



Natural Resources Council of Maine

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Comments of Maine Audubon and the Natural Resources Council of Maine
on the DEP's Chapter 2 Rules
Concerning the Processing of Applications and
Other Administrative Matters/Amendments
Jan. 22, 2013

Thank you for the opportunity to comment on DEP's proposed revised Chapter 2 Rules concerning the processing of applications and other administrative matters.

We have a number of comments and will address them in the order in which they appear in the rules.

- 1. Page 1. Definition of “hearing” should distinguish between “public hearings,” “adjudicatory hearings,” and “public meetings.”** “Public hearings” require an official word for word transcription or recording, so that the exact testimony of the member of the public testifying under oath is available to the decision maker(s). “Adjudicatory hearings” require the same level of official word for word transcription or recording, and, in addition, provide the opportunity for intervenors to offer witnesses and to cross examine witnesses of other parties. “Public meetings” are opportunities for members of the public to testify, but the only record required of public meetings are informal notes taken by staff or the Commissioner. Public meetings do not require a word for word transcription or recording of the testimony.
- 2. Page 7. Criteria for holding public hearings and meetings should include whether there is significant public interest and whether the information presented at the hearing or meeting will assist the Commissioner or Board in reaching its/his/her decision.** The current rules limit hearings to those occasions where the Department determines there is “credible conflicting technical information.” However, the criteria the Department is required to find includes that the development “will not adversely affect existing uses, scenic character...or other natural resources...” Evidence about these impacts may not be considered “technical information” yet is crucial to the determination of adverse impact. An additional criterion should be:

The Department will hold hearings in those instances where the Department determines there is credible conflicting technical information regarding a licensing criterion or where there is significant public interest, and, in either case, it is likely that a hearing will assist the Department in understanding the evidence.

3. **Page 8. The Board and Commissioner should have discretion to hold public meetings and hearings on license applications near the proposed project or in any location near citizens who are likely to attend.** By definition, many of the applications that come before BEP do so because they have statewide significance. The Board or Commissioner should be given the discretion to hold hearings in the most appropriate locations, considering, among other factors, those members of the public who may want to testify. The rules should state:

At the Board's or Commissioner's discretion, the Board or Commission may schedule and hold public meetings or public or adjudicatory hearings in accordance with Title 38 §345-A(5) on license applications in the geographic area of a proposed project or activity or in any area near citizens who may want to testify for the purpose of...
4. **Page 25. The Board should have the authority to review the Commissioner's decisions on its own initiative.** The current provision in Rule 24 (A) allowing the Board to review the Commissioner's decision on its own initiative appears to have been removed altogether from the rule. It should be reinstated as follows:

24. Appeal to the Board of Commissioner License Decisions. Final license decisions of the Commissioner may be appealed to the Board by persons who have standing as aggrieved persons or on the Board's own initiative.
5. **Page 25 – 26. The Chair's dismissal of an appeal for untimeliness should be appealable to the entire board.** The proposed rule would bar an appellant from any relief should the Chair deny the appeal due to untimeliness. The dismissal of an appeal for untimeliness essentially bars the appellant from any relief in any forum whatsoever. The appellant should have an opportunity to appeal such a dramatic and final decision.
6. **Page 26. The additional requirement of an offer of proof to support an appeal is a significant and unnecessary new requirement that should be deleted.** The existing rule already includes several submission requirements, including a lengthy narrative covering many topics, all exhibits and any proposed supplemental evidence. All of this must be submitted within 30 days. The additional requirement to provide an offer of proof is onerous and should be deleted. If it is needed at all, it should be required at a later date.
7. **Page 27. Intervenors and other interested parties should be permitted to actively participate in all phases of an appeal.** Proposed Rule 24 (C), Response to Appeal, fails to include provisions allowing an intervenor or other interested party

who participated during the Commissioner's licensing proceeding to participate in the appeal to the Board. Intervenors and interested parties who participated in the initial hearing should be allowed to respond to the appeal, comment on the admissibility of proposed supplemental evidence, offer supplemental evidence in response to supplemental evidence offered by the appellant, and participate fully in every aspect of the appeal. Rule 24 (C), (D) and (F) need to be revised to include these opportunities for intervenors and interested parties to participate in the appeal.

8. **Page 33 and 34. Decisions of the Commissioner and Board should be subject to judicial review.** Section 25(F) limits the ability of a petitioner to appeal to a court a final decision of the Commission to dismiss or take no action at the conclusion of a proceeding in response to a petition for revocation or suspension of a license. Similarly, Section 26(H) limits the ability of a petitioner to appeal to a court a final decision of the Commissioner or Board to dismiss, fail to take action or take no action at the conclusion of a proceeding on a petition to modify a license or prescribe corrective action. The Commission and/or Board should not be able to make totally discretionary and potentially arbitrary final decisions without the petitioner having any recourse. The Commissioner and/or the Board should clearly state the reasons for their actions (or failure to act) and be required to defend themselves should a petitioner choose to apply for judicial review. The rules should not foreclose judicial review.

Respectfully submitted,



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