



JANET T. MILLS
GOVERNOR

435
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, Board Executive Analyst

Date: September 16, 2021

Re: Policy Regarding Remote Participation in Board Proceedings

This memorandum briefs the Board on recent changes to Maine law regarding public proceedings and summarizes the staff recommendation that the Board post for comment and a hearing a new draft policy entitled "Policy Regarding Remote Participation in Board Proceedings" (copy included as **Attachment A** of this memorandum).

Background

Except as otherwise provided by law, all public proceedings of the Board are open to the public and members of the public are permitted to attend. 1 M.R.S. § 403(1).

In March 2020, Governor Mills proclaimed a state of emergency due to the imminent threat posed by Covid-19, issued Executive Order 14 FY 19/20, *An Order to Protect Public Health*, and signed into law Public Law 2019, Chapter 617, *An Act To Implement Provisions Necessary to the Health, Welfare and Safety of the Citizens of Maine in Response to the COVID-19 Public Health Emergency*. Emergency legislation followed, including new statutory subsection 1 M.R.S. § 403-A, Public proceedings through remote access during declaration of state of emergency due to COVID-19, which authorized the Board to conduct its public proceedings through telephonic, video, electronic or other similar means of remote participation.

Beginning in April 2020, the Board conducted its meetings remotely, first through telephonic conference then through video and audio webinars, in accordance with 1 M.R.S. § 403-A.

The newly enacted law contained a sunset provision whereby it would be repealed 30 days after the termination of the state of emergency. The last state of emergency proclaimed by Governor Mills expired on June 30, 2021. Consequently, the authority provided by 1 M.R.S. § 403-A for the Board to conduct remote meetings dissolved at the end of July 2021.

In June 2021, the Governor signed into law emergency legislation, *An Act Regarding Remote Participation in Public Proceedings*, P.L. 2021 ch. 290 (copy included as **Attachment B** of this memorandum), which governs remote participation in public proceedings of certain public bodies after the termination of the state of emergency. (The chaptered law for this new authority is 1 M.R.S. § 403-B.) The new law authorizes the Board to adopt a written policy to allow its members and the public to participate in a public proceeding using remote methods under certain conditions identified in the law. To that end, Board staff recommend that the Board consider adopting a new policy, a recommended draft of which is attached hereto for consideration.

Board Process for Policy Adoption

In accordance with 1 M.R.S. § 403-B, the Board must provide notice of and hold a hearing on its proposed written remote meeting policy. Following consultation with the Office of the Attorney General regarding the requirements for notice and a hearing, Board staff suggest that public notice of the availability of a draft Board policy for comment could be accomplished through the same means and timing as required by 1 M.R.S. § 406 for notice of public proceedings, which is the same process the Board follows to provide notice of its routine public meetings. The Board staff suggest that the requirement to hold a hearing on the draft Board policy could be satisfied by providing an opportunity for members of the public to submit comments both in writing and orally at an upcoming regular meeting.

Following the public comment period, the Board may deliberate and vote on whether to approve the draft policy, with or without revisions based on public comment.

Policy Implementation

The existing statutory framework requires Board members to be physically present for public proceedings except when being physically present is not practicable. Consistent with statute, circumstances in which physical presence for one of more Board members is not practicable may include:

- (1) The existence of an emergency or urgent issue that requires the Board to meet by remote methods;
- (2) Illness, other physical condition, or temporary absence from Maine, that causes a member of the Board to face significant difficulties traveling to and attending in person the meeting identified in the notice provided by the Board;
- (3) Significant distance a member of the Board must travel to be physically present at the location of the meeting identified in the notice provided by the Board; and
- (4) Geographic characteristics that impede or slow travel, including but not limited to islands not connected to the mainland by bridges.

If, following adoption of a written policy, the Board Chair determines that an emergency or urgent issue exists such that a physical meeting of the Board is not practicable (i.e., criterion (1) above is satisfied), the Board may plan for and provide notice that the meeting will be conducted exclusively by remote means.¹ In that scenario, members of the public will be provided a meaningful opportunity to attend by remote methods. At this time, it is anticipated that the remote meeting process would be the same as or similar to the Zoom meeting method used by the Board between April 2020 and June 2021.

If the Board Chair determines that criterion (2), (3), or (4) above is satisfied for one or more Board members such that one or more Board members will participate by remote means, the Board must identify a location for members of the public to attend in person. In that scenario, it is anticipated that the Board and public would meet together in a physical location and the Board member participating by remote means would participate in such a manner as to allow an effective means of communication between that Board member, the public, other Board members, Board staff, and counsel to the Board.

Requested Action

Board staff recommend that the Board: 1) post to its website and to subscribers of its GovDelivery service the draft *Policy Regarding Remote Participation in Board Proceedings* for comment through September 27, 2021; and 2) direct staff to schedule a hearing to receive oral comment at the next regularly scheduled Board meeting.

Estimated time of agenda item: 10 minutes

- Attachments:
- 1) Attachment A: Draft *Policy Regarding Remote Participation in Board Proceedings*
 - 2) Attachment B: P.L. 2021 ch. 290

¹ See P.L. 2021 ch. 290, section 2(E), and section III, para. 3 of the draft *Policy Regarding Remote Participation in Board Proceedings* regarding authority to meet solely by remote means when the Board Chair determines that an emergency or urgent issue exists such that a physical meeting of the Board is not practicable.

To ensure compliance with Maine's Freedom of Access Act, staff recommend that the Board include language in its initial notice made for each meeting that a physical meeting of the Board may be changed to a remote meeting in response to a Board Chair determination that an emergency or urgent issue exists such that a physical meeting of the Board is not practicable, provided that notice of such a change may be given in ample time to allow public participation.

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ATTACHMENT A



BOARD POLICY

POLICY REGARDING REMOTE PARTICIPATION IN BOARD PROCEEDINGS

I. Introduction and Purpose

Except as otherwise provided by law, all public proceedings of the Board of Environmental Protection (Board) are open to the public and members of the public are permitted to attend.

This Board policy, adopted after notice and hearing, governs the conditions upon which members of the Board and the public may participate in a public proceeding of the Board by remote methods. Pursuant to this Board policy, the Board may allow remote methods of participation in its public proceedings in accordance with 1 M.R.S. § 403-B.

For purposes of this policy, “remote methods” means telephonic or video technology allowing simultaneous reception of information and may include other means when such means are necessary to provide reasonable accommodation to a person with a disability.

II. Expectations for Board Member Participation

Board members are expected to be physically present for public proceedings of the Board except when being physically present is not practicable. Circumstances in which physical presence for one or more Board members is not practicable may include:

- (1) The existence of an emergency or urgent issue that requires the Board to meet by remote methods;
- (2) Illness, other physical condition, or temporary absence from Maine, that causes a member of the Board to face significant difficulties traveling to and attending in person the meeting identified in the notice provided by the Board;
- (3) Significant distance a member of the Board must travel to be physically present at the location of the meeting identified in the notice provided by the Board; and
- (4) Geographic characteristics that impede or slow travel, including but not limited to islands not connected to the mainland by bridges.

The existence of an emergency or urgent issue that requires the Board to meet by remote methods as described in Section II(1) above shall be determined by the Board Chair in his or her discretion. A determination as to whether a criterion in Section II(2) through (4)

above has been met shall be made by the Board Chair in consultation with the impacted Board member(s).

A Board member who participates in a public proceeding by remote methods is present for purposes of a quorum and voting.

All votes taken during a public proceeding using remote methods will be taken by roll call vote that can be seen and heard if using video technology and heard if using only audio technology by the other members of the Board and the public.

III. Expectations for Public Participation

Members of the public will be provided a meaningful opportunity to attend by remote methods when a member or members of the Board participate by remote methods. Reasonable accommodations will be provided when necessary to provide access to individuals with disabilities.

When the Board allows or is required to provide an opportunity for public input during a public proceeding conducted using remote methods, an effective means of communication between the Board members and the public will be provided, such as the ability to address the Board through video, microphone or telephone.

The Board will provide notice of all public proceedings in accordance with 1 M.R.S. § 406, the Freedom of Access Act. When the public may attend by remote methods, the meeting notice will include the means by which members of the public may access the meeting using remote methods. For individuals with disabilities seeking a reasonable accommodation, the notice will identify the specific individual to contact about arranging for the accommodation. When applicable, the notice will also identify a location for members of the public to attend in person. The Board will not determine that public attendance at a public proceeding will be limited solely to remote methods except when an emergency or urgent issue exists that requires the Board to meet by remote methods as specified in Section II(1) of this policy.

The Board will make all documents and other materials considered by the Board available, electronically or otherwise, to the public who attend by remote methods to the same extent customarily available to members of the public who attend Board proceedings in person, as long as additional costs are not incurred by the Board.

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ATTACHMENT B

STATE OF MAINE

IN THE YEAR OF OUR LORD
TWO THOUSAND TWENTY-ONE

S.P. 40 - L.D. 32

An Act Regarding Remote Participation in Public Proceedings

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the state of emergency declared by the Governor pursuant to the Maine Revised Statutes, Title 37-B, section 742 in response to the public health emergency caused by the spread of the novel coronavirus disease referred to as COVID-19 may terminate sooner than 90 days after the adjournment of the First Special Session of the 130th Legislature; and

Whereas, the Maine Revised Statutes, Title 1, section 403-A governs remote participation in public proceedings of certain public bodies but is automatically repealed 30 days after the termination of the state of emergency declared by the Governor; and

Whereas, there is a need to have in place a law that governs remote participation in public proceedings of certain public bodies after the termination of the state of emergency declared by the Governor; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 1 MRSA §403-B is enacted to read:

§403-B. Remote participation in public proceedings

1. Remote participation. This section governs remote methods of participation in public proceedings of certain public bodies. For the purposes of this section, "remote methods" means telephonic or video technology allowing simultaneous reception of information and may include other means when such means are necessary to provide reasonable accommodation to a person with a disability. Public proceedings may not be conducted by text-only means such as e-mail, text messages or chat functions.

2. Requirements. A public body subject to this subchapter may allow members of the body to participate in a public proceeding using remote methods only under the following conditions:

A. After notice and hearing the body has adopted a written policy governing the conditions upon which members of the body and the public may participate in a public proceeding of that body by remote methods;

B. The policy adopted pursuant to paragraph A must provide that members of the body are expected to be physically present for public proceedings except when being physically present is not practicable. Circumstances in which physical presence for one or more members is not practicable may include:

(1) The existence of an emergency or urgent issue that requires the public body to meet by remote methods;

(2) Illness, other physical condition or temporary absence from the jurisdiction of the body that causes a member of the body to face significant difficulties traveling to and attending in person at the location in the notice under section 406;

(3) With respect to a public body with statewide membership, significant distance a member must travel to be physically present at the location in the notice under section 406; and

(4) The area of the public body's jurisdiction includes geographic characteristics that impede or slow travel, including but not limited to islands not connected by bridges;

C. The policy adopted pursuant to paragraph A must provide members of the public a meaningful opportunity to attend by remote methods when members of the body participate by remote methods, and reasonable accommodations may be provided when necessary to provide access to individuals with disabilities;

D. If the body allows or is required to provide an opportunity for public input during the proceeding, an effective means of communication between the members of the body and the public must be provided;

E. Notice of the proceeding must be provided in accordance with section 406. When the public may attend by remote methods pursuant to paragraphs C and D, the notice must include the means by which members of the public may access the proceeding using remote methods. The notice must also identify a location for members of the public to attend in person. The body may not determine that public attendance at a proceeding will be limited solely to remote methods except under the conditions in paragraph B, subparagraph (1);

F. A member of the body who participates in a public proceeding by remote methods is present for purposes of a quorum and voting;

G. All votes taken during a public proceeding using remote methods must be taken by roll call vote that can be seen and heard if using video technology, and heard if using only audio technology, by the other members of the public body and the public; and

H. The public body must make all documents and other materials considered by the public body available, electronically or otherwise, to the public who attend by remote methods to the same extent customarily available to members of the public who attend

the proceedings of the public body in person, as long as additional costs are not incurred by the public body.

3. Remote participation not permitted. This section does not authorize town meetings held pursuant to Title 30-A, section 2524 or regional school unit budget meetings held pursuant to Title 20-A, section 1482-A to be conducted using remote methods.

4. Application. This section does not apply to:

A. The Legislature; or

B. A public body to which specific statutory provisions for remote participation apply.

Emergency clause. In view of the emergency cited in the preamble, this legislation takes effect when approved.