# **01 DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY**

**026 BOARD OF PESTICIDES CONTROL**

**Chapter 70: ADJUDICATORY PROCEEDINGS**

**SUMMARY:** These regulations describe procedures the Board must follow in conducting hearings concerned with pesticide certification, licenses and permits.

**Section 1. Purpose**

 These rules are in conformance with the Administrative Procedure Act as promulgated pursuant to 5 M.R.S.A. §8051 and the *Pesticides Control Board Law,* 22 M.R.S.A. §1471‑A *et seq.*

**Section 2. Applicability**

 A. These rules apply to proceedings when the Board considers the following:

 1. The application of pesticides in a critical area described pursuant to 22 M.R.S.A. §1471‑M(2)(A), when a rule establishing the critical area so provides;

 2. The application of pesticides to a water body pursuant to 22 M.R.S.A. §1471‑E;

 3. The renewal of a previously issued certification, license or permit provided for in 22 M.R.S.A. §§ 1471‑D, 1471‑N, unless the certification, license or permit is renewed by other action of the Board;

 4. The amendment or modification of a certification, license or permit provided for in 22 M.R.S.A. §§ 1471‑D, 1471‑N;

 5. The continuation of a temporary suspension of a license, certification or permit pursuant to 22 M.R.S.A. §1471‑D(7)(C).

**Section 3. Application to Apply Pesticides to a Critical Area or Water Body**

 A. A written application for permission to apply a pesticide under 22 M.R.S.A. §§ 1471‑M(2)(A) or 1471‑E shall be addressed to the Director, Pesticides Control Board, Department of Agriculture, Augusta, Maine, 04333.

 B. Such application shall contain such information as is requested by the Board.

**Section 4. Notice of Right to Hearing**

 A. Upon receipt of an application or otherwise when the Board's action is covered by these rules, the Board shall give notice to:

 1. The person or persons whose legal rights, duties or privileges are at issue, by regular mail, sufficiently in advance of the anticipated time of the decision to afford an adequate opportunity to prepare and submit evidence and argument, and to request a hearing if so desired; and

 2. The general public, in any proceeding deemed by the Board to involve the determination of issues of substantial public interest, such notice to be given sufficiently in advance of the anticipated time of the decision to afford interested persons an adequate opportunity to prepare and submit evidence and argument, and to request a hearing if so desired.

 B. This section is complied with if notice is given as provided in 6 of these regulations.

**Section 5. Hearings**

 A. **Upon request.** A hearing shall be held upon receipt of a request by a person whose legal rights, duties or privileges are at issue under these rules. Failure by such person to request a hearing within 15 days of receipt of notice as provided in 4 shall be deemed a waiver of the right to a hearing.

 B. **Board's discretion.** A hearing may be held, at the Board's discretion, in any proceedings deemed by the Board to involve issues of substantial public interest.

**Section 6. Notice of Public Hearing**

 A. When a hearing is to be held, notice shall be given as follows:

 1. To the person or persons whose legal rights, duties or privileges are at issue, be regular mail, sufficiently in advance of the hearing date to afford an adequate opportunity to prepare and submit evidence and argument; and

 2. In any proceeding deemed by the agency to involve the determination of issues of substantial public interest, to the public sufficiently in advance of the hearing date to afford interested persons an adequate opportunity to prepare and submit evidence and argument and to petition to intervene.

**Section 7. Notice to the Public of a Hearing**

 A. **Notice to the public.** Notice to the public shall be given:

 1. By publication, at least twice in a newspaper of general circulation in the area of the state affected;

 2. By publication in any other trade, industry, professional or interest group publication which the agency deems effective in reaching persons who would be entitled to intervene as of right under section 12 of these regulations.

 3. In any other manner deemed appropriate by the Board.

**Section 8. Notice**

 Notice shall consist of:

 1. A statement of the legal authority and jurisdiction under which the proceeding is being conducted;

 2. A reference to the particular substantive statutory and rule provisions involved;

 3. A short and plain statement of the nature and purpose of the proceeding and of the matters asserted;

 4. A statement of the time and place of the hearing, or the time within which a hearing may be requested;

 5. A statement of the manner and time within which evidence and argument may be submitted to the Board for consideration, whether or not a hearing has been set; and

 6. When a hearing has been set, a statement of the manner and time within which applications for intervention may be filed.

**Section 9. Presiding Officer**

 A. **Presiding officer.** The Board may authorize any agency member, employee or agent to act as presiding officer in any hearing.

 B. **Substitute officer.** Whenever a presiding officer is disqualified or it becomes impracticable for him to continue the hearing, another presiding officer may be assigned to continue with the hearing; provided that, if it is shown that substantial prejudice to any party will thereby result, the substitute officer shall commence the hearing anew.

 C. **Presiding officer; duties.** Presiding officers may:

 1. Administer oaths and affirmations;

 2. Rule on the admissibility of evidence;

 3. Regulate the course of the hearing, set the time and place for continued hearings, and fix the time for filing of evidence, briefs and other written submissions; and

 4. Take other action authorized by statute or agency rule consistent with 5 M.R.S.A., Chapter 375, subchapter IV.

 D. **Report.** In the event that the presiding officer prepares any report or proposed findings for the Board, the report or findings shall be in writing. A copy of the report or findings shall be provided to each party and an opportunity shall be provided for response or exceptions to be filed by each party.

**Section 10. Bias of Presiding Officer or Board Member**

 A. **Hearings; impartial.** Hearings shall be conducted in an impartial manner. Upon the filing in good faith by a party of a timely charge of bias or of personal or financial interest, direct or indirect, of a presiding officer or Board member in the proceeding requesting that that person disqualify himself, that person shall determine the matter as a part of the record.

 B. **Counsel.** Notwithstanding 1, the person involved may consult with private counsel concerning the charge.

**Section 11. Disposition without Full Hearing**

 A. **Stipulation, settlement, consent order.** The Board may make informal disposition of any adjudicatory proceeding by stipulation, agreed settlement or consent order.

 B. **Default.** The Board may make informal disposition of any adjudicatory proceeding by default, provided that notice has been given that failure to take required action may result in default, and further provided that any such default may be set aside by the Board for good cause shown.

 C. **Issues limited.** The Board may limit the issues to be heard or vary any procedure prescribed by these rules or 5 M.R.S.A. Chapter 375, subchapter IV if the parties and the Board agree to such limitation or variation, or if no prejudice to any party will result.

**Section 12. Intervention As of Right**

 A. Any person showing that he is or may be a member of a class which is or may be substantially and directly affected by the proceedings, or any other agency of federal, state or local government which is or may be substantially and directly affected, shall be allowed to intervene as a party to the proceedings.

 B. **Intervention; interested person.** The Board may, by order, allow any other interested person to intervene and participate as a full or limited party to the proceeding. This subsection shall not be construed to limit public participation in the proceeding in any other capacity.

 C. **Application.** Application for intervention shall be received by the Director no later than five days before the commencement of the hearing, except for good cause shown. The application shall state the interest of the person or class and the reason it wishes to intervene. A copy of the application shall be sent by regular mail to the person or persons whose legal rights, duties or privileges are at issue.

 D. **Decision.** The Board shall either grant or deny the application at the time of the hearing, unless all parties agree to an earlier decision.

 E. **Participation limited or denied.** When participation of any person is limited or denied, the Board shall include in the record an entry to that effect and the reasons therefor.

 F. **Consolidation of presentations.** Where appropriate, the Board may require consolidation of presentations of evidence and argument by members of a class entitled to intervene under subsection (A) of these regulations, or by persons allowed to intervene under subsection (B).

 G. **Participation.** The Board shall allow any of its staff to appear and participate in any adjudicatory proceeding.

**Section 13. Ex Parte Communications; Separation of Functions**

 A. **Communication prohibited.** In any adjudicatory proceeding, no Board members authorized to take final action or presiding officers designated by the Board to make findings of fact and conclusions of law shall communicate, directly or indirectly, in connection with any issue of fact, law or procedure, with any person, except upon notice and opportunity for all parties to participate.

 B. **Communication permitted.** This section shall not prohibit any Board member or other presiding officer described in subsection (A) from:

 1. Communicating in any respect with other members of the Board or other presiding officers; or

 2. Having the aid or advice of those members of his own Board staff, counsel or consultants retained by the Board who have not participated and will not participate in the Board proceeding in an advocate capacity.

**Section 14. Opportunity to be Heard**

 A. **Opportunity for hearing.** The opportunity for hearing in an adjudicatory proceeding shall be afforded without undue delay.

 B. **Rights.** Unless limited by stipulation under 11(C) or by Board order pursuant to 12(B) or 12(F) or unless otherwise limited by the Board to prevent repetition or unreasonable delay in proceedings, every party shall have the right to present evidence and arguments on all issues, and at any hearing to call and examine witnesses and to make oral cross‑examination of any person present and testifying.

**Section 15. Evidence**

 A. **Rules of privilege.** The Board need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law.

 B. **Evidence.** Evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. The Board may exclude irrelevant or unduly repetitious evidence.

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

 D. **Prefiling testimony.** Subject to these requirements, the Board may, for the purposes of expediting adjudicatory proceedings, require procedures for the prefiling of all or part of the testimony of any witness in written form. Every such witness shall be subject to oral cross‑examination.

 E. **Written evidence; exception.** No sworn written evidence shall be admitted unless the author is available for cross‑examination or subject to subpoena, except for good cause shown.

**Section 16. Official Notice**

 A. **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 their specialized knowledge and of statutes, regulations and non-confidential agency records. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the substance or materiality of the facts noticed.

 B. **Facts.** Facts officially noticed shall be included and indicated as such in the record.

 C. **Evaluation of evidence.** Notwithstanding the foregoing, the Board may utilize their experience, technical competence and specialized knowledge in the evaluation of the evidence presented to them.

**Section 17. Record**

 A. **Record.** In an adjudicatory proceeding, the Board shall make a record consisting of:

 1. All applications, pleadings, motions, preliminary and interlocutory rulings and orders;

 2. Evidence received or considered;

 3. A statement of facts officially noticed;

 4. Offers of proof, objections and rulings thereon;

 5. Proposed findings and exceptions, if any;

 6. The recommended decision, opinion or report, if any, by the presiding officer;

 7. The decision of the Board; and

 8. All staff memoranda submitted to the members of the Board or other presiding officers by Board staff in connection with their consideration of the case, except memoranda of counsel to the Board.

 B. **Hearings recorded.** The Board shall record all hearings in a form susceptible to transcription. Portions of the record as required and specified in subsection A may be included in the recording. The Board shall transcribe the recording when necessary for the prosecution of an appeal.

 C. **Record; copies.** The Board shall make a copy of the record, including recordings made pursuant to subsection B available at its principal place of operation, for inspection by any person during normal business hours; and shall make copies of the record, copies of recordings or transcriptions of recordings available to any person at actual cost. Notwithstanding the provisions of this subsection, the Board shall withhold, obliterate or otherwise prevent the dissemination of any portions of the record which are made confidential by state or federal statute, but shall do so in the least restrictive manner feasible.

 D. **Decision on the record.** All material, including records, reports and documents in the possession of the Board, of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record and no other factual information or evidence shall be considered in rendering a decision.

 E. **Documentary evidence.** Documentary evidence may be incorporated in the record by reference when the materials so incorporated are made available for examination by the parties before being received in evidence.

**Section 18. Subpoena and discovery**

 A. Any party may request the issuance of a subpoena by the Board, and the Board may issue the same if it first obtains the approval of the Attorney General or of any deputy attorney general. Such approval shall be given when the testimony or evidence sought is relevant to any issue of fact in the proceeding.

 B. When properly authorized, subpoenas may be issued by the Board or by any person designated by the Board for that purpose, in accordance with the following provisions:

 1. The form shall be similar to that used in civil cases before the courts. Witnesses shall be subpoenaed only within the territorial limits and in the same manner as witnesses in civil cases before the courts, unless another territory or manner is provided by law. Witnesses subpoenaed shall be paid the same fees for attendance and travel as in civil cases before the courts. Such fees shall be paid by the party requesting the subpoena.

 2. Any subpoena issued shall show on its face the name and address of the party at whose request it was issued.

 3. Any witness subpoenaed may petition the Board to vacate or modify a subpoena issued in its name. The Board shall give prompt notice to the party who requested issuance of the subpoena. After such investigation as the Board considers appropriate, it may grant the petition in whole or in part upon a finding that the testimony or the evidence whose production is required does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive or has not been issued a reasonable period in advance of the time when evidence is requested.

 4. Failure to comply with a subpoena lawfully issued in the name of the Board and not revoked or modified by the Board as provided in this section shall be punishable by a fine of not less than $500 and not more than $5,000, or by imprisonment not to exceed 30 days, or both.

**19. Decisions: Appeal**

 A. Every Board decision made at the conclusion of an adjudicatory proceeding shall be in writing or stated in the record, and shall include findings of fact sufficient to apprise the parties and any interested member of the public of the basis for the decision. The Board shall maintain a record of the vote of each member of the Board with respect to the Board's decision. A copy of the decision shall be delivered or promptly mailed to each party to the proceeding or his representative of record.

 B. The Board shall inform the parties at the time the decision is delivered or mailed that they have the right to have the Superior Court review the decision and that a petition for review of the decision must be filed in the Superior Court within 30 days after receipt of notice of the decision pursuant to 5 M.R.S.A. §11002.

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