

MAINE LAND USE PLANNING COMMISSION

Department of Agriculture, Conservation, and Forestry



BASIS STATEMENT and SUMMARY OF COMMENTS

For PROPOSED RULEMAKING to

REPEAL AND REPLACE THE COMMISSION'S CHAPTER 13 RULES, *METALLIC MINERAL EXPLORATION, ADVANCED EXPLORATION, AND MINING*, AND TO AMEND RELATED SECTIONS OF THE COMMISSION'S CHAPTER 10 RULES

June 20, 2018

STATUTORY AUTHORITY

38 M.R.S. § 490-NN(2);
12 M.R.S. §§ 685-A(3), 685-C(5)(A); and
P.L. 2017, Chapter 142, sec. 12

EFFECTIVE DATE OF THE RULE AMENDMENT

FACTUAL AND POLICY BASIS FOR THE RULE AMENDMENT

Chapter 13 of the Commission's Rules, originally adopted pursuant to 38 M.R.S. § 349-A, contains rules for metallic mineral exploration, advanced exploration, and mining, including requirements for permitting advanced exploration and mining. Chapter 10 of the Commission's Rules, adopted in accordance with 12 M.R.S. Chapter 206-A, contains definitions, requirements for development and management subdistricts, and activity-specific standards related to mining.

Prior to 2012, the Commission and the Department of Environmental Protection (Department or DEP) separately regulated exploration and mining within their respective service areas. The Commission did so primarily through application of its Chapter 10, *Land Use Districts and Standards*, as well as through its Chapter 13, *Rules for Metallic Mineral Exploration, Advanced Exploration and Mining*. The Commission's Chapter 13 rule was originally adopted jointly with DEP's Chapter 200, *Metallic Mineral Exploration, Advanced Exploration and Mining* rule.

In 2012, reform legislation went into effect and shifted permitting authority for projects qualifying for review under the Site Location of Development Act (Site Law) from the Commission to the Department. That changed the regulation of metallic mineral mining activities in that, at the time, metallic mineral mining was regulated under the Site Law. From the reform legislation, the Commission was tasked with certifying whether metallic mineral mining and advanced exploration are an allowed use in the subdistrict in which they are proposed and whether they satisfy the Commission's land use standards not addressed by the DEP in its permit application review. The Commission's responsibilities for metallic mineral exploration were not changed by the reform legislation and the Commission continues to have regulatory authority over exploration under its Chapter 10 and Chapter 13 rules.

The Maine Metallic Mineral Mining Act, 38 M.R.S. §§ 490-LL et seq., (the Mining Act) also was enacted in 2012, but did not become effective until June of 2014 (Public Law 2011, Chapter 653, "An Act to Improve Environmental Oversight and Streamline Permitting for Metallic Mineral Mining in Maine.") The mining legislation retained the same general permitting framework. DEP is responsible for permitting metallic mineral mining and advanced exploration, and the Commission is tasked with certifying those activities. The Commission retains its responsibilities to regulate exploration under its rules.

In the last few years, there have been several significant legislative actions relating to DEP and Commission rulemaking for mining activities. The 2012 mining legislation, in addition to enacting the Mining Act, directed the Commission to remove any provisions related to permitting from its rezoning procedures for metallic mineral mining. The Commission revised its Chapter 12, *Land Use District Requirements for Metallic Mineral Mining and Level C Mineral Exploration Activities* rule, effective May 27, 2013, in response to the legislation. That legislation also directed the Commission to adopt rules regarding LUPC certification of metallic mineral mining projects reviewed by the DEP as major substantive rules, and mining exploration and advanced exploration as routine technical rules. At the same time, the legislation required the DEP to adopt major substantive rules related to the Mining Act, including standards to protect public health and safety and the environment, language referencing the requirement for LUPC certification in the permitting process, and amendments for exploration and advanced exploration activities. Both agencies proceeded with rulemaking initiatives in response to the legislation.

The Commission provisionally adopted a repeal and replacement of its Chapter 13 rule, as a major substantive rulemaking in January of 2014. The revisions created, within Chapter 13, a new subchapter 3 with standards for Commission certification of metallic mineral mining and advanced exploration projects in the Commission's service area. In addition, at the same January 2014 meeting, routine technical revisions to Chapter 13 relating primarily to exploration activities and updating subchapters 1 and 2 were posted to public comment. This routine technical rulemaking also included related changes to Chapter 10. Together, the major substantive rulemaking and routine technical rulemaking were intended to completely overhaul

Chapter 13, making the Commission's rule consistent with the new Mining Act. Corresponding changes to Chapter 10 were intended to ensure consistency.

Major substantive rules must be approved by the Legislature before final adoption at the agency level. In March of 2014, the Legislature rejected the major substantive mining rules provisionally adopted by both the Commission and DEP. At the same time, the Legislature directed the Commission and DEP to undertake new mining rulemaking. The Governor vetoed this action and the veto was sustained. (See L.D. 1771, 126th Legislature.) This meant the major substantive rules developed by the Commission and DEP did not go into effect and there was no directive to write new or revised rules. The Commission's routine technical rulemaking did not require legislative approval and was not addressed in L.D. 1771. As a practical matter, however, that rulemaking was designed to dovetail with the major substantive changes. When the major substantive changes were rejected by the Legislature, the Commission ceased the companion routine technical rulemaking. As a result, the Mining Act remained in place, but without updated rules. Since 2014, further action by the Commission has been on hold as it awaited clarity.

In 2017, the Legislature enacted Public Law 2017, Chapter 142. This legislation revised certain provisions of the Mining Act, and approved final adoption of the Department's revised Chapter 200 rule, provided certain changes were made to the rule. The legislation contains a new directive for the Commission to complete rulemaking on certifications of mining permit applications. It also provides the Commission must include in the rulemaking any additional provisions necessary to ensure consistency with the Mining Act and rules adopted by the Department related to that act. This rulemaking complies with the Legislative directive in Public Law 2017, Chapter 142.

PUBLIC NOTICE OF RULEMAKING

At a meeting held in Brewer on January 10, 2018, the Commission voted to post the proposed revisions to Chapter 13 and 10 to a 30-day public comment period. A public notice was first posted in the State's consolidated Weekly Rulemaking Notice on January 24, 2018. Following the publication, the Commission received 23 requests for a public hearing on the rulemaking. In accordance with Chapter 4, Section 4.06,(4) of the Commission's rules, if five or more persons request a hearing, a hearing must be held. The original date for the public hearing was noticed in the State's Weekly Rulemaking Notice on February 21, 2018. Due to inclement weather, the public hearing was rescheduled to April 11, 2018. The public notice for the hearing was reposted in the Weekly Rulemaking Notice on March 21, 2018. In addition to these postings, the Commission posted notice by e-mail through the State's GovDelivery system to all individuals wishing to be contacted regarding any proposed changes to the Commission's rules, any Commission hearing, and any matters relating to mining. There were 1,170 recipients of the GovDelivery e-mail notices. The notice of the hearing and the proposed revisions were also posted on the agency's website. The record remained open until April 23, 2018 to allow interested persons to file written statements with the Commission, and for an additional 7 days until April 30, 2018 to allow interested persons to file written rebuttal comments.

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The Commission received verbal testimony from nine people at the public hearing, received written testimony from six people present at the hearing, five submissions of written comments, and one letter of rebuttal comments. Testimony included several themes. In accordance with state statute and Commission policy, the Commission has summarized all testimony and comments received. In order to fully consider the range of comments in the context of the rule revision proposal, the Commission has organized the comments into topic areas.

I. Testimony Not Relevant to the Proceeding

A. Ecosystem and Human Health, and Maine’s Natural Resource-based Economy

Metallic mineral mining activities will negatively impact ecosystem health, cause water contamination, degrade fish and wildlife habitat, adversely affect human health, and destroy the State’s natural resource-based industries including tourism.

Commenters: Shelly Mountain, Alice Bolstridge, Gail Maynard, Lorette Adams, Michael Maynard, and Craig Terrell.

Response: The public hearing in a rulemaking proceeding helps ensure that the relevant facts and information are available to the Commission and that interested members of the public have an opportunity to express their view on the policy that is the subject of the rulemaking. This helps the Commission make an informed decision on the specific proposal before it. The Commission must act in accordance with state law and may not amend the Maine Metallic Mineral Mining Act (Mining Act) through rulemaking. The public hearing on the 2018 metallic mineral mining rulemaking was held to focus on the rulemaking, not the law enacted by the Legislature. In the Mining Act, the Legislature adopted provisions to eliminate duplicative review of metallic mineral mining activities and made clear which aspects of mining each State agency is reviewing. Permit granting authority for metallic mineral mining was transferred to the Maine Department of Environmental Protection (DEP). Although the Commission retains authority to certify metallic mineral mining activities, that authority is limited to whether the activities are an allowed use in the subdistrict proposed and whether the activities comply with land use standards adopted by the Commission that are not covered in the DEP review. The DEP has adopted standards for water quality and water management systems, containment structures, protection of wildlife and fisheries, and other issues related to ecosystem and human health, and the State's natural resources. Therefore, these are not issues relevant to the Commission's certification of metallic mineral mining activities, or the proposed rule revisions.

Action: No action is recommended.

B. *Financial Assurance*

Mining companies will be unable to provide adequate disaster mitigation funds for metallic mineral mining activities, and the future costs of compliance could be prohibitive.

Commenter: Gail Maynard

Response: The DEP has adopted standards for financial assurance and insurance in Subchapter 4 of its Chapter 200 rules. Those rules also include standards for monitoring plans, contingency plans, reclamation, closure and post-closure maintenance, and other compliance matters. Therefore, financial assurance and insurance are not issues relevant to the Commission's certification of metallic mineral mining activities, or the proposed rule revisions.

Action: No action is recommended.

C. *Use of Designated State Lands*

Article IX, Section 23 of the Maine Constitution cannot be violated, no reduction in use nor substantial alteration in use of designated state lands can be made through LUPC rules, the categories of designated state lands should be explicitly included in LUPC rules as areas in

which mining activity is prohibited, and lakes should be explicitly included in the LUPC listing of designated state lands.

Commenter: Representative Ralph Chapman

Response: Article IX, Section 23 of the Maine Constitution states:

“**Section 23. State park land.** State park land, public lots or other real estate held by the State for conservation or recreation purposes and designated by legislation implementing this section may not be reduced or its uses substantially altered except on the vote of 2/3 of all the members elected to each House. The proceeds from the sale of such land must be used to purchase additional real estate in the same county for the same purposes.”

Nothing in the LUPC’s rule violates the Maine Constitution. In addition, in establishing the DEP’s criteria for approval of a mining permit, the Legislature included a criterion that no part of the mining operation be located wholly or partially in, on or under any state land listed in Title 12, section 549-B, subsection 7, paragraph C-1. This criterion has been incorporated in the DEP’s Chapter 200, Section 11,(n). Chapter 200 was approved by the Legislature. Further, the DEP’s Chapter 200 rules include siting criteria that prohibit removal of metallic minerals in, on or from certain resources including great ponds. Since the DEP includes standards for protection of designated state lands and great ponds, these issues are not relevant to the Commission’s certification of metallic mineral mining activities, or the proposed rule revisions.

Action: No action is recommended.

D. Major Substantive Rules

The minor technical rulemaking charge in Public Law Chapter 142 is inconsistent with Maine’s Administrative Procedures Act; these rule revisions should be major substantive rules and processed accordingly.

Commenter: Representative Ralph Chapman

Response: The Maine Administrative Procedures Act, in Section 8071, subsection 1 states:

“All new rules authorized to be adopted by delegation of legislative authority that is enacted after January 1, 1996, including new rules authorized by amendment of provisions of laws in effect on that date, must be assigned by the Legislature to one of 2 categories and subject to the appropriate level of rule-making procedures as provided in this subchapter. The Legislature shall assign the category and level of review to all rules at the time it enacts the authorizing legislation.”

In Public Law Chapter 142, the Legislature assigned this rulemaking to the routine technical rule category. The Commission does not have authority to revise the

assignment made by the Legislature in enacting the authorizing legislation.

Action: No action is recommended.

II. Testimony Relevant to the Proceeding

A. *Beneficiation.*

The terms “sintering,” “roasting,” and “in situ leaching” should be removed from Section 13.01,B,2 and the definition on Pg. 16 of Section 10.02 should be consistent. The first two terms are smelting operations, not beneficiation operations, and the third is legally prohibited.

Commenter: Representative Ralph Chapman

Response: In Public Law 2017 Chapter 142, the Legislature directed the Commission to adopt rules related to Commission certification of metallic mineral mining permit applications. In addition, the public law states in Section 12,

“Rules adopted pursuant to this section must include any additional provisions necessary to ensure consistency with the Maine Metallic Mineral Mining Act and rules related to the Maine Metallic Mineral Mining Act adopted by the Department of Environmental Protection.”

The definition of beneficiation adopted in Section 13.01,B,2 is identical to the definition in the Mining Act and DEP’s Chapter 200 rules adopted pursuant to the Mining Act. Further discussion on the definition of metallic mineral mining activity in Chapters 13 and 10 is found below.

Action: No action is recommended.

B. *Obligation to Comply*

The Federal Clean Water Act and Federal Clean Air Act should be explicitly included in the list under Section 13.01,D,1 Obligation to Comply.

Commenter: Representative Ralph Chapman

Response: Section 13.01,D,1 is a general statement to make clear that compliance with Chapter 13 does not relieve a person of the obligation to comply with all other applicable state or federal statutes or regulations, and includes references to regulations for air emissions and waste discharges, among others. The general references cover the Federal Clean Air Act and Federal Clean Water Act, and are sufficient to meet the Commission’s intent.

Action: No action is recommended.

C. *Applicability of Standards.*

Section 13.02,C,1 should explicitly identify contamination of groundwater or its migration as an “adverse impact” related to non-compliance OR the non-compliance section should be removed.

Commenter: Representative Ralph Chapman

Response: Section 13.02,C,1 relates to the performance standards for mineral exploration activities, not metallic mineral mining activities. The section has been written, like many other activity specific standards in Commission rules, with the intention that compliance with the specific performance standards would ensure no undue adverse impact upon resources and uses in the area. If a person planning on conducting mineral exploration wishes to vary from the specific performance standards, the rule provides an opportunity, through submission of a permit application and credible evidence that exploration conducted in a different manner would result in no undue adverse impact. The no undue adverse impact standard is comprehensive and includes protection of ground water resources.

Action: No action is recommended.

D. *Limits on Exploration*

In addition to exploration tonnage limits, limits on exploration material removal should be science-based and tied to the neutralizing potential/ acid producing potential ratio consistent with current science.

Commenter: Representative Ralph Chapman

Response: The DEP’s Chapter 200 rules adopted pursuant to the Mining Act as major substantive rules and approved by the Legislature include specific definitions of the terms exploration, advanced exploration, and mining. The limits of exploration are defined based on methods and the maximum surface opening of test pits and trenches. The definition of advanced exploration includes a tonnage limit, removal of 10,000 tons or less of mine waste. Neither the Mining Act, nor the DEP’s Chapter 200 rules include limits based on a neutralizing potential/ acid producing potential ratio. In Chapter 13, the Commission is adopting definitions for the terms that are consistent, as directed by the Legislature, with the Mining Act and DEP’s Chapter 200 rules.

Action: No action is recommended.

E. *Exploration vs. Advanced Exploration*

Several commenters raised concerns about the Level A and Level B Exploration definitions in proposed revisions to Chapter 10, particularly how they relate to the LUPC’s Chapter 13 and DEP’s Chapter 200 definitions for Exploration and Advanced Exploration. Comments included:

- a. The Chapter 10 rules should have a clearer definition of what constitutes Exploration and Advanced Exploration.
- b. Those definitions should conform to DEP's Chapter 200 rules.
- c. The Chapter 10 rules should clearly state what constitutes Advanced Exploration requiring a permit from DEP.
- d. There is a conflict between the DEP's Advanced Exploration definition and LUPC's Level B Mineral Exploration Activities definition that will lead to confusion among the regulatory community and stakeholders.
- e. The Level B Mineral Exploration Activities definition should be adjusted to align with DEP's Exploration definition, removing advanced exploration activities from the Level B definition.
- f. The LUPC should consider adoption of DEP's definition of Tier 1 and Tier 2 Advanced Exploration.
- g. The LUPC should revise the definition of Level A Mineral Exploration Activities to limit the disturbance area on each site. This change would allow for the appropriate oversight of exploration activities in certain environmental sensitive subdistricts.

Commenters: The Natural Resources Council of Maine, the Maine Department of Environmental Protection, and the Maine Geological Survey.

Also, in rebuttal, one commenter suggested that the metrics for defining Level A and Level B Exploration should be based on groundwater contamination potential rather than area of disturbance or tonnage. The commenter also indicated that, in the absence of using a science-based metric such as groundwater contamination potential, the LUPC's more restrictive definitions for these terms should remain.

Commenter: Representative Ralph Chapman

Response: The Commission agrees that the originally proposed definition of Level A Exploration Activities could allow for extensive soil disturbance and does not provide the level of oversight for exploration activities that was intended for sensitive protection subdistricts. Also, the Commission agrees that the originally proposed definition of Level B Exploration Activities conflicts with the definition of Advanced Exploration and could lead to confusion. Therefore, the Commission has revised both definitions in the final rule. Following the changes to those definitions, revisions were made to several use listings in Chapter 10 ensuring that the use listings align appropriately with the new definitions. In addition, after removing advanced exploration activities from Level B Exploration, definitions for Advanced Exploration, and Tier 1 and Tier 2 Advanced Exploration were added to Chapter 10, consistent with the DEP's Chapter 200 rules; and Tier 1 Advanced Exploration was included as a new use listing in certain subdistricts. These latter changes continue the current practice of allowing some advanced exploration activities by permit (now issued by DEP) in the specified subdistricts (D-CI, D-RB, M-GN, P-SG) without the need for rezoning. As revised, Tier 2 Advanced Exploration and Mining Activities are not an allowed use in any subdistrict and would require rezoning prior to

applying for a permit. One last change was made to implement the revised definitions in Chapter 13, updating the Section 13.01,E, Relation to Chapter 10.

Regarding the rebuttal comments, the Commission determined that it has adopted definitions for the terms Exploration and Advanced Exploration that are consistent with the Mining Act and DEP's Chapter 200 rules, as directed by the Legislature. Also, the Commission does not agree that the addition of an area limitation to the Level A Exploration definition and removing the ability to conduct bulk sampling in Level B Exploration makes these definitions less restrictive.

Action: For the reasons explained above, the Commission made the following changes to the Level A Exploration and Level B Exploration definitions. Other revisions to the rules were made to implement these changes.

100. Level A Mineral Exploration Activities:

Mineral exploration activities ~~engaged in~~conducted for ~~the~~ purposes of determining the location, extent, and composition of mineral deposits, provided that such activities are limited to test boring, test drilling, hand sampling, the digging of test pits, trenching or outcrop stripping for the removal of overburden having a maximum surface opening of 100 square feet per test pit or trench, or other test sampling methods determined by the Commission which cause minimum disturbance to soil and vegetative cover. ~~Level A mineral exploration activities shall not include bulk sampling of mineral deposits.~~

Access ways for Level A mineral exploration activities shall include only access ways the creation of which involves little or no recontouring of the land or ditching, and does not include the addition of gravel or other surfacing materials. Clearing of the vegetative cover shall be limited to the minimum necessary to allow for the movement of equipment and shall not exceed 1 acre of total disturbed area.

101 Level B Mineral Exploration Activities:

Mineral exploration activities ~~involving the bulk sampling of mineral deposits, or any mineral exploration activities~~ which exceed those defined as Level A mineral exploration activities having a maximum surface opening of 300 square feet per test pit or trench ~~and which are not defined as Level C metallic mineral exploration activities.~~ Level B mineral exploration activities shall not include bulk sampling of mineral deposits.

Access ways for Level B mineral exploration activities shall include only access ways the creation of which involves little or no recontouring of the land or ditching, and does not include the addition of gravel or other surfacing materials. Clearing of the vegetative cover shall be limited to the minimum necessary to allow for the movement of equipment.

F. Metallic Mineral Mining Activity

The current definition of Metallic Mineral Mining Activity in Section 10.02(123) is inconsistent with the Mining Act and both the Commission's Chapter 13 proposal and the DEP's Chapter 200 rules.

Commenter: Maine Department of Environmental Protection

In rebuttal, one person responded that replacement of a series of specific allowed processes associated with mining activity with an all-encompassing term creates an open-ended definition that is of no value to the protection of the lands under LUPC jurisdiction.

Commenter: Representative Ralph Chapman

Response: The Commission agrees the proposed definition of Metallic Mineral Mining Activity in Chapter 10 was inconsistent with the definition for that term in Chapter 13, as well as the DEP's Chapter 200 rule and the Mining Act definitions for Metallic Mineral Mining. Inconsistent definitions for what constitutes metallic mineral mining between different chapters of State rules and across different jurisdictions of State government would be confusing for the regulated community and all stakeholders.

Action: Following the directive of the Legislature for the Commission to revise its rules to ensure consistency with the Mining Act and DEP rules, the Commission revised the definition as follows:

123. Metallic Mineral Mining Activity:

"Metallic mineral mining activity" means ~~any activities, facilities, or processes that is necessary~~ for the ~~purpose of~~ extraction or removal of metallic minerals ~~or overburden or for the preparation, washing, cleaning, or other treatment, and includes processes used in the separation or extraction~~ of metallic minerals ~~and includes the bulk sampling, advanced exploration, extraction or beneficiation of metallic minerals as well as waste storage and other stockpiles and reclamation activities, but from other material including, but not limited to: crushing, grinding, beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic); cyanidation; leaching; crystallization; or precipitation; mine waste handling and disposal; and processes substantially equivalent, necessary, or incidental to any of the foregoing.~~

~~Metallic mineral mining or metallic mineral mining activity~~ does not include Level A, ~~or B or C~~ exploration activities, ~~or thermal or electric smelting.~~

G. D-PD Subdistrict

All D-PD subdistrict related revisions should be included in a single rulemaking.

Commenter: Land Use Planning Commission staff

Response: The proposed Chapter 13 and Chapter 10 rule revisions included several changes to Section 10.21,G, Planned Development Subdistrict (D-PD). The Commission has initiated a separate miscellaneous rulemaking that also includes revisions to Section 10.21,G. The miscellaneous rulemaking package includes revisions intended to provide the same consistency

and clarity as those posted in this rulemaking; however, a majority of the D-PD-related revisions in the miscellaneous rulemaking do not bare on mining activities or exploration.

Action: All changes proposed for Section 10.21,G, Planned Development Subdistrict (D-PD) were removed from this rulemaking.