# **90-564 Clean-up and Response Fund Review Board**

**Chapter 3: APPEALS PROCEDURE**

**SUMMARY**: This chapter outlines the procedures governing the review of appeals filed with Clean-up and Response Fund Review Board of insurance claims-related decisions of the Commissioner of the Department of Environmental Protection and the State Fire Marshal as set forth in the *Oil Storage Facilities and Ground Water Protection Act*, 38 M.R.S. §568-B.

**1. Appeals Panel**

 Pursuant to 38 M.R.S. §568-B, the Appeals Panel of the Clean-up and Response Fund Review Board (“Appeals Panel” or “Panel”) shall hear and decide appeals of insurance claims-related decisions of the Commissioner of the Department of Environmental Protection (“Commissioner”) and the State Fire Marshal including but not limited to decisions on eligibility for coverage, eligibility for costs and waiver and amount of deductible. The Appeals Panel shall consist of the four public members of the Board as designated pursuant to 38 M.R.S. §568-B(1)(B) and (2-C).

**2.** **Filing of Submissions and** **Computation of Time**

1. **Filing of Submissions**: Whenever this rule requires or allows the filing or delivery of any submission, that filing or delivery is complete:
2. Upon the Appeals Panel, when the Appeals Panel receives the submission by the close of business on the due date by:
3. first-class mail or comparable commercial delivery;
4. in-hand delivery; or
5. fax or electronic communication confirmed by a delivery receipt.

The risk of a submission not being received by the Appeals Panel in a timely manner is on the sender, regardless of the method used.

1. Upon the Commissioner, State Fire Marshal, appellant or other party, when the submission is sent to the recipient by:
2. first-class mail or comparable commercial delivery;
3. in-hand delivery; or
4. fax or electronic communication confirmed by a delivery receipt.

 B. **Computation of Time**: For the purpose of this rule, “days” are calendar days unless otherwise specified. In computing any period of time prescribed or allowed by this rule, the day of the act or event that starts the period is not included. The last day of the period so computed is included unless it is not a business day (or the state office at which the filing must be made is partially or fully closed for business), in which event the period runs until the close of business the next full business day. “Business day” excludes Saturdays, Sundays, state holidays and any other day state offices are closed for business.

**3. Notice of Appeal**

 A. **Filing of Notice of Appeal**: Pursuant to 38 M.R.S. §568-B(2-C), an appeal of the Commissioner’s or State Fire Marshal’s decision must be filed with the Appeals Panel within 30 days after the applicant receives the decision. A copy of the notice of appeal, and all other information submitted by the appellant, shall be simultaneously delivered to the Commissioner or State Fire Marshal, whichever agency issued the order, . Unless an exception to the filing deadline applies as set forth in sections 3(B) and 3(C) of this rule, a decision of the Commissioner or State Fire Marshal becomes final if no appeal is filed within the 30-day period.

 B. **Extension of Appeal Period When Request Made Before Appeal Period Expires**. If the request for an extension is received by the Appeals Panel before the original appeal deadline expires, for good cause shown, the Chair of the Panel or designee may, in the Chair’s or designee’s discretion, extend the time for filing an appeal by no more than 30 days from the expiration of the original appeal period. The Chair’s or designee’s refusal to extend the filing deadline is not appealable to the full Appeals Panel.

 C. **Extension of Appeal Period When Request Made After Appeal Period Expires**. If the request for an extension is received by the Appeals Panel after the original appeal deadline expires, for good cause shown, the Appeals Panel may in its discretion extend the time for filing an appeal by no more than 30 days from the expiration of the original appeal period,.

 D. **Contents of the Notice of Appeal**: The notice of appeal shall include, but not be limited to the following:

 1) A copy of the Commissioner’s or State Fire Marshal’s decision;

 2) The specific grounds for the appeal and a brief statement of the appellant’s position;

 3) The remedy sought; and

 4) If any new evidence is to be offered, the information required in section 5(B) below.

 E. **Motion to Request a Complete Notice of Appeal**: If any party believes a notice of appeal does not meet the requirements of section 3(D), within 15 days of receipt of the notice a party may file a motion with the Appeals Panel requesting a complete notice of appeal. The appellant shall file a reply or an amended notice of appeal within 15 days of receipt of the motion. If the issues raised by the motion remain unresolved, the motion will be considered by the Panel at its next regularly scheduled meeting, at which time the Appeals Panel may, by majority vote, dismiss the appeal. The filing dates specified in the remainder of this rule are stayed pending the Panel’s determination that a complete notice of appeal has been filed.

**4. Parties**

 A. **Parties as a Matter of Right**: The parties to the appeals proceeding shall consist of the appellant and the Commissioner or State Fire Marshal, as applicable. Upon application received by the Appeals Panel at least 10 days prior to the scheduled hearing, the Panel shall allow any person showing that he or she is or may be, or is a member of a class which is or may be, substantially and directly affected by the proceeding, or any other agency of federal, state or local government, to intervene as a party to the proceeding.

 B. **Participation of Interested Persons as Parties**: At its discretion, the Appeals Panel may allow any other interested person to intervene and participate as a full or limited party. A request for permission to participate as a party and the reasons for the request must be received by the Panel at least 10 days before the hearing.

 C. **Statement of Interested Persons**: At its discretion, the Appeals Panel may allow statements by members of the public at a hearing, even if those individuals are not formally parties to the proceeding.

**5. Record**

 A. **Record Before the Commissioner and State Fire Marshal**: The record before the Appeals Panel shall consist of the notice of appeal and the entire record that was developed before the Commissioner and the State Fire Marshal at the time the decision which is being appealed was made. However, the Appeals Panel will review only those parts of the record which have been forwarded to the Panel by the parties. Therefore, within 15 days of the Commissioner’s or State Fire Marshal’s receipt of a complete notice of appeal, the Commissioner or State Fire Marshal shall file with the Appeals Panel those parts of the record which the Commissioner or State Fire Marshal deems pertinent to the issues presented in the notice of appeal, hereinafter referred to as the appellate record. The Commissioner or State Fire Marshal shall simultaneously deliver a copy of the appellate record to the appellant.

 Instead of filing the record within 15 days of receipt of a complete notice of appeal, the Commissioner or State Fire Marshal may file a request for an extension of time in which to file the record so long as the extension does not seek permission to file the record less than 30 days prior to the anticipated hearing date, which is the next scheduled meeting of the Appeals Panel. The request shall indicate whether any parties object to the request. Requests shall be ruled upon by the Chair of the Panel or the Chair’s designee, who shall notify the parties of the decision.

 Within 10 days of receiving the appellate record from the Commissioner or State Fire Marshal, the appellant shall file with the Appeals Panel those documents from the record that was developed before the Commissioner and/or State Fire Marshal which the appellant deems necessary to supplement the appellate record as provided by the Commissioner or State Fire Marshal. The appellant shall simultaneously deliver a copy of the supplemental documents filed to the Commissioner or State Fire Marshal.. Upon filing of the record pursuant to this paragraph, or expiration of these time periods, whichever first occurs, the appeal shall be deemed complete and ready for action by the Appeals Panel.

 B. **New Evidence**: The Appeals Panel will not accept any new evidence unless it finds that it is relevant and that such evidence could not have been submitted to the Commissioner or State Fire Marshal as part of the application process. If the appellant seeks to introduce new evidence in support of its appeal, the appellant shall provide an offer of proof as part of the notice of appeal which shall contain the following information: (1) a summary of what the evidence is expected to show and why it is relevant to the appeal; (2) the nature or form of such evidence, i.e., whether the evidence is documentary or testimonial or both; (3) the reason(s) why such evidence could not have been presented to the Commissioner or State Fire Marshal; and (4) copies of any documents which the appellant proposes to offer as new evidence. At the hearing, the Appeals Panel shall determine, by majority vote, whether it will accept the new evidence or remand the proceeding to the Commissioner or State Fire Marshal for consideration of such evidence. Written testimonial evidence shall not be admitted into the record unless the author of such testimony is available for cross-examination or subject to subpoena, except for good cause.

 C. **Statement of Position**: Any party may file a statement of position on the appeal for inclusion in the record. The statement of position must be received by the Appeals Panel and all parties to the proceeding at least 10 days before the hearing.

 D. **Documents prepared by Staff**: Summary documents that are prepared by the staff of the Appeals Panel and that are submitted to the Appeals Panel shall be included in the record and served upon all parties.

 E. **Post-hearing Submissions**: The Appeals Panel may, by majority vote taken at the hearing, agree to accept additional material for consideration after the close of the hearing. The date by which any such submission must be received by the Panel will be established at the hearing.

F. **Consequences of Failure to Meet Filing Deadline**: Except for documents referred to in subsection D and E, if any submissions for the record have not been received by the Appeals Panel or other parties to the proceeding within the applicable time period set forth in these rules, the Appeals Panel may refuse to accept and consider such submissions or the Chair of the Panel or designee may postpone the hearing until a later date.

**6. Scope of Review**

Except for issues which by law may be raised at any time, such as jurisdictional issues, or issues raised by new evidence accepted by the Appeals Panel, the review by the Appeals Panel shall be limited to issues raised in the notice of appeal. The review of the record on such issues shall be de novo. When assignment of deductibles is appealed, the burden of proof is on the Commissioner or State Fire Marshal as to which deductibles apply. For all other appeals, the burden of proof is on the appellant.

**7**. **Alternative Dispute Resolution**

 If the appellant and Commissioner or State Fire Marshal agree to use mediation or another form of alternative dispute resolution in an attempt to resolve an appeal and so notify the Appeals Panel, the Appeals Panel will not hear the matter until the conclusion of that effort, provided the effort at resolution does not extend beyond six months from the date of filing of the appeal. If the appellant and Commissioner or State Fire Marshal wish to request additional time beyond six months, they shall file a request with the Appeals Panel, which request shall be ruled upon by the Chair of the Panel or designee. The Appeals Panel may accept, reject or modify any mediated settlement that does not include withdrawal of the appeal.

**8. Hearing**

A. **Date of Hearing**: An appeal shall be scheduled for hearing at the next meeting of the Appeals Panel following the filing of a complete record pursuant to section 5(A), unless the appeal is filed less than 30 days before the meeting, the Appeals Panel and the appellant agree to a continuance, or the Panel has been notified that the parties have agreed to use alternative dispute resolution.

B. **Continuances**: A request by the appellant for a continuance must be received by the Appeals Panel at least 3 days prior to the hearing. Requests received less than 3 days prior to the hearing may be granted only for sudden emergencies or other exceptional circumstances. Requests shall be ruled upon by the Chair of the Panel or designee. If a continuance is granted, the hearing shall be rescheduled for the next meeting of the Panel at which time is available.

 C. **Witnesses**: All witnesses shall be sworn.

D. **New Evidence**: Directly after the commencement of the hearing, if there has been a request to consider new evidence, the Appeals Panel shall determine, by majority vote, whether to accept such evidence pursuant to section 5(B).

E. **Format of the Hearing**: Unless a different format is warranted by the circumstances, the hearing shall be structured as follows. After consideration of whether new evidence may be presented as set forth in subsection D, the appellant shall be present and make a statement, either personally or through counsel, explaining the appeal. Witnesses or new evidence shall be presented at this time, if permitted by the Panel. The Commissioner or State Fire Marshal or their designees, the Appeals Panel, staff and counsel may ask questions of the appellant and any witness. At the conclusion of the presentation of the appellant’s case, the Commissioner or State Fire Marshal or their designees shall present the Commissioner’s or State Fire Marshal’s position. The appellant or counsel for the appellant, the Appeals Panel, staff and counsel may ask questions of the Commissioner or State Fire Marshal and any witness. All hearings shall be recorded.

**9. Decision**

A. **Voting**: A quorum consisting of a majority of the members currently serving on the Appeals Panel shall be necessary for action by the Panel. A tie vote constitutes denial of the appeal unless a majority of the Appeals Panel members subsequently vote at that meeting for another action on the appeal or to table the appeal until another meeting. In the case of a tie vote, the findings and reasoning of the Appeals Panel members voting to deny the appeal constitute the findings and reasoning for denial of the appeal.

B. **Participation by Panel Members**: No member of the Appeals Panel may participate in review of an appeal if the member has a direct or indirect pecuniary interest in the outcome of the appeal, or if the member represents, or is member of a firm or association which represents, the interest of any of the parties before the Panel in the appeal under consideration. Where a Panel member does not voluntarily abstain in such situations, the remaining members of the Appeals Panel may determine, by majority vote, whether abstention is required.

C. **Action of the Panel**: After consideration of the appeal, the Appeals Panel may take the following action by majority vote:

1) Grant the appeal in whole or in part;

2) Deny the appeal in whole or in part;

3) Remand the appeal back to the Commissioner or State Fire Marshal; or

4) Continue the appeal to a later date.

D. **Effective Date of Decision**: The decision of the Appeals Panel is not final until the Chair or the Chair’s designee signs the written decision.

E. **Judicial Review**: Decisions of the Appeals Panel are subject to judicial review pursuant to Title 5, Chapter 375, subchapter VII.

**10. Motion for Reconsideration**

A. **Basis for Motion**: A motion for reconsideration will not be considered by the Appeals Panel unless it is based upon one or both of the following grounds:

1) New or additional evidence exists that was not considered during the appeal and that could not have been presented to the Panel at the time of the appeal; or

2) The Panel’s decision contains an error of law or relies on facts contrary to those in the record.

B. **Filing of Motion**: A motion for reconsideration must be filed with the Appeals Panel within 30 days of receipt of the written decision of the Appeals Panel. A copy of any motion must be simultaneously delivered to the other parties to the proceeding.

C. **Response to the Motion**: Any party wishing to respond to a motion for reconsideration shall file its response within 20 days of the date the motion was filed with the Panel. A copy of any response filed must be simultaneously delivered to the other parties to the proceeding.

D. **Hearing of the Motion**: The parties shall be notified when the Appeals Panel will consider the motion for reconsideration. At the hearing, the Panel may, at its discretion, permit oral arguments by the parties or consider the motion based only upon the written submission. If the Appeals Panel votes to grant the motion to reconsider its decision, the Panel will reconsider the appeal on its merits at the same meeting, unless an evidentiary hearing is required.

E. **Decision on the Motion**: The decision of the Appeals Panel denying the motion for reconsideration will be reflected in the minutes of the meeting and no separate order will be issued. If the Panel votes to grant the motion, after further hearing if necessary, a new decision will be issued as set forth in section 9.

F. **Effect of Filing a Motion**: If a motion for reconsideration is filed, the Panel’s decision shall not be considered final and the period within which an appeal of the Panel’s decision must be filed in Superior Court does not begin to run. If the Panel denies the motion, the appellant has 30 days from receipt of notice of the Panel’s decision within which to appeal the decision to Superior Court.

**11. Costs and Attorney Fees**

 Pursuant to 38 M.R.S. §568-B(2-C), if the Appeals Panel overturns the Commissioner’s or State Fire Marshal’s decision, reasonable costs, including reasonable attorney fees incurred from the time of a claims-related decision forward, will be paid by the fund for costs incurred in pursuing the appeal to the Appeals Panel. In order to receive payment, the prevailing party must submit documentation substantiating its costs and fees to the Appeals Panel for approval, with a copy to the Commissioner or State Fire Marshal, within 30 days of receipt of the Panel’s decision. Parties will be notified of the date of the meeting when the submission will be considered by the Panel. At such time, the Panel shall consider comments by the Commissioner or State Fire Marshal or their designees and the Panel’s staff regarding the reasonableness of the amount that has been submitted for approval. An hourly rate for “reasonable attorney fees” is the established hourly rate of the attorney, but may not exceed $200.00 per hour. However, the Panel has the right to approve less than the amount of the costs or fees requested based upon its determination of what is reasonable under the circumstances of a particular case. The decision of the Appeals Panel regarding attorney fees will be stated in the minutes of the meeting and no separate order will be issued.

STATUTORY AUTHORITY: 38 M.R.S. §§ 568-A(3-A) and 568-B(1)

**As “Fund Insurance Review Board”:**

EFFECTIVE DATE :

 May 28, 1994

REPEALED AND REPLACED:

 December 4, 1995

EFFECTIVE DATE (ELECTRONIC CONVERSION):

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NON-SUBSTANTIVE CORRECTIONS:

 August 19, 1997 - minor spelling and punctuation.

REPEALED AND REPLACED:

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AMENDED:

 June 16, 2013 – filing 2013-131

**Renamed as “Clean-Up and Response Fund Review Board”:**

AMENDED:

 May 20, 2017 – minor edits including new agency name, filing 2017-074

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