



# BEP INFORMATION SHEET

## Department Rulemaking

Date: October 2020 Contact: (207) 287-2811 or 314-1458

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### Statutory Authority for Rulemaking

State law authorizes the Board of Environmental Protection (Board) to “adopt, amend or repeal reasonable rules and emergency rules necessary for the interpretation, implementation and enforcement of any provision of law that the department is charged with administering... The board shall also adopt, amend or 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). Rulemaking is governed by the Maine Administrative Procedure Act (MAPA), 5 M.R.S. §§ 8051-8074 and the Department’s statutes.

### What is a rule?

The Maine Administrative Procedure Act (MAPA) defines a rule as “[t]he whole or any part of every regulation, standard, code, statement of policy, or other agency statement of general applicability, including the amendment, suspension or repeal of any prior rule, that is or is intended to be judicially enforceable and implements, interprets, or makes specific, the law administered by the agency, or describes the procedures or practices of the agency.” (5 M.R.S. § 8002(9)). When the Legislature passes a law such as the Natural Resources Protection Act, the Legislature establishes the scope and general direction of the program. However, the Legislature often authorizes or directs the appropriate state agency to develop through rulemaking the details needed to implement the law. Rulemaking must be conducted in accordance with state law and follow the public notice and adoption requirements of the MAPA. Rules that have been properly adopted have the force of law and may be enforced by the agency and the courts.

### What is the difference between a routine technical and a major substantive rule?

When the Legislature directs an agency to develop rules for a program, it identifies the rule as either routine technical or major substantive. (5 M.R.S. § 8071). Routine technical rules include all rules which have not been designated as major substantive by the Legislature. Major substantive rules are rules that, in the judgment of the Legislature: (1) require the exercise of significant agency discretion or interpretation in drafting, or (2) because of their subject matter or anticipated impact, are reasonably expected to result in a significant increase in the cost of doing business, a significant reduction in property values, the loss or significant reduction of government benefits or services, the imposition of state mandates on local government, or other serious burdens on the public or local government. (5 M.R.S. § 8071(2)). Major substantive rules are adopted, amended or repealed by the Board, but must be presented to the Legislature for review and approval before they may be finally adopted and become effective.

### How is rulemaking initiated?

The Department may initiate rulemaking for a number of reasons, most commonly because the Legislature has directed the Department to do so. Other common reasons include: (1) a change in state or federal law, (2) the availability of new data or information on threats to the environment or

public health, (3) to improve the effectiveness of an existing rule, and (4) advancements in pollution control technology. The Department may also initiate rulemaking in response to a citizen petition.

### **Can a member of the public request a rule change?**

Yes. State law provides a mechanism for any person to petition an agency for the adoption or modification of any rule. (5 M.R.S. § 8055). Within 60 days of receipt of a petition for rulemaking, the agency must notify the petitioner in writing of its denial, stating the reasons for denial, or the agency must initiate rulemaking proceedings in accordance with the Maine Administrative Procedure Act (MAPA). If a petition for rulemaking is signed by 150 or more registered Maine voters, the Department must initiate rulemaking by establishing a deadline for submittal of written public comment or by scheduling a public hearing on the petitioner's proposed rule.

### **What are the steps in the rulemaking process?<sup>1</sup>**

Rule Development: The development of a rule or rule amendment begins with the identification of a need, frequently by the Legislature through the enactment of a law or by the agency in the conduct of its responsibilities. Once the need and authority for a rule are established, the DEP often meets with the potentially regulated entities and other interested persons to gather additional information and discuss various options for addressing the issues. DEP staff also consults with the Office of the Attorney General on questions of law. DEP staff then drafts a proposed rule which is presented to the Board for approval to begin the MAPA process for accepting public comment.

Public Comment: A draft proposed rule is presented to the Board at a regular Board meeting. If the Board determines that the draft proposed rule is ready for formal public comment, it will set a deadline for filing of written comments and may vote to hold a public hearing on the draft rule. Notice of the public hearing (if one is to be held) and the deadline for written public comment is published in accordance with the rulemaking requirements of the MAPA (see 5 M.R.S. §8053). Information on proposed rules is available on the Department's website at: [www.maine.gov/dep/rules](http://www.maine.gov/dep/rules).

Following the public hearing (if one was held) and the close of the comment period, DEP staff reviews and summarizes all comments and data received. The Board may hold a work session with DEP staff at a Board meeting to review comments received and discuss key provisions of the proposed rule. DEP staff prepares a response to comments and a basis statement that explains the reasons for accepting or rejecting any suggested changes to the draft proposed rule. A final draft rule is presented to the Board at a Board meeting for consideration and decision.

Adoption: The transcript of the public hearing, copies of all comments received and responses thereto, the basis statement, and any proposed changes to the rule recommended by DEP staff are provided to the Board for consideration. Notice of the Board meeting at which a rule is proposed for adoption (or provisional adoption in the case of a major substantive rule) and a copy of the proposed rule are posted on the Board's web page in advance of the meeting. The Board is required to accept and consider additional public comment on a proposed rule following the close of the formal rulemaking comment period provided that the comment is directly related to comments received during the formal rulemaking comment period or in response to changes to the proposed rule since the close of the

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<sup>1</sup> In addition to the process described here, the APA provides for a consensus-based rule development process. See 5 M.R.S. §8051-B.

formal comment period. (38 M.R.S. §341-H(3-A)). The Board provides an opportunity for such comment at the meeting prior to a vote of the Board on the proposed rule.

If the Board determines that a rule it intends to adopt is substantially different from the draft proposed rule which was made available for public comment, the Board must seek additional public comment on the significant changes prior to a final decision on the rule. (5 M.R.S. § 8052(5)(B)).

If the proposed rule has been identified by the Legislature as a major substantive rule, the Board may provisionally adopt the rule. A provisionally adopted rule is presented to the Legislature for its review and approval during the next Legislative session. If authorized by the Legislature, the rule may then be finally adopted by the Board with any changes directed by the Legislature.

Deadline: The MAPA requires the Department to adopt a rule within 120 days of the close of the public comment period. A rule also must be approved by the Office of the Attorney General as to form and legality within 150 days of the close of the comment period. (5 M.R.S. § 8052(7)). If either deadline is missed, the rulemaking process must begin anew. Major substantive rules must be finally adopted within 60 days of the effective date of the legislation approving the rule. (5 M.R.S. § 8072(8)). After the rule has been approved by the Office of the Attorney General, it must be filed with the Secretary of State to become effective.

**For more information:** General questions regarding rulemaking by the Board should be directed to the Board's Executive Analyst at (207) 314-1458.

**Note: This Information Sheet is provided for general guidance only; it is not intended to be legally binding or to be used as a legal reference.**