties.** Unless limited by stipulation or by the Board to prevent repetition or unreasonable delay in the proceeding, every party has the right to present evidence and arguments on all relevant issues, to call and examine witnesses, and to cross-examine any person present and testifying. The Presiding Officer may require that evidence and argument on certain issues be presented solely in writing.

11. Evidence.

- A. **Relevancy.** Evidence will be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. Irrelevant and unduly repetitious evidence may be excluded.
- B. **Documentary and Real Evidence.** All documents, materials, and objects offered into evidence as exhibits must be uniquely numbered or otherwise identified. Documentary evidence may be received in the form of copies and excerpts if the original is not readily available. The Presiding Officer may require that parties also provide paper copies of exhibits initially submitted in electronic format. Electronic links to documents will not be accepted. The Presiding Officer will prescribe the number of copies of exhibits required. Where an exhibit is not easily reproduced due to its form, size or character, the Presiding Officer may allow copies to be provided in alternate formats.
- C. **Contents of Record.** The record will consist of the following items.
- (1) All applications, relevant Department licenses, permits or certifications, notices of violation, motions, rulings and orders;
 - (2) Evidence received or considered;
 - (3) A statement of any facts officially noticed by the Board and any stipulations by the parties, if any;
 - (4) Offers of proof, objections and rulings thereon;
 - (5) Proposed findings, if any;
 - (6) Outside agency review comments and memoranda or reports from Board hired consultants, if any;
 - (7) The recommended decision, if any, by the Presiding Officer; and
 - (8) The final decision of the Board.
- D. **Decision on the Record.** All materials, including records, reports, and documents to be considered as evidence by the Board in making its decision must be offered by the parties and made a part of the record. No other factual information or evidence may be considered by the Board in rendering a decision.
- E. **Stipulations.** Parties are encouraged to consult with one another and stipulate to facts and the admission of exhibits, when practicable.
- F. **Official Notice.** Official notice may be taken of any facts of which judicial notice could be taken. Parties will be notified of material so noticed and will be afforded an opportunity to contest the substance or materiality of the matters noticed. Facts officially noticed will be included and indicated as such in the record.
- G. **Objections.** Objections must be made at the time a party believes an objectionable action has occurred. Presiding Officer rulings on objections made during a hearing are final, except for rulings on the admissibility of evidence.
- H. **Offer of Proof.** An offer of proof will be allowed in connection with an objection to any testimony, evidence, or question of a witness. An offer of proof must consist of a

summary statement of the substance of the proffered evidence or that which is expected to be shown by the answer of the witness. Comment or argument by any party will be allowed on the offer of proof.

12. Subpoenas. Any party may request the issuance of a subpoena in the name of the Board to require the attendance and testimony of witnesses and the production of any evidence relating to any issue of fact in the proceeding. Any request for subpoena will be governed by 06-096 C.M.R. ch. 3, § (13) to the extent applicable, except that all references to “Department” will be to the “Board.”

13. General Conduct of Hearing.

- A. **Opening of Hearing.** The Presiding Officer will open the hearing by describing in general terms the purpose of the hearing and the procedures governing its conduct.
- B. **Witnesses.** All persons presenting testimony must be sworn. All witnesses providing testimony must be present at the hearing and are subject to cross-examination by the parties. The parties have a right to question all persons testifying.
- C. **Filing of Testimony.** If the schedule of the hearing allows, the Board may require the pre-filing of all or part of the testimony of witnesses in written form for the purposes of expediting the proceeding. Every such witness shall be subject to oral cross-examination.
- D. **Order of Testimony.** Unless specified otherwise in the enabling statute, the Commissioner must first name the person to whom the order was issued and establish the basis for the Commissioner’s Order; accordingly, the Commissioner’s witnesses testify first. The witnesses for the person named in the order testify after cross-examination and questioning of the Commissioner’s witnesses. If the proceeding provides for intervention, the Presiding Officer will specify the schedule for intervenor testimony and the cross-examination of intervenor witnesses.
- E. **Examination of Witnesses and Questioning by Board.** Board members, Board counsel, and Board staff may ask questions at any time of all persons testifying.
- F. **Closing Arguments.** Oral closing arguments by each party may be allowed by the Presiding Officer after the presentation of evidence has concluded, at a time and place to be fixed by the Presiding Officer. Closing arguments may not introduce new evidence.
- G. **Post-hearing Briefs and Proposed Findings of Fact.** The Presiding Officer may provide the parties with an opportunity to submit post-hearing briefs and proposed findings of fact after the close of the hearing and the record, within such time as specified by the Presiding Officer.
- H. **Board Deliberations.** Following the close of the hearing and evidentiary record, the Board will deliberate and vote on a decision. Participation in deliberations is limited to Board members, Board counsel, and Board staff.
- I. **Hearings recorded.** Hearings will be recorded in a form susceptible to transcription.

15. Decision. The decision of the Board made at the conclusion of a hearing on a Commissioner's Order will be in writing or stated in the record and will include findings of fact sufficient to apprise the parties and any interested member of the public of the basis for the decision. A copy of the decision will be delivered or promptly mailed to each party to the proceeding or the party's representative of record. Written notice of a party's right to appeal to court, the action required, and the time within which such action must be taken will be given to each party with the decision. The decision will be mailed to the parties, other than the Commissioner, by certified mail, return receipt requested.

STATUTORY AUTHORITY:

5 M.R.S. § 8051

38 M.R.S. §§ 341-D, 341-H

EFFECTIVE DATE:

DATE - filing xx-xxx

ATTACHMENT

BASIS STATEMENT**Chapter 4: Rule Governing Hearings on Appeals of Certain Emergency or Administrative Commissioner Orders****September 16, 2021**

The Department is recommending that the Board adopt a new rule, Chapter 4, *Rule Governing Hearings on Appeals of Certain Emergency or Administrative Commissioner Orders*, to govern proceedings in which hearings are held by the Board on appeals of certain emergency or unilateral administrative orders issued by the Commissioner. Some of the types of emergency or unilateral administrative orders issued by the Commissioner in the exercise of the Commissioner's statutory responsibility to protect public health, safety and welfare, and the environment are identified in section 2 of the proposed Chapter 4 rule.

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