# Chapter 40: REGULATIONS FOR THE CONDUCT OF ENFORCEMENT

#  HEARINGS

SUMMARY: The Board of Environmental Protection may at its discretion conduct enforcement hearings. These rules provide for a presiding officer and his powers, general conduct of the hearing, notice, commencement of proceedings, response to notice, evidence, offer of proof, record, Board actions, consent agreements and other necessary functions for equitable enforcement proceedings. They clearly state the rights, obligation and responsibilities of both the alleged violator and the Department. These rules are intended to secure the just, speedy and inexpensive determination of enforcement action.

**1. Scope of Regulations.** These regulations govern practice in all enforcement proceedings before the Board of Environmental Protection or the Department of Environmental Protection involving violations of any provisions of the laws or regulations which it administers, or of the terms or conditions of any of its orders or licenses. These regulations shall not apply to hearings on applications, whether ordinary hearings or those involving a significant public interest, but shall apply to hearings which may result in the revocation, modification or suspension of any license whenever such hearings are based upon the violation of any of the provisions of the laws administered by the Board or of the terms or conditions of any license. These regulations shall be construed to serve the just, speedy and inexpensive determination of every enforcement proceeding.

**2. Presiding Officer**

**A. Designation.** The Presiding Officer at all hearings may be either:

(l) The Commissioner, if present and willing to preside,

(2) A member of the Board selected by those members present at the hearing, or

(3) If no Board member is present or willing to preside a qualified employee or representative of the Department designated by the Board or Commissioner.

**B. Powers.** The Presiding Officer shall have authority to:

(1) Administer oaths,

(2) Rule upon issues of evidence,

(3) Regulate the course of the hearing,

(4) Rule upon issues of procedures,

(5) Hold conferences before or during the hearing for settlement or simplification of issues or procedure,

(6) Regulate the placement of television cameras, still cameras, motion picture cameras or microphones at Board hearings in order that the use of such equipment does not interfere with the orderly conduct of the hearing,

(7) When authorized by the Board, issue subpoenas to compel the production of any witness, books, records or other data related to the matters at issue in the hearing, and

(8) Take such other actions as may be ordered by the Board or that are necessary for the efficient and orderly conduct of the hearing consistent with these regulations and applicable statutes.

**3. General Conduct of Hearing**

**A. Opening Statement**

(1) The Presiding Officer shall open the hearing by describing in general terms the purpose of the hearing and the general procedure governing its conduct.

(2) The Presiding Officer shall read the notice of alleged violation.

**B. Testimony and Questions**

(1) Testimony shall be offered in the following order:

(a) Direct Testimony;

(i) Department staff and Consultants,

(ii) Other Departmental Witnesses,

(iii) Respondent or Representative, and

(iv) Respondent Witnesses.

(b) Questions. At the conclusion of the testimony of each witness questioning of witnesses shall be in the following order:

(i) Board members and their counsel may be permitted by the presiding officer to ask questions at any time,

(ii) Department staff and Consultants, and

(iii) Respondent or Representative.

**C. Witnesses.** All witnesses shall be sworn. Witnesses shall be compelled to attend, testify and produce records if subpoenaed by the Board.

**D. Continuance.** All hearings conducted pursuant to these regulations may be continued for reasonable cause and reconvened from time to time and from place to place by the Presiding Officer as circumstances require.

**4. Commencement of Proceedings**

**A. Commencement of Proceedings.** A proceeding shall be commenced by serving a notice of violation upon the alleged violator (herein called "Respondent").

**B. Notice: Form, Contents.** The notice shall set forth in clear and concise language the following:

(1) A specific designation of the statute, regulation, order or license alleged to be violated;

(2) A factual statement sufficient to inform the Respondent with reasonable definiteness of the acts or practices alleged to be in violation of applicable law;

(3) Where practical, a form of order which the Department has reason to believe the Board should issue if the facts are as alleged in the Complaint; and,

(4) The date, time and place of the hearing, which shall not be less than thirty (30) days from the date of service of the notice.

**C. Service.** Notice under this section shall be served upon the Respondent by registered mail return receipt requested, or by the Sheriff or Deputy Sheriff within the appropriate county. If service under these rules is made by registered mail, the return receipt, properly endorsed and postmarked, shall be prima facie evidence of the completion and date of such service. If service is made by the Sheriff or Deputy Sheriff, Rule 4 of the Maine Rules of Civil Procedure shall apply to the making of such service and proof thereof.

**D. Copy of Regulations.** A copy of the Department of Environmental Protection Regulations for the Conduct of Enforcement Hearings shall be attached to the notice of violation.

**5. Response to Notice.** Upon receipt of notice of hearing the Respondent shall file an answer to the allegations contained in such notice not later than ten (10) days prior to the date of hearing contained in the notice. The answer shall contain:

**A.** Specific admission or denial of each fact alleged in the notice, or if the Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of an allegation, a statement to that effect; and

**B.** A concise statement of the facts constituting all grounds for defense.

 Failure to answer or to respond to any factual allegations shall be deemed as an admission of such facts.

**6. Evidence**

**A. Admissibility.** Evidence which is relevant and material to the subject matter of the hearing and is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs shall be admissible. Evidence which is irrelevant, immaterial or unduly repetitious shall be excluded. The Board and the Department's experience, technical competence and specialized knowledge may be utilized in the evaluation of all evidence submitted to the Board.

**B. Official Notice.** The Board may take official notice of any facts of which judicial notice could be taken, and in addition may take official notice of general, technical or scientific matters within its specialized knowledge and of statutes, regulations and nonconfidential agency records. Facts officially noticed shall be included and indicated as such in the record.

**C. Documentary and Real Evidence.** All documents, materials and objects offered as evidence shall be numbered or otherwise identified. Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. All such evidence shall be made available during the course of the hearing for public examination. All such evidence will be available for public examination at the Department's office in Augusta during normal business hours.

**D. Official Record.** An official record or lack thereof may be evidenced in the manner provided by Rule 44 of the Maine Rules of Civil Procedure.

**E. Objections.** All objections to rulings of the Presiding Officer regarding evidence or procedure and the grounds therefore shall be timely made during the course of the hearing. If, during the course of or after the close of the hearing and during its deliberations the Board determines that the ruling of the Presiding Officer was in error, it may reopen the hearing or take such other action as it deems appropriate to correct such error.

**F. Offer of Proof.** An offer of proof may be made in connection with an objection to a ruling of the Presiding Officer excluding or rejecting any testimony or question on cross-examination. Such offer of proof shall consist of a statement of the substance of the preferred evidence or that which is expected to be proven by the answer of the witness.

**7. Consent Order - Procedures**

**A. Request for Disposal of Proceedings by Consent Order - How Made.** At any time prior to ten (10) days before a scheduled hearing and subject to the provisions of subsection C (2), a Respondent may file with the Board a statement indicating his desire to dispose of the proceeding by the entry of a consent order. On receipt of such statement the Commissioner shall notify the Board and the Respondent that the hearing has been stayed.

 Within thirty (30) days after receiving notice of such stay, an executed agreement conforming to the requirements of this section shall be submitted to the Board.

**B. Agreement - Contents.** Every agreement shall contain, in addition to an appropriate order, an admission of all jurisdictional facts and express waivers of further procedural steps before the Board, and of the Respondent's right to appeal. The agreement shall also contain provisions that it shall not become part of the official record unless and until it is accepted by the Board. In addition, the agreement may contain a statement that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the notice.

**C. Disposition of Proposed Agreement by Board.** Upon receiving such agreement the Board may:

(1) Accept it and issue the order agreed upon;

(2) Reject it, in which case the Board shall send a notice of rejection and an order that hearing be had at a date, place and time specified, not less than fifteen (15) days from the date of notice of rejection. The Respondent shall then file his answer within the period prescribed by section 40.5 and no other agreement may be presented to the Board; or

(3) Take such other action as it deems appropriate.

 If no agreement is received by the Board within the 30-day period prescribed by section 40.7 of this Regulation the Board shall proceed as though such agreement had been presented and rejected.

 The provisions of this Regulation shall not preclude settlement of the proceedings in any other manner.

**8. Action by Board when not in Session.** Whenever any action or order is required of the Board and the Board is not in session, such actions or orders may be done by the Commissioner, except that the Commissioner shall not take any action to dismiss a hearing, accept or reject a proposed consent order, or otherwise dispose of any action on the merits.

**9. Record.** A full and complete record shall be kept of all proceedings. The record shall include, but not be limited to, the notice of violation, supporting documents, all exhibits, proposed findings of fact, and conclusions of the presiding officer, if any, staff documents, respondents answer and supporting documents, consent orders, if any, Board finding of facts and order, and the recording or transcript of the proceedings.

**10. Orders.** After consideration of the records or in the event of the failure of the Respondent to answer as required in section 40.5 or to appear at the hearing, the Board shall as soon as practicable make findings of fact and, if it finds that a violation exists, issue an order aimed at ending such violation. The order shall state the date upon which it becomes effective and shall advise the party of his right to appeal under appropriate provisions of the law. The findings and order shall be served upon the party as provided in section 40.4(C). Except as otherwise provided by these regulations all other orders and decisions of the Commissioner, Presiding Officer or Board shall be served in the manner prescribed by section 40.12(B) herein.

**11. Pleadings**

**A. Filing.** An original and 15 copies of all such motions, petitions, briefs and pre-filed testimony shall be filed with the Board by delivery to the Commissioner, Department of Environmental Protection, State House Station #17, Augusta, Maine, 04333.

**B. Service.** A copy of all motions, petitions, briefs and pre-filed written testimony, permitted or required to be filed with the Board pursuant to these regulations, except briefs or proposed findings prepared by the Department, its consultants or counsel, shall be served upon parties in the proceeding or their representatives in the manner pursuant to Rule-4(d) of Maine Rules of Civil Procedure (Attached as Appendix A).

**C. Forms.** All pleadings shall be typewritten or printed on white opaque paper 8 1/2 x 11 inches in size, bound on the left margin. Typed matter shall be doubled spaced. The first page shall be headed by

State of Maine

Department of Environmental Protection

 and shall have a caption with (1) the title of the matter (e.g. in the Matter of John Jones, Violation of 38 M.R.S.A. Section 451) and (2) the title of the document (e.g. Answer of John Jones). The final page shall be dated and signed by the person who prepared such document.

**12. Time: Extension of Time Within Which to Comply with Orders**

**A. Generally.** In computing any period of time prescribed by statute or by these rules, Rules 6(a) and 6(e) of the Maine Rules of Civil Procedure shall apply. When by these rules or by law or order of the Board an act is required or allowed to be done at or within a specified time, the Board may for cause shown at any time within its discretion order the period enlarged if petition therefor is made before the expiration of the period originally prescribed; or upon petition made after the expiration of the period originally prescribed, where the failure to act was the result of excusable neglect.

**B. Petitions for Extensions of Time Within Which to Comply with Orders.** Any person affected by an order of the Board issued under these regulations may petition the Board for an extension of time within which to comply with the terms of such order. Such petition may be made no earlier than sixty (60) days before compliance with such order is required. Such a petition shall contain a concise statement by the petitioner of the facts which he believes warrant an extension; shall include, where appropriate, affidavits of engineers and contractors, engineering drawings and other material which will aid the Board in acting upon the petition, and shall state a definite date to which extension is desired.

**13. Copies of Record.** Copies of the transcript of any hearing or evidence submitted may be purchased through the Department or directly from the independent official Board reporter provided that no undue burden is placed on the Department in responding to such request, and further provided that such materials are in a form or size susceptible of reproduction by photocopying or similar means.

**14. Signing of Pleading.** Every pleading of a Respondent shall be signed by such Respondent or his attorney or representative. Such signature shall constitute a certification by such person that he has read the pleading, that to the best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served and filed.

**15. Effective Date.** These regulations shall be effective upon the date of filing with the Secretary of State and shall replace Rules for the Conduct of Enforcement Hearings effective May 15, 1973.

 After public notice and public hearing November 21, 1977 the above regulation is hereby adopted this 28th of December, 1977.

AUTHORITY: 38 M.R.S.A., Section 343

EFFECTIVE DATE: May 15, 1973

 Amended February 8, 1978

EFFECTIVE DATE (ELECTRONIC CONVERSION): May 8, 1996

APAO WORD VERSION CONVERSION (IF NEEDED) AND ACCESSIBILITY CHECK: July 15, 2025

**BASIS STATEMENT**

The Department of Environmental Protection may conduct an enforcement hearing on any alleged violation. These rules provide for the equitable conduct of hearing as well as the basis for communication between the alleged violator and the Staff of the Department. In addition to protect the rights of the alleged violator and provide alternative means of setting enforcement actions.