Chapter 3: RULES GOVERNING THE CONDUCT OF LICENSING HEARINGS

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CHAPTER 3: RULES GOVERNING THE CONDUCT OF LICENSING HEARINGS

SUMMARY. This chapter sets forth the procedures that will be followed by the Commissioner or Board when conducting a hearing in a licensing proceeding.

1. **Applicability.** The following provisions govern those Department licensing proceedings where a decision has been made to hold a hearing on a license application or on an appeal to the Board of a Commissioner license decision. This rule governs the conduct of the hearing and related pre- and post-hearing procedures.

2. **Definitions.** For the purposes of this chapter, the following words and phrases have the following meanings:

   A. **Appellant.** "Appellant" means a person who appeals a Commissioner license decision to the Board.

   B. **Applicant.** "Applicant" means a person who has submitted an application to the Department for a license.

   C. **Board.** "Board" means the Board of Environmental Protection, an independent citizen board that is part of the Department and that, among its duties, decides selected applications and considers appeals of Commissioner license decisions.

   D. **Board Chair.** "Board Chair" means the chair of the Board, or his or her designee.

   E. **Commissioner.** "Commissioner" means the commissioner of the Department of Environmental Protection or his or her designee.

   F. **Conference.** "Conference" means a pre-hearing, mid-hearing, or post-hearing meeting scheduled by the Presiding Officer at which the Presiding Officer and the parties discuss matters pertaining to the licensing proceeding.

   G. **Department.** "Department" means the Department of Environmental Protection, which includes the Commissioner and the Board.

   H. **Hearing.** "Hearing" means a hearing conducted in accordance with the procedural requirements of the Maine Administrative Procedure Act, Title 5, chapter 375, subchapter IV at which the Department receives oral testimony and evidence for the purpose of gathering facts upon which a decision in a licensing proceeding will be based.

   I. **Interested Person.** "Interested person" means a person who submits written comments on an application or who requests, in writing, receipt of notices related to a particular licensing proceeding. The Department shall maintain a list of interested persons for each licensing proceeding.

   J. **Intervenor.** "Intervenor" means a person who, in accordance with the Maine Administrative Procedure Act, 5 M.R.S. § 9054(1) or (2), and section 11(A) of this rule, has been granted leave

to participate as a party in a licensing proceeding where a decision has been made to hold a hearing.

K. License. "License" means the whole or any part of a new license, amended license, minor revision, renewal license, transfer, surrender, variance, certification or similar form of permission issued by the Department that is required by law, and represents the State's exercise of regulatory or police powers. The term "permit" is used interchangeably with "license" in some Department statutes. Examples of licenses include: Site Location of Development licenses pursuant to 38 M.R.S. § 481 et seq., waste discharge licenses pursuant to 38 M.R.S. § 413, water level orders pursuant to 38 M.R.S. § 840, and water quality certifications pursuant to Section 401 of the federal Clean Water Act.

L. Licensee. "Licensee" means the person to whom a license has been issued.

M. Licensing Proceeding. "Licensing proceeding" means a proceeding on a license application or an appeal of a license decision.

N. Party. "Party" means:

(1) the specific person whose legal rights, duties or privileges are being determined in a licensing proceeding; or

(2) an intervenor.

O. Person. "Person" means an individual, partnership, corporation, governmental entity, association or public or private organization of any character, other than the Department.

P. Presiding Officer. "Presiding Officer" means the individual authorized pursuant to the Maine Administrative Procedure Act and section 4 of this rule to preside over a licensing proceeding where a decision has been made to hold a hearing.

Q. Written Testimony. "Written testimony" means the sworn written testimony of a party submitted for inclusion in the record of a licensing proceeding.

3. Form, Service, and Filing of Documents

A. Form of Papers. A party must print all petitions, motions, proposed findings, briefs, responses, pre-filed written testimony, and proposed orders on 8.5 inch by 11 inch paper. The upper left side of the first page must have a caption in capital letters identifying:

(1) the name of the applicant or licensee;

(2) the type of application or license;

(3) the application or license number issued by the Department; and

(4) the location of the activity subject to the application or license including the county and town.

The upper right side of the first page must identify the party filing the document and the title of the document. The final page must be dated and signed by, or on behalf of, the party filing the

document and include under the signature line that person's printed name, capacity, mailing address, electronic mail address, and telephone number.

B. Service List. The Presiding Officer will maintain a service list with the contact information of the individual designated by each party to receive service of papers and communications on its behalf. Unless otherwise indicated in the first document filed by any party in a proceeding, the name and mailing address of the individual filing the first document shall be used by the Department and all parties for the purposes of document service. Any subsequent change of the designated representative must be served on all parties by the party making the change.

C. Service on Parties. Unless the Presiding Officer provides otherwise, every document or communication filed with the Department by a party or a state, federal, municipal or other governmental agency participating in accordance with section 11(C) shall be served upon all parties. Service is deemed complete when a filing is delivered:

(1) by U.S. mail, First Class or electronic mail to the party's designated representative, as identified pursuant to section 3(B);

(2) by delivery in-hand to the party's designated representative or to the office of the party's designated representative; or,

(3) by telefax when approved by the Presiding Officer.

D. Filing with the Department. If the hearing is before the Commissioner, the original of all documents, materials and other submissions must be filed with the Department by delivery to the Maine Department of Environmental Protection, Office of the Commissioner, 17 State House Station, Augusta, Maine 04333, unless otherwise specified by the Presiding Officer. If the hearing is before the Board, the original of all documents, materials and other submissions must be filed with the Board by delivery to the Board Chair, Maine Department of Environmental Protection, 17 State House Station, Augusta, Maine 04333, unless otherwise specified by the Presiding Officer.

Filing with the Department is complete when the Department receives the submission by the close of business on the date due (5:00 p.m., as determined by the received time stamp on the document, telefax, or electronic mail), unless otherwise specified by the Presiding Officer, by:

(1) U.S. mail, First Class;

(2) in-hand delivery;

(3) telefax, only if followed by receipt of an identical original document within five (5) working days; or,

(4) electronic mail to the address specified by the Department for receipt of filings in the licensing proceeding, with attachments supplied in an unalterable format showing a handwritten or electronic signature acceptable to the Department, only if followed by receipt of an identical original document within five (5) working days.

Persons filing materials with the Department are encouraged to confirm receipt by the Department in order to avoid inadvertently missing a deadline. Submissions not received by the

Department by a prescribed deadline will be deemed untimely, absent a showing of good cause. The risk of material not being received in a timely manner is on the sender, regardless of the method used.

E. Availability of Application Materials. All applications filed with the Department are available for public inspection, copying and comment. At the time an application is filed with the Department, a copy of the application and its supporting documents must be filed by the applicant with the appropriate town or city clerk or, if the project is in an unorganized territory, with the county commissioners. Once the Department determines that a hearing will occur, the applicant must make copies of the complete application reasonably available to the parties and interested persons. Availability may be in the form of paper or electronic versions as determined by the Presiding Officer. Any subsequent amendments, modifications, response to comments, or other supplemental filings must be served on all parties and filed by the applicant with the appropriate town or city clerk or, if the project is in an unorganized territory, with the county commissioners. If the Presiding Officer determines that such new or additional information is significant or substantially modifies the activity proposed in the application, the applicant shall provide written notice of the filing to interested persons and shall make a copy of the filing reasonably available to interested persons who request a copy in writing.

F. Computation of Time. For the purpose of this rule, "days" are calendar days unless otherwise specified by the Presiding Officer. "Working days" excludes Saturdays, Sundays, state holidays and any other day state offices are closed for business. 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 working day or the state office location 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 (5:00 p.m.) the next full working day. Whenever a party has the right or is required to take some action within a prescribed period of time after the service of notice or other paper upon the party and the notice or paper is provided by U.S. mail First Class, three (3) days shall be added to the prescribed period. This "3-day rule" does not affect any date-certain deadline established by the Presiding Officer.

G. Documents Issued by the Department. The Presiding Officer shall ensure that all orders, decisions and notices of hearings and Board meetings issued by the Department are provided to parties and interested persons. Except as set forth in sections 12 and 28 of the rule, or as otherwise ordered by the Presiding Officer, these documents may be provided electronically. Service of a subpoena is the responsibility of the requesting party.

4. Presiding Officer

A. Designation. The Commissioner or Board Chair shall designate a Presiding Officer for the hearing.

(1) For hearings conducted by the Commissioner, the Presiding Officer must be:

(a) the Commissioner; or

(b) an employee or agent of the Department who is designated by the Commissioner.

(2) For hearings conducted by the Board, the Presiding Officer must be:

(a) the Board Chair; or

(b) a Board member who is designated by the Board Chair.

B. Substitute Presiding Officer. Whenever a Presiding Officer is disqualified or it becomes impractical for him or her to continue in that capacity, another Presiding Officer may be designated pursuant to section 4(A) to continue with the hearing; provided that, if it is shown substantial prejudice to any party will thereby result, the substitute officer shall commence the hearing anew.

C. Authority. The Presiding Officer has the authority to:

(1) identify statutes and rules that are applicable to the proceeding;

(2) act upon requests for subpoenas;

(3) rule upon the admissibility of evidence;

(4) limit the issues to be heard if the parties and the Presiding Officer agree to such limitation, or if no prejudice to any party will result;

(5) grant or deny petitions for intervention which have not previously been ruled upon by the Commissioner or the Board;

(6) administer oaths and affirmations;

(7) conduct conferences;

(8) regulate the course of the proceeding, set the time and place for hearings, and fix the time for filing of pre-filed written testimony, exhibits, evidence, briefs, and other written submissions;

(9) rule upon issues of procedure;

(10) for hearings conducted by the Board, certify questions to the Board for its determination;

(11) vary from any procedure prescribed by this rule or the Maine Administrative Procedure Act, chapter 375, subchapter IV, if the parties and the Presiding Officer agree to such variation, or if the variance will achieve greater fairness or economy and no prejudice to any party will result; and

(12) take such other action that is necessary for the efficient and orderly conduct of the hearing.

D. Ruling Appeals. Pre-hearing rulings made pursuant to section 4(C)(1) through 4(C)(5) are appealable to the full Board in Board licensing proceedings and to the Commissioner in Commissioner licensing proceedings where the Commissioner is not the Presiding Officer. Unless determined necessary by the Presiding Officer, the course of a licensing proceeding is not

stayed by an appeal of a Presiding Officer's ruling. An appeal of the Presiding Officer's ruling is not a necessary prerequisite to preserve a party's objection for the purpose of judicial appeal.

5. **Department Staff.** The role of Department staff in a licensing proceeding is to assist the Presiding Officer, Commissioner or Board in a non-advocate capacity by gathering facts, identifying issues for consideration, analyzing evidence submitted, and making recommendations regarding compliance with relevant license criteria. Department staff may communicate with the applicant regarding additional information sought on specific license criteria. Department staff may also communicate with any party regarding evidence or other materials submitted by that party.

   A. **Evaluation of Evidence**. The experience, technical expertise and specialized knowledge of Department staff may be utilized in the evaluation of all evidence in a licensing proceeding before and during a hearing and after the hearing record is closed.

   B. **Hired Consultants and Outside Agency Review Staff**. Department staff may hire consultants or request the aid of outside agency review staff to assist in the evaluation of evidence in a licensing proceeding. Where Department staff has asked outside agency review staff to assist in evaluation of the evidence, the outside agency review staff may submit written comments on the evidence submitted by the parties, supply information in that agency's possession, respond in writing to questions from Department staff related to matters in the agency's area of expertise-, or recommend that Department staff request additional information from the applicant on specific license criteria. Department staff shall provide notice to the parties of the availability of materials received from hired consultants or outside agency review staff.

   C. **Review Comments on Application.** Department staff and any outside agency review staff assisting the Department in its review of the application shall submit any review comments on the application sufficiently in advance of the hearing so that the applicant has an opportunity to respond to those comments and all parties have an opportunity to review the applicant's responses. The review comments shall be submitted to the persons listed on the service list maintained by the Presiding Officer pursuant to section 3(B). This subsection does not preclude Department staff from using at any time the experience, technical expertise and specialized knowledge of hired consultants and outside agency review staff in its analysis of the evidence during the hearing and after the hearing record has closed.

   D. **Additional Information from Applicant.** If Department staff or the Presiding Officer request additional information from the applicant pursuant to section 16(A), such requests shall be made sufficiently in advance of the hearing so that the applicant has an opportunity to respond to those requests and all parties have an opportunity to review the applicant's responses. If additional information needs arise during the hearing, the Presiding Officer shall afford the applicant a reasonable opportunity to respond to those information requests prior to the close of the hearing record.

   E. **Hearing and Recommendation.** Department staff and, if requested by the Presiding Officer, Department hired consultants and outside agency review staff will attend the hearing to answer questions of the Presiding Officer or Board members regarding the contents of the record, ask questions of witnesses, and otherwise assist in the gathering of facts. The Presiding Officer may request hired consultants or outside agency review staff to testify at the hearing to respond to questions regarding comments submitted to the record. If this occurs parties shall be permitted to

ask questions of the hired consultant or outside agency review staff person regarding their review comments. At the conclusion of the hearing and after the record is closed, Department staff will draft a recommendation for the Presiding Officer's, Commissioner's or the Board's consideration.

F. Exceptions. This section does not apply to state, federal, municipal or other governmental agencies that have not been asked by Department staff to assist in the evaluation of evidence, but rather are participating in the licensing proceeding pursuant to section 11(A) or 11(C).

6. Ex-parte Communications

A. Communication Prohibited. For hearings conducted by the Commissioner, neither the Commissioner nor the Presiding Officer may communicate directly or indirectly in connection with any issue of fact, law, or procedure regarding the matter, with any party or other person legally interested in the outcome of the proceeding, except upon notice and opportunity for all parties to participate. For hearings conducted by the Board, no Board member participating in the proceeding may communicate directly or indirectly in connection with any issue of fact, law, or procedure regarding the matter, with any party or other persons legally interested in the outcome of the proceeding, except upon notice and opportunity for all parties to participate.

B. Communication Permitted. This section does not prohibit the Presiding Officer, Commissioner or Board members from communicating in any respect with or receiving the aid or advice of Department staff, counsel, or consultants retained by the Department who have not participated and will not participate in the licensing proceeding in an advocate capacity.

7. Impartiality. Hearings must be conducted in an impartial manner. Upon a timely allegation, made in good faith, of bias or of personal financial interest, direct or indirect, of a Presiding Officer, Commissioner or Board member in the proceedings, requesting that person disqualify him or herself, that person shall determine the matter as part of the record. Should the person alleged to be biased request it, an allegation must be reduced to writing by the person making the allegation with an adequate time for response on the record. The Presiding Officer, Commissioner, or Board member to whom the charge of bias or of personal financial interest is directed may consult with the Office of the Attorney General or private counsel concerning the charge.

8. Rights of Parties. The opportunity for a hearing shall be afforded without undue delay. Unless limited by stipulation of the parties or order of the Presiding Officer under this rule, every party has the right to present evidence and argument on all issues in contention, and at any hearing to call and examine witnesses and to make oral cross-examination of any person present and testifying.

9. Consolidation of Proceedings. On motion and for good cause shown, or on his or her own initiative, the Presiding Officer may consolidate for hearing two or more related proceedings when such action will be conducive to the just and proper dispatch of business, the rights of any party are not prejudiced, and opportunities for public participation will not be compromised. A consolidation under this section may be for any purpose or issue of the proceedings.

10. Location of Hearing. The Department shall strive to hold hearings in the area or areas of the State significantly affected by the license application or which are concerned about the issue, or as specified by state or federal law, taking into consideration the needs, costs and convenience of the parties, interested public and Department.

11. Public Participation. Members of the public may attend hearings. This section governs participation at a hearing.

A. Intervention. The Commissioner, the Board, or the Presiding Officer pursuant to section 4(C)(5) of this rule shall decide petitions for leave to intervene in a licensing proceeding where a decision has been made to hold a hearing.

(1) Except as provided in this subsection, any person who wants to participate in a hearing as an intervenor must file a petition for leave to intervene within ten (10) days of the Department's publication of notice of opportunity to intervene, or within such other time as may be specified in the notice. The petition must include: identification of the petitioner, a description of the effect of the proposed activity on the petitioner; specific contentions regarding the subject matter of the hearing and the relevant statutory criteria; the name of the spokesperson for the petitioner; and a statement regarding the ability of the petitioner to participate in the proceeding. If the petitioner is a group or organization, the petition shall include a general description of the purpose and membership of the group or organization. A petition shall be granted if it demonstrates that the petitioner is or may be, or is a member of a class which is or may be, substantially and directly affected by the proceeding. The Department may, at its discretion, allow any other person to intervene and participate as a party to the proceeding. A petition for leave to intervene may be granted to allow participation as a full or limited party to the proceeding.

(2) Any state, federal, municipal or other governmental agency that wants to participate as a party shall be granted intervenor status if it files a petition for leave to intervene within ten (10) days of the Department's publication of notice of opportunity to intervene, or within such other time as may be specified in the notice.

(3) An appellant and a licensee shall be granted automatic intervenor status in an appeal where the Board has decided to hold a hearing and need not file a petition for leave to intervene.

(4) A petition for leave to intervene which is not timely filed will be denied unless the petitioner shows good cause for failure to file on time, including but not limited to failure to receive reasonable notice.

(5) An intervenor is a party to the proceeding and has the right to offer testimony and evidence, and conduct cross examination. An intervenor shall be permitted to participate in the hearing, subject, however, to such reasonable terms as the Presiding Officer may direct.

(6) Intervenors may be required by the Presiding Officer to consolidate their presentations of evidence and argument in part or in whole if their interests or contentions are substantially similar and such consolidation would expedite or simplify the hearing without prejudice to the rights of any party. A consolidation under this section may be for all purposes of the proceeding, all of the issues of the proceeding, or with respect to any one or more issues thereof.

(7) A Presiding Officer shall allow an intervenor to withdraw from participation in a licensing proceeding. The Presiding Officer shall evaluate whether any testimony or evidence presented by the withdrawing party must be stricken from the record because a witness is no longer available for cross-examination or inclusion of evidence would cause undue prejudice to remaining parties. Any decision regarding such materials shall be made in writing by the

Presiding Officer, except that any such decision that occurs during the hearing shall be stated on the record.

B. Participation by a Non-Intervenor. Any person who is not an intervenor may, at the discretion of the Presiding Officer, attend but not participate in a conference, and participate in a hearing by testifying and presenting evidence and submitting cross-examination questions through the Presiding Officer within such terms and conditions as the Presiding Officer specifies. Written comments submitted at a hearing on a license application, but not testified to, will be included in the application record. Nothing in this rule shall be construed to limit a person's right to submit written comments to the Department in the normal course of application processing.

C. State, Federal, Municipal or Other Governmental Agencies. An interested state, federal, municipal or other governmental agency that has not been asked by Department staff to provide assistance in the evaluation of the evidence under section 5 and that has not petitioned for leave to intervene under section 11(A)(2) shall be afforded a reasonable opportunity to participate in a hearing and to introduce evidence and question witnesses. The agency will be permitted such rights as are granted by this subsection only if the representative appearing on behalf of the agency represents the views and positions of the agency. If a governmental agency intends to participate in the hearing as set forth in this section, the agency must notify the Department at least 20 days prior to the start of the hearing. If the agency representative testifies or introduces evidence, the representative shall be available for cross-examination by the parties.

12. Public Notices. When a hearing is required by law or when a decision has been made to hold a hearing, public notice shall be provided by the Department as follows.

A. Notice of Opportunity to Intervene

(1) Notice of opportunity to intervene shall be provided at least 10 days prior to the deadline for the filing of a petition to intervene by U.S. mail, First Class to:

(a) the person or persons whose legal rights, duties, or privileges are at issue;

(b) the municipality or municipalities affected by the licensing matter as determined by the Department to the best of its ability;

(c) the county, if the affected locality as determined by the Department to the best of its ability is an unorganized territory;

(d) the legislators of the geographic area or areas affected by the licensing matter; and

(e) persons who have made timely requests in writing to be notified of a licensing hearing on a specific matter.

(2) Notice to the public of the opportunity to intervene must be published at least once in a newspaper of general circulation in areas affected by the licensing matter as determined by the Department.

(a) The notice must be published in the legal notices section in a form readily noticeable to the general public.

(b) The date of the publication must be at least ten (10) days prior to the deadline for the filing of a petition to intervene.

(3) Notice of the opportunity to intervene shall consist of:

(a) a short statement in plain and clear English which can be readily understood by the general public of the nature and the purpose of the proceeding;

(b) a reference to the particular substantive statutory and rule provisions involved;

(c) a statement of the legal authority and jurisdiction under which the proceeding is being conducted;

(d) a reference to the statutory and regulatory requirements for a petition to intervene;

(e) the deadline for filing a petition to intervene;

(f) the name, address and telephone number of a person to contact for more information; and,

(g) the place and time where relevant material may be examined.

B. Notice of Hearing

(1) Notice of the Hearing shall be provided at least thirty (30) days prior to the date of the hearing by U.S. mail, First Class to:

(a) the person or persons whose legal rights, duties, or privileges are at issue;

(b) the municipality or municipalities affected by the licensing matter as determined by the Department to the best of its ability;

(c) the county, if the affected locality as determined by the Department to the best of its ability is an unorganized territory;

(d) the legislators of the geographic area or areas affected by the licensing matter;

(e) intervenors;

(f) persons who have made timely requests in writing to be notified of a specific licensing hearing; and,

(g) persons who have filed a written request, within the calendar year, to be notified of licensing hearings.

(2) Notice to the public of the hearing shall be given as follows.

(a) Newspaper. Notice of the hearing must be published at least twice in a newspaper of general circulation in the area of the proposed activity and in areas affected by the licensing matter as determined by the Department to the best of its ability.

(i) The notice must be published in the legal notices section in a form readily noticeable to the general public.

(ii) The date of the first publication must be thirty days prior to the hearing.

(iii) The date of the second publication must be at least seven (7) days and no more than thirteen (13) days before the date of the hearing.

(b) Press Releases. The issuance of a press release describing the date, place, time, and nature of the hearing must occur once and be sent at least seven (7) days and no more than thirteen (13) days before the date of the scheduled hearing to the news desks of television stations and newspapers of general circulation in the area(s) of the proposed activity, as determined by the Department.

(c) Public Service Radio and Television Announcements. The issuance of radio and television announcements describing the date, place, time, and nature of the hearing must be provided to radio and television stations in the area of the proposed activity, as determined by the Department. In the first instance, this must occur at least twenty-one (21) days prior to the first day of the hearing and in the second instance no less than seven (7) and no more than ten (10) days prior to the first day of the hearing.

(3) Notice of the hearing shall consist of:

(a) a short statement in plain and clear English which can be readily understood by the general public of the nature and the purpose of the proceeding;

(b) a statement of the legal authority and jurisdiction under which the proceeding is being conducted;

(c) a reference to the particular substantive statutory and rule provisions involved;

(d) a statement of the time and place of the hearing;

(e) a statement of the manner and time within which evidence and argument may be submitted to the agency for consideration;

(f) the name, address and telephone number of a person to contact for more information; and;

(g) the place and time where relevant material may be examined prior to the hearing.

(4) Notice described in this subsection is not required if a hearing continues beyond the date(s) and times published pursuant to this subsection. Notice of a continued hearing is subject to section 19(E).

13. Subpoenas. Any party may request the issuance of a subpoena in the name of the Department to require the attendance and testimony of witnesses and the production of any evidence relating to any issue of fact in the licensing proceeding. Prior to requesting a subpoena, the party shall exhaust all other reasonable means of procuring attendance of the witness or the information sought such as

asking for voluntary attendance or submission of the information. Such requests must be directed to the Presiding Officer for determination and action.

A. **For Documents.** The Department may issue subpoenas pursuant to 38 M.R.S. § 345-A(4) to compel the production of books, records and other data relevant to the matters in issue at a hearing. If any person served with a subpoena demonstrates to the satisfaction of the Department that the production of the information would, if made public, divulge methods or processes which are entitled to protection as trade secrets, or if the information is otherwise protected by law, the information shall be disclosed only at a non-public portion of the hearing and shall be confidential and not available for public inspection.

B. **For Attendance of Witnesses.** The Department may issue a subpoena compelling the attendance of a witness to provide testimony relevant to the matters in issue at a hearing if it first obtains the approval of the Attorney General or of any Deputy Attorney General pursuant to the Maine Administrative Procedure Act, 5 M.R.S. § 9060.

C. **Department Staff, Outside Agency Review Staff, and Department Hired Consultants.** Department staff, outside agency review staff, and Department hired consultants who assist the Presiding Officer, Commissioner or Board as described in section 5 are not subject to subpoena.

D. **Public Records.** Prior to requesting a subpoena for public records, the party shall exhaust all other means of procuring the documents including making a request for copies of public records pursuant to the Maine Freedom of Access Act.

E. **Form.** Subpoenas will be in the form used by the courts of the State. Every subpoena will bear the name of the Department, the name of the issuing officer, and the name and address of the party at whose request it was issued. Each subpoena will command the person to whom it is directed to attend and give testimony or produce specified documents or things at a designated time and place. The subpoena will also advise of the procedure to vacate or modify provided herein. Witnesses may only be subpoenaed within Maine's territorial limits and in the same manner as witnesses in civil cases before the courts, unless another territory or manner is provided by law.

F. **Service.** Service of a subpoena must be arranged by the requesting party and made by delivering a copy of the subpoena to the person named in it. Unless the witness will accept service by other means, a subpoena must be served by a person who is not a party to the proceeding and is not less than eighteen years of age. Fees for attendance and mileage must be served simultaneously with the subpoena and must be the same as those paid witnesses in the Superior Courts of this State and must be paid for by the party requesting the subpoena.

G. **Return.** The person serving the subpoena shall make proof of service by filing the subpoena and affidavit or acknowledgement of service with the Presiding Officer. Failure to make such proof of service shall not affect the validity of the subpoena and service.

H. **Vacating or Modifying Subpoena**. Any person subpoenaed to produce records or provide testimony may petition the Presiding Officer to vacate or modify a subpoena issued by the Department. The Department shall give prompt notice of such a petition to the party who requested issuance of the subpoena and all other parties. The Presiding Officer may vacate or modify the subpoena when, after such investigation as the Presiding Officer considers appropriate, he or she finds that:

1) the testimony or evidence whose production is required does not relate with reasonable directness to any matter in question in the licensing proceeding;

2) a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive;

3) the subpoena has not been issued sufficiently in advance of the time specified for the appearance of the witness or the production of evidence;

4) the subpoena would require the disclosure of privileged or confidential material where no waiver or exception applies; or

5) the subpoena would require production of an un-retained expert's opinion, including experts employed by government agencies.

The decision to grant or deny a petition to vacate or modify a subpoena must be in writing.

I. Enforcement. If any person fails or refuses to obey a subpoena, the Department may apply to any Justice of the Superior Court for an order compelling that person to comply with the subpoena. The Superior Court may issue an order and may punish failure to obey the order as civil contempt.

J. Costs. The Presiding Officer may condition issuance of the subpoena upon the advancement by the party on whose behalf the subpoena was issued of the reasonable cost of producing the books, papers, records, documents, data, electronic records, or tangible things.

14. Disposition without Full Hearing. Unless otherwise provided by law, the Department may make informal disposition of a licensing proceeding by stipulation, agreed settlement or consent order. Every agreement shall contain an express waiver of further procedural steps concerning the matter and waiver of each party's right to appeal.

15. Conferences. Conferences may be held at the discretion of the Presiding Officer at any time prior to, during, or after a hearing. Members of the public may attend conferences; however, participation is limited to the parties to the proceeding and any agency participating pursuant to section 11(C) except by leave of the Presiding Officer.

A. Purpose. Conferences may be held for any purpose including the following:

(1) review relevant statutory and regulatory criteria and clarify or narrow issues to be addressed at the hearing;

(2) discuss consolidation of parties;

(3) discuss the organization of the hearing;

(4) establish specific procedural requirements;

(5) impose limits, if necessary, on the number of witnesses and the time allocated to each party or issue at the hearing;

(6) obtain stipulations of fact and stipulations as to the admissibility into evidence of documents and other exhibits;

(7) establish schedules and deadlines; and

(8) consider such other matters that may be necessary or advisable in order to facilitate an orderly and fair hearing process and to expedite the hearing process.

B. Notice. The Presiding Officer shall provide reasonable notice of all conferences to the parties and any other person whom the Presiding Officer deems appropriate.

C. Conference Procedure. A conference is an informal meeting of the parties and the Presiding Officer. The Presiding Officer may limit participation to one representative per party.

D. Procedural Orders. Any actions or agreements made at a conference, or any rulings of the Presiding Officer made at or following a conference, will be set forth in a procedural order or otherwise provided in writing to the parties, except that actions, agreements or rulings made at a conference that occurs during the hearing will be stated on the record.

E. Failure to Attend. All parties are required to attend conferences. Any party failing to attend a conference waives its right to object to matters discussed or decided at the conference unless the Presiding Officer determines that the party has demonstrated good cause for its absence.

16. Pre-hearing Submissions. The Presiding Officer may require that certain information be submitted by the parties prior to the hearing.

A. Additional Information from Applicant in a License Application Proceeding.

(1) Department staff may at any time prior to the hearing submit questions to the applicant or request additional information from the applicant.

(2) The Presiding Officer may at any time prior to the hearing request that the applicant submit to the Department additional information necessary to evaluate the license application. A party may ask the Presiding Officer to make such a request. A party asking the Presiding Officer to make such a request must explain why the additional information sought is relevant and necessary for an analysis of the materials submitted in support of the application and why the additional information is not otherwise readily available.

(3) A request for additional information under this subsection must be made with a reasonable time for response prior to the scheduled hearing. While the applicant is not obligated to respond to a request for additional information, the burden of proof to demonstrate that all licensing standards are met remains with the applicant.

(4) Copies of any requests for additional information made pursuant to this subsection, and any responses thereto, must be provided to all parties.

B. Witness Lists. The Presiding Officer may require the parties to provide a list of witnesses and a description of the issues to be addressed by each. Substitute or additional witnesses may be

permitted by leave of the Presiding Officer when so doing will not prejudice the rights of any party.

C. Pre-filed Testimony. The Presiding Officer may require that written direct and rebuttal testimony of the parties' witnesses be pre-filed. Such written pre-filed testimony must be sworn. Written testimony is sworn if the witness declares by oath or affirmation that the testimony is true and correct to the best of the witness's knowledge and belief.

D. Pre-filed Exhibits. The Presiding Officer may require that exhibits be pre-filed.

17. Modification of a Pending Application. An applicant who modifies a pending license application within sixty days prior to a scheduled hearing shall notify the Presiding Officer at the time of filing of the modification with the Department. Depending upon the nature of the change to the proposed activity and the amount of time remaining before the hearing, the Presiding Officer may provide an opportunity to submit written testimony in response to the proposed modification, postpone the hearing, or take any other appropriate action to ensure that all parties have a full and fair opportunity to address the modification and prepare for the hearing. Any Department costs associated with the need to reschedule a hearing as a result of a modification to a pending application will be paid by the applicant.

18. Withdrawal of an Application. An applicant may withdraw its application by right until ten (10) days before the due date for pre-filed direct testimony or, in a proceeding where pre-filed testimony is not required, until ten (10) days before the hearing. Written notice of such withdrawal by right must be filed and served in accordance with section 3. After the deadline for withdrawal by right, the applicant must obtain permission to withdraw by submitting a written request to the Presiding Officer. All parties to the proceeding will have an opportunity to comment in writing on a request for permissive withdrawal. Decisions on requests for permissive withdrawal will be based on all relevant information including but not limited to the following:

A. the point in the proceeding at which the request is made;

B. the reason for the request for withdrawal;

C. the amount of resources expended up to that point by the parties, the public, and the Department and additional resources needed to fully adjudicate the matter;

D. the comments of the parties and the basis for their objections, if any;

E. the nature of the issues in dispute and the precedential value of a decision; and

F. the interests of fairness and justice.

The decision to allow withdrawal is made by the Presiding Officer for matters pending before the Commissioner, or by the Board for matters pending before it. All application withdrawals are without prejudice.

19. General Conduct of Hearing

A. Opening Statement. The Presiding Officer will open the hearing by describing in general terms the purpose of the hearing and the general procedures governing its conduct. Immediately

following the Presiding Officer's opening statement, Department staff will offer the existing record of the license application or appeal for acceptance into the record.

B. Witnesses. All witnesses must be sworn. Witnesses are required to state for the record their name, address, business or professional affiliation, and whether they represent another individual, firm, organization, government agency or other legal entity for the purpose of the hearing. All witnesses providing sworn testimony, including pre-filed written testimony, shall be present at the hearing and subject to cross-examination by the parties. The parties have a right to question all persons present and testifying.

(1) Hearing on a License Application. Direct testimony provided at a hearing on a license application will occur in the following order unless otherwise prescribed by the Presiding Officer:

(a) applicant;

(b) intervenors;

(c) state, federal, municipal, and other governmental agencies; and

(d) members of the public.

(2) Hearing on an Appeal. Direct testimony provided at a hearing on an appeal of a Commissioner license decision will occur in the following order unless otherwise prescribed by the Presiding Officer:

(a) appellant;

(b) licensee, if different than the appellant;

(c) other intervenors;

(d) state, federal, municipal, and other governmental agencies; and

(e) members of the public.

(3) The Presiding Officer, Board members, counsel to the Department, Department staff and, if permitted by the Presiding Officer, Department hired consultants and outside agency review staff, may ask questions at any time.

(4) The Presiding Officer may require that cross-examination be conducted at the conclusion of the testimony of each category of witnesses rather than at the conclusion of the testimony of each individual witness.

(5) All parties have the right to redirect and recross examination of witnesses. Re-examination questions are limited to matters brought out in the last round of questioning, except by leave of the Presiding Officer.

(6) Rebuttal and sur-rebuttal testimony and exhibits are allowed only by leave of the Presiding Officer.

(7) Prior to or during the course of a hearing, the Presiding Officer may set time limits for direct testimony, cross-examination, or rebuttal testimony. Time limits may be adjusted by the Presiding Officer during the course of the hearing.

C. Testimony from the Public. The Presiding Officer may designate a segment of the hearing solely for receiving testimony from members of the public. In instances where a member of the public is affiliated with a party to the proceeding, the member of the public shall speak on his or her own behalf and shall not provide evidence that should have been provided by the party as part of its case in chief.

D. Questions from the Public. If a member of the public in attendance at the hearing wishes to pose a question to a witness, that person is required to submit the proposed question in writing to the Presiding Officer. If the Presiding Officer determines that the question is relevant and not repetitive, the Presiding Officer may pose the question to the witness as time permits.

E. Continuance. A hearing conducted pursuant to this rule may be continued for reasonable cause and reconvened by the Presiding Officer. The Presiding Officer will notify the parties, interested persons, and the public in a manner appropriate to ensure that reasonable notice will be given of the time and place of the reconvened hearing.

F. Regulation of Certain Devices. The placement and use of cameras, recording devices, microphones or similar devices at a hearing may be regulated by the Presiding Officer so that the equipment does not interfere with the orderly conduct of the hearing.

G. Disruptive Conduct. In order to ensure an orderly, fair and productive hearing, actions such as applause, the placement of signs in support of or opposition to a proposal, or comment from persons who have not been recognized by the Presiding Officer will not be allowed. If requests to cease disruptive conduct are not complied with, the Presiding Officer may prohibit a person from attending or participating in the hearing, adjourn the hearing, or take other appropriate action.

20. Evidence

A. Relevancy. Evidence will be admitted if it is relevant and material to the subject matter of the hearing and is of a kind upon which reasonable persons are accustomed to rely in the conduct of serious affairs. Evidence which is irrelevant, immaterial or unduly repetitious will be excluded. The Department's experience, technical expertise, and specialized knowledge may be utilized in the evaluation of all evidence.

B. Privileges. The rules of evidence observed by courts do not apply; however, the rules of privilege recognized by law will be observed.

C. Official Notice. Official notice may be taken of any facts of which judicial notice could be taken; of any general, technical, or scientific matters within the Department's specialized knowledge; and of statutes, regulations, and non-confidential agency records. Parties will be notified of material so noticed and will be afforded an opportunity to contest the substance or materiality of the matters noticed. Facts officially noticed will be included and indicated as such in the record.

D. Documentary Evidence

(1) All documents, materials, and objects offered into evidence as exhibits must be uniquely numbered or otherwise identified. Documentary evidence may be received in the form of copies and excerpts if the original is not readily available. Exhibits submitted in electronic format will typically be accompanied by a paper copy of the content unless the Presiding Officer determines that a paper copy is not needed or is impractical. The Presiding Officer will prescribe the number of copies of exhibits required. Where an exhibit is not easily reproduced due to its form, size or character, the Presiding Officer may allow copies to be provided in alternate formats.

(2) If allowed by the Presiding Officer, exhibits may be introduced by a member of the general public at a hearing. Prior to the introduction of such exhibits, parties have a right, upon request, to examine the exhibits, raise any objection at that time, and if requested, shall be provided with an opportunity to respond regarding the content of an exhibit before the hearing record is closed.

(3) At least one (1) copy of the record of the license application or appeal placed into evidence will be made available by the Department at the hearing location for the purposes of providing the opportunity for public examination at specified times during the course of the hearing. A copy of the Department's file on the matter will be available for members of the public to schedule an examination at the Department's office before and after the hearing, during normal business hours.

E. Objections. Objections to evidence submitted prior to or after the hearing must be made within ten (10) working days of service of the evidence on the objecting party, unless otherwise specified by the Presiding Officer. Objections during the course of the hearing must be made at the time a party believes an objectionable action has occurred. Presiding Officer rulings on objections during a hearing are final.

F. Offer of Proof. An offer of proof shall be allowed in connection with an objection to any testimony, evidence, or question of a witness. Such offer of proof must consist of a summary statement of the substance of the proffered evidence or that which is expected to be shown by the answer of the witness. Comment or argument by any party shall be allowed on the offer of proof.

21. Closing Argument. Oral closing arguments by each party may be allowed by the Presiding Officer after the presentation of evidence has concluded, at a time and place to be fixed by the Presiding Officer. The applicant may choose to present its oral argument last, except that in an appeal proceeding where the appellant is not the applicant, the appellant may choose to present its oral argument last.

22. Conclusion of Hearing. At the conclusion of the hearing, no other evidence will be allowed into the record, except as specified by the Presiding Officer.

23. Post-hearing Brief and Proposed Findings. All parties have the right to submit briefs and proposed findings of fact in writing after the close of the hearing and the record, within such time as specified by the Presiding Officer.

24. Reopening the Record. Prior to issuing a final decision, the Presiding Officer may reopen the record for good cause shown. The Department shall give notice of a reopening of the record and any further

proceeding to the parties and shall notify interested persons and the public in such manner as is appropriate to afford them the opportunity to participate.

25. **Decision on the Record.** The decision in a licensing proceeding must be based upon the evidence in the record.

26. **Board Deliberations.** Following a Board hearing and close of the record, the Board may hold as many deliberative sessions as members deem necessary to discuss the record and the relevant review criteria. Participation is limited to Board members, Board counsel, Department staff, and if requested by the Presiding Officer, outside agency review staff and Department hired consultants.

27. **Draft License Decisions.**

A. **Draft Commissioner License Decision.** For license applications to be decided by the Commissioner following a hearing, the Commissioner will issue a draft license decision to all parties and interested persons to provide them with an opportunity to comment. The draft license decision must be made available for inspection at the Department's Augusta office and appropriate regional offices at least five (5) working days before the Commissioner takes final action.

B. **Draft Board License Decision.** For license applications to be decided by the Board following a hearing, the Board will issue a draft license decision to all parties and interested persons to provide them with the opportunity to comment. The draft license decision must be made available at the Department's Augusta office and appropriate regional offices at least fifteen (15) working days before the Board takes final action.

28. **Decisions.** Every decision made at the conclusion of a licensing proceeding must be in writing and must include findings of fact sufficient to apprise the parties and members of the public of the basis for the decision. A copy of the decision must be provided to each party to the proceeding and interested persons. Written notice of the right to appeal the decision within the Department, or to review of the decision by the courts, as the case may be, and of the action required and the time within which such action must be taken, must be given with the decision to each party and interested person. All correspondence notifying the parties of the license decision must be by certified mail, return receipt requested, to each party's designated representative as identified on the Service List in Section 3(B).

29. **Record of Proceeding.** A record must be kept of all licensing proceedings.

A. **Hearings Recorded.** All hearings will be recorded in a form susceptible to transcription. The Department shall transcribe the recording upon the filing of an appeal.

B. **Contents of Record.** The record must contain:

(1) all applications, petitions, motions, briefs, procedural rulings, and orders;

(2) evidence admitted;

(3) a statement of facts officially noticed and stipulations made by the parties;

(4) offers of proof, objections, and rulings thereon;

(5) all outside agency review comments and memoranda submitted by Department staff and Department hired consultants in connection with the licensing proceeding;

(6) all substantive correspondence;

(7) proposed findings, if applicable;

(8) recommended decisions, opinions, and reports, if any, by the Presiding Officer; and

(9) the final decision of the Department.

C. Record Copies. The Department shall make the record of the licensing proceeding available at its office for inspection by any person during normal hours of operation.

30. Post Decision Notice Requirements. Any licensee receiving an approval following a hearing must provide notice to all parties of the filing of any documents with the Department indicating:

A. actions to comply with conditions contained in the license that require Department review and approval;

B. proposals to amend a license when such a proposal was not part of the original decision and is submitted within one (1) year of the decision becoming final or project start date, whichever is later, unless otherwise provided in the decision; and

C. proposals to amend a license regarding an issue that was the subject of an appeal when the proposal is submitted within three (3) years of the decision, unless otherwise provided in the decision.

The licensee's responsibility under this section is deemed fulfilled when the notice is mailed to a party to a proceeding.

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AUTHORITY: 5 M.R.S. § 8051, 38 M.R.S. §§ 341-H and 345-A

EFFECTIVE DATE:

EFFECTIVE DATE (ELECTRONIC CONVERSION):

BASIS STATEMENT

Chapter 3 repeals and replaces Chapter 20 *Regulations for Hearings on Applications,* last amended on March 8, 1981, and Chapter 30 *Special Rules for Hearings on Applications of Significant Public Interest,* last amended February 8, 1978, consolidating them into a single rule. Chapters 20 and 30 no longer comply with the Maine Administrative Procedure Act or the Department's statutes governing hearings on license applications or on appeals of license decisions. Chapter 3 incorporates statutory changes and ideas for improvement gained by the Department during the conduct of hearings in recent years. It provides for efficient and fair licensing hearings on applications before the Commissioner or the Board, and on hearings before the Board on appeals of Commissioner license decisions.