



BOARD OF ENVIRONMENTAL PROTECTION INFORMATION SHEET

Rulemaking

Date: December 2008

Contact: (207) 287-2811 or 287-2452

Statutory Authority for Rulemaking

State law authorizes the Board of Environmental Protection (Board) to adopt, amend or repeal reasonable rules and emergency rules necessary for the interpretation, implementation and enforcement of any provision of law that the Department of Environmental Protection (DEP) is charged with administering. The Board is also authorized to adopt, amend and repeal rules as necessary for the conduct of its own business. (38 M.R.S.A. § 341-D(1-B)). In addition to this general authority, the Board's authority to adopt rules for specific matters such as air emissions, wastewater discharges or certain land use activities is contained in the various laws administered by the DEP. Rulemaking by the Board is governed by the *Maine Administrative Procedure Act* (MAPA), 5 M.R.S.A. §§ 8051 - 8074 and the Department's statutes.

What is a rule?

The Maine Administrative Procedure Act (MAPA) defines a rule as “[t]he whole or any part of every regulation, standard, code, statement of policy, or other agency statement of general applicability, including the amendment, suspension or repeal of any prior rule, that is or is intended to be judicially enforceable and implements, interprets, or makes specific, the law administered by the agency, or describes the procedures or practices of the agency.” (5 M.R.S.A. § 8002(9)).

When the Legislature passes a law such as the Natural Resources Protection Act or the Hazardous Waste, Septage and Solid Waste Management Act, the Legislature establishes the scope and general direction of the program. However, the Legislature often leaves the details needed to implement the law to be developed through rulemaking by the appropriate state agency. When the Legislature directs an agency to develop rules for a program, it identifies the rule as either routine technical or major substantive. (5 M.R.S.A. § 8071). In both cases, the rulemaking process must follow the rigorous public notice and adoption requirements of the MAPA; the only difference is that major substantive rules must be presented to the Legislature for review and approval before they become effective. Rules that have been finally adopted, whether routine technical or major substantive, have the force of law and may be enforced by the agency and the courts.

How is rulemaking initiated at DEP?

Title 38 M.R.S.A. § 342(9) authorizes the Commissioner of Environmental Protection to “[s]ubmit to the board new or amended rules for its adoption.” The Commissioner may initiate rulemaking for a number of reasons, most commonly because the Legislature has directed the DEP to do so. Other common reasons include: (1) a change in state or federal law, (2) the availability of new data or information on threats to the environment or public health, (3) to improve the effectiveness of an existing rule, and (4) advancements in pollution control technology. The Department must consider and may initiate rulemaking in response to a citizen petition.

Can a member of the public request a rule change?

Yes. While most rules are initiated by the Commissioner, state law provides a mechanism for any person to petition an agency for the adoption or modification of any rule. (5 M.R.S.A. § 8055). Within 60 days of receipt of a petition for rulemaking, the petition, including the suggested language for the proposed rule or rule change, is presented to the Board for its consideration at a regular Board meeting. At the Board meeting, the Board will hear from the petitioner, other interested persons, and DEP staff regarding the need for the proposed rule or rule change. In this situation, the Board may either vote to deny the petition, stating its reasons in writing for the denial, or initiate rulemaking proceedings in accordance with the Maine Administrative Procedure Act (MAPA). If the Board votes to initiate rulemaking, it will establish a deadline for submittal of written public comment on the proposed rule or rule change. The Board may also vote to hold a public hearing. In a scenario where a petition is signed by 150 or more registered Maine voters, the Board must initiate rulemaking by scheduling a hearing or establishing a deadline for submittal of written public comment.

What are the steps in the rulemaking process?¹

Development: The development of a rule or rule amendment begins with the identification of a need, frequently a need identified by the Legislature through the enactment of a law or by the agency in the conduct of its responsibilities. Once the need and authority for a rule are established, the DEP generally meets with the potentially regulated individual and other interested persons to gather additional information and discuss various options for addressing the issues. DEP staff also consults with the Office of the Attorney General on questions of law. DEP staff then drafts a proposed rule which it will bring to the Board to initiate the MAPA process for accepting public comment.

Public Comment: The draft proposed rule is presented to the Board at a regular meeting. If the Board determines that the draft proposed rule is ready for formal public comment, it will set a deadline for submittal of written comments and may also vote to hold a public hearing on the draft rule. Notice of the public hearing (if one is to be held) and the deadline for written public comment is published in Maine's five major news papers in accordance with the rulemaking requirements of the MAPA [see 4 M.R.S.A. "§8053], and copies of the draft proposed rule are made available from the DEP and on the DEP's web site.

Following the public hearing (if one was held) and the close of the comment period, DEP staff reviews and summarizes all comments and data received. The Board may hold a work session with DEP staff at a Board meeting to review comments received and discuss key provisions of the proposed rule. DEP staff then prepares what is known as a basis statement that explains the reasons for accepting or rejecting any suggested changes to the draft proposed rule.

¹ In addition to the process described here, the APA provides for a consensus-based rule development process. See 5 M.R.S.A. §8051-B.

Adoption: The transcript of the public hearing, copies of all comments received, the basis statement including the response to comments, and any proposed changes in the rule recommended by DEP staff are provided to the Board for its consideration. At the Board meeting when a rule is proposed for adoption, the public is given a final opportunity for oral comment on the proposed rule in accordance with the provisions of 38 M.R.S.A. § 341-D(1-B). Comments at this time are limited to: (a) comments on changes to the draft rule since the close of the public comment period, and (b) comments on comments submitted by another party during the formal comment period. See Guidance on Public Comment at Time of Rule Adoption (April 2001).

If the Board determines that the rule it intends to adopt is substantially different from the draft proposed rule which was made available for public comment, the Board must seek additional public comment on the significant changes prior to a final vote on the rule. (5 M.R.S.A. § 8052(5)(B)). If the rule has been identified by the Legislature as a routine technical rule, the Board may vote to adopt the rule as presented or with minor modifications. If the proposed rule has been identified as a major substantive rule, the Board may provisionally adopt the rule. A provisionally adopted rule is sent to the Legislature for its consideration and approval during the next Legislative session.

The MAPA requires the Board to adopt a rule within 120 days of the close of the public comment period. A rule also must be approved by the Office of the Attorney General as to form and legality within 150 days of the close of the comment period. If either deadline is missed, the Board must begin the rulemaking process anew. After the rule has been approved by the Office of the Attorney General, it must be filed with the Secretary of State in order to become effective.

For more information: General questions regarding rulemaking should be directed to the Board's Executive Analyst at (207) 287-2452 or the Board's Administrative Assistant at (207) 287-2811. Questions regarding a specific rule should be directed to the DEP contact person identified in the rulemaking notice.

<p>Note: This Information Sheet is provided for general guidance only; it is not intended to be legally binding or to be used as a legal reference.</p>
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