

310 CMR: DEPARTMENT OF ENVIRONMENTAL PROTECTION

310 CMR 1.00: ADJUDICATORY PROCEEDINGS

Section

- 1.01: Adjudicatory Proceeding Rules for the Department of Environmental Protection
- 1.02: (Not Applicable to Proceedings Before the Department of Environmental Protection Pursuant to 310 CMR 1.01(1))
- 1.03: Miscellaneous Provisions Applicable to All Adjudicatory Proceedings

1.01: Adjudicatory Proceeding Rules for the Department of Environmental Protection

(1) Authority, Scope, Construction and Definitions.

(a) Authority and Scope. 310 CMR 1.01 is promulgated under the authority of M.G.L. c. 30A, § 9. 310 CMR 1.01 governs the conduct of adjudicatory appeals and adjudicatory hearings of the Department of Environmental Protection under M.G.L. c. 30A. 310 CMR 1.03 is also applicable to adjudicatory proceedings before the Department. The Commissioner of the Department has the authority to issue final decisions and may designate as Presiding Officers other persons or agencies to conduct adjudicatory hearings. The Commissioner shall designate qualified, impartial attorneys to serve as Presiding Officers. The Commissioner may take any action that a Presiding Officer is authorized to take under 310 CMR 1.01. To further effectuate 310 CMR 1.01, the Commissioner may issue directives including, without limitation, case handling timelines and quantitative limits on submissions and presentations by the parties. Directives or standing orders may be obtained from the Department.

(b) Construction. 310 CMR 1.01 shall be construed to secure a just and speedy determination of every appeal. Issues not addressed in 310 CMR 1.01 or for which a party seeks clarity are to be considered in light of the entire M.G.L. c. 30A.

(c) Definitions.

Adjudicatory Appeal or Appeal means the portion of an adjudicatory proceeding initiated by filing a notice of claim with the Department and concluded by a final decision.

Adjudicatory Hearing or Hearing means a hearing under M.G.L. c. 30A, where parties may present evidence on issues of fact, and argument on issues of law and fact prior to the Commissioner's issuance of a final decision.

Adjudicatory Proceeding means a proceeding under M.G.L. c. 30A that may culminate in an adjudicatory hearing and the Commissioner's issuance of a final decision. It is a proceeding before the Department in which the legal rights, duties or privileges of specifically named persons are required by constitutional right, by provision of M.G.L. c. 30A, or by any other provision of the General Laws to be determined, after opportunity for a Department hearing, but does not include the types of proceedings described in M.G.L. c. 30A, § 1(a) through (f).

Authorized Representative means an attorney, legal guardian or other person authorized to represent a party in an adjudicatory appeal.

Alternative Dispute Resolution means any of several processes intended to resolve disputes other than by traditional trial-type proceedings. These processes include, without limitation, mediation and case evaluation.

Commissioner means the Commissioner of the Department of Environmental Protection.

Department means the Massachusetts Department of Environmental Protection.

Deposition means testimony of a witness taken outside the presence of the Presiding Officer, under oath, with opportunity for cross-examination and making objections, in the form of a transcript signed by the witness.

Directive means a public document issued by the Commissioner requiring Department employees and parties to take specific actions or follow specific procedures, to further effectuate the provisions of 310 CMR 1.01.

Electronic Medium means any device used to preserve or transmit written information electronically, including but not limited to facsimile and email.

File means to deliver by authorized means in accordance with 310 CMR 1.01(3)(a).

Final Decision means the decision issued by the Commissioner, consistent with the requirements of 310 CMR 1.01(14)(b), from which any party may seek judicial review pursuant to M.G.L. c. 30A, § 14(1).

Law means statutes, regulations, and common law of the Commonwealth of Massachusetts.

Motion means a request for relief which may be granted or denied by a ruling or an order.

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Notice of Appearance means a paper signed by an individual stating that the signer is the authorized representative of a party in a particular adjudicatory appeal.

Notice of Claim for an Adjudicatory Appeal or Notice of Claim means the first pleading in an adjudicatory proceeding; it is filed by the petitioner.

Notice of Department Action means a document notifying the recipient of a Department action, including, without limitation, enforcement orders, penalty assessment notices under 310 CMR 5.00, and permit or license decisions.

Offer of Proof means a statement of those facts a party would expect to prove through a response of a witness to a question asked at the hearing and excluded by the Presiding Officer.

Papers means all written communications filed in an adjudicatory appeal, including motions, pleadings, and other documents.

Party means a specifically named person whose legal rights, duties or privileges are being determined in an adjudicatory proceeding; another person who as a matter of constitutional right or by any provision of the General Laws is entitled to participate fully in the proceeding; any person or group of persons allowed to intervene; any person or group identified as a party in Department regulations, and the Department.

Person means an individual or legal entity.

Petitioner means the party who initiates an adjudicatory appeal.

Presiding Officer means the individual(s) authorized by law or designated by the Commissioner to conduct, in whole or in part, an adjudicatory appeal.

Respondent means a party other than the petitioner who may answer or otherwise respond to allegations and arguments of the petitioner.

Settlement means a paper signed by all parties, or by the parties who move to have a settlement adopted, resolving all the issues in an appeal, consistent with 310 CMR 1.01(8)(c)2.

Simplified Hearing means a hearing described in 310 CMR 1.01(8)(a).

Standing Order means a public document issued by the Department ordering specific action by parties in all or in some categories of appeals.

Stipulation means an agreement between two or more parties to an adjudicatory appeal, concerning one or more issues of fact or law which are the subject of the appeal.

Subpoena means a legal document that requires a person to appear at a hearing or a deposition to testify or to bring documents or physical objects.

(2) Representation.

(a) Appearance. Parties may appear on their own behalf. A duly authorized officer or employee may represent a corporation, an authorized member may represent a partnership or joint venture, and an authorized trustee may represent a trust. A party in an adjudicatory appeal shall have the right to be accompanied, represented and advised by an authorized representative.

(b) Notice of Appearance. The filing of a notice of claim for an adjudicatory appeal, a motion, an opposition to a motion, or other paper in an adjudicatory appeal shall constitute an appearance by the person signing the paper as the filing party's authorized representative, unless the paper states otherwise. An appearance by an authorized representative for a party in an adjudicatory appeal may also be made by filing and serving upon the other parties a notice of appearance stating the authorized representative's full name, mailing address, telephone number, facsimile number, and email address. An appearance by an authorized representative who is not an attorney shall include a signed affirmation by the party, or by each member of a ten person or residents group, that the representative is duly authorized to represent the party in an adjudicatory appeal.

(c) Changes of Name, Address and Representation. Parties or their authorized representatives shall file and serve a written notice of any change of their name or address, of the name or address of their authorized representative or the withdrawal of the authorized representative, immediately following such change. Parties shall bear the consequences of a failure to file and serve the notice or of any delay on their part in doing so.

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(3) Time.

(a) Timely Filing. Papers required or permitted to be filed under 310 CMR 1.01, or any provision of the applicable law, must be filed with the Presiding Officer and served on the parties within the time limits for such filing, as set by Department regulation or other provision of law. Papers shall be considered filed as set forth in 310 CMR 1.01(3)(a)1. through 5.:

1. Hand-delivery During Business Hours. Hand-delivery to the Office of Administrative Appeals between 9 A.M. and 5 P.M. during regular business days shall be considered filed on the day delivered.

2. Hand-delivery During Nonbusiness Hours. Hand-delivery at times other than between 9 A.M. and 5 P.M. during regular business days shall be considered filed on the next regular business day.

3. Mailing. Unless otherwise provided by law,<sup>1</sup> placing in United States mail shall be considered filed on the date postmarked.

4. Date Received. All papers filed with the Department shall show the date received by the Department, and the Department shall upon request give date receipts to persons filing papers by hand-delivery.

5. Where papers may be filed by electronic medium and are received during regular business hours, they shall be deemed filed on the date received. Papers received after regular business hours shall be deemed filed on the following business day.

(b) Notice of Department Actions. Notice of actions and other communications from the Department hand-delivered or mailed to the person's last known address shall be presumed received upon the day of hand-delivery or, if mailed, three days after the date postmarked.

(c) Computation of Time. Unless otherwise specifically provided by law<sup>2</sup>, computation of any time period referred to in 310 CMR 1.01 shall begin with the first day following the act which initiates the running of the time period. The last day of the time period is to be included unless it is a Saturday, Sunday, or legal holiday in which event the period shall run until the end of the next business day. When the time period is seven days or less, intervening Saturdays, Sundays, or legal holidays shall be excluded in the computation. When a time period is greater than seven days each intervening calendar day shall be included in the computation.

(d) Extension of Time. Except as otherwise provided in 310 CMR 1.01(13)(d), the Presiding Officer shall have the discretion, for good cause shown and in accordance with any directive or standing order, to extend any time limit contained in 310 CMR 1.01. All requests for extensions of time shall be made by motion before the expiration of the original or previously extended time period. The filing of the motion shall toll the time period sought to be extended until the Presiding Officer acts on the motion. 310 CMR 1.01(3)(d) shall not apply to a limitation of time otherwise prescribed by law.

(e) Timelines. The parties and the Presiding Officer shall conform to the timelines for adjudicatory hearings as established in a directive. Parties who do not conform to time limits or schedules established by the Presiding Officer shall, absent good cause shown, summarily be dismissed for failure to prosecute the case.

(4) Filings.

(a) Title. Papers filed shall state the docket number, if any, the title of the appeal, the name of the person on whose behalf the filing is made and the name of the Department. Papers which do not contain all of this information shall be accepted for filing if they contain sufficient identifying information so they can be placed in the appropriate file.

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<sup>1</sup> E.g. 310 CMR 5.35 provides that an appeal of a penalty assessment notice is filed when the Department receives it.

<sup>2</sup> Department regulations may specify different time periods or prescribe that the time periods be calculated differently. E.g. 310 CMR 10.05(1) requires an appeal to be filed within ten business days.

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(b) Signatures. Papers filed shall be signed and dated by the party on whose behalf the filing is made or by the party's authorized representative and shall state the address, telephone number, and facsimile number of the party or authorized representative. This signature shall constitute a certification that the signer has read the document and believes the content of the document is true and accurate, and that the document is not interposed for delay. Signature by an authorized representative also certifies the full power and authority to represent the party.

(c) Designation of Agency. The Department or any other local, state or federal agency shall be designated by its name and not by the name of a particular individual.

(d) Form.

1. All papers, except those exhibits and other documents which are kept in a larger format in the ordinary course of business, shall be handprinted or typewritten on paper eight to 8½ inches wide by ten to eleven inches long, with margins not less than one inch wide. The writing may be on one or both sides of the page, and shall be double-spaced except that quotations in excess of three lines shall be single-spaced and indented. Font size shall not be smaller than 12 point. Mimeographed, multigraphed, photo-duplicated papers will be accepted as handprinted or typewritten. All filings shall be clear and legible.

2. The Department may provide forms to be used by the parties. Where provided, forms shall be used.

(e) Copies. The original of all papers shall be filed with the Presiding Officer together with any additional copies as the Presiding Officer or law may require.

(f) Service. Simultaneously with the filing of papers with the Department, the party filing shall send a copy to all other parties to the appeal, by delivery in hand or by United States mail, postage prepaid, properly addressed or by electronic medium where available. All papers filed and served shall be accompanied by a statement that copies have been sent to all parties. The statement shall include the following information: the mode of service, the date of service, and name and address of the parties to whom it was sent. Papers served by electronic medium shall indicate the date transmitted and the telephone number or electronic address used for transmittal. Failure to comply with 310 CMR 1.01(4)(f) may be grounds for refusal to accept papers for filing. Failure to serve the applicant with a request for an adjudicatory hearing when required by 310 CMR 10.05(7), absent good cause shown, shall be grounds for dismissal of the appeal.

(g) Where to File. A notice of claim shall be filed as specified in the document being appealed or with the Department. Subsequent papers shall be filed as directed by the Department or Presiding Officer.

(5) Powers of the Presiding Officer; Rights of the Parties.

(a) Powers of the Presiding Officer. The Presiding Officer shall have the power to take any action authorized by M.G.L. c. 30A to conduct a just, efficient and speedy adjudicatory appeal, and to write a fair and impartial recommended decision for consideration by the Commissioner. The Presiding Officer may, on the Presiding Officer's own initiative or on a party's motion where appropriate, without limitation:

1. conduct adjudicatory hearings;
2. dismiss appeals for lack of standing, lack of jurisdiction, mootness, untimeliness or where the record discloses that the proposed project, activity has been denied by a local, state or federal agency or authority pursuant to law other than that relied on by the Department in the decision appealed from, and such denial has become final.
3. stay appeals where the failure to previously obtain a final decision required under another law would result in an unnecessary expenditure of the Department's administrative resources, or for other good cause;
4. conduct evidentiary hearings where necessary to resolve an issue in dispute;
5. issue orders to show cause;
6. impose sanctions under 310 CMR 1.01(10);
7. request from the parties a statement of the issues in dispute and then define the issues to be adjudicated;
8. order attendance at an alternative dispute resolution information session;
9. use other neutral persons to facilitate resolution of some or all of the issues;

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10. impose limits on the presentation of evidence in accordance with 310 CMR 1.01(13)(d), (e) and (f);
11. issue, vacate or modify subpoenas;
12. administer an oath or affirmation to anyone who will testify at the hearing; and
13. manage the presentation of the evidence and participation of the parties so as to develop an adequate and comprehensible record of the adjudicatory appeal.
14. conduct views;
15. prescreen appeals and determine their potential amenability to settlement through alternative dispute resolution and early resolution through motions to dismiss.

Prescreening may include, without limitation:

- a. conducting a prescreening conference;
- b. identification of the parties;
- c. identification of the issues;
- d. issuing orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions;
- e. conducting simplified hearings under 310 CMR 1.01(8)(a); and
- f. issuing recommended final decisions for the dismissals of appeals, including, but not limited to, where there is
  - i. the filing of a stipulation of dismissal voluntarily dismissing the notice of claim under 310 CMR 1.01(11)(d)1.;
  - ii. the withdrawal of the notice of claim;
  - iii. mootness of the underlying claim;
  - iv. a lack of jurisdiction over the subject matter of the appeal,
  - v. a lack of jurisdiction due to untimeliness, lack of standing, failure to state a claim on which relief can be granted, or because the notice of claim purports to appeal an unappealable document; and
  - vi. lack of prosecution for failure to attend a prescreening or otherwise comply with an order.

(b) Rights of the Parties. Consistent with the right to a just and speedy resolution of the adjudicatory appeal, parties at their option may present their case or may be assisted by an authorized representative. The parties, or their authorized representatives shall have a right, subject to the powers of the Presiding Officer at 310 CMR 1.01(5)(a) to:

1. present witnesses;
2. present and establish relevant facts by oral or written testimony and documentary evidence;
3. advance pertinent arguments;
4. refute testimony including an opportunity to cross-examine adverse witnesses; and
5. examine and introduce pertinent documents.

(6) Initiation of Adjudicatory Appeal.

(a) Claim for Adjudicatory Appeal. Any person having a right to initiate an adjudicatory appeal shall file a written notice of claim for an adjudicatory appeal. The notice shall be filed within the time prescribed by any applicable provision of law<sup>3</sup>, or in the absence of a prescribed time period, within 21 days from the date that the notice of Department action was sent to a person.

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<sup>3</sup> Department regulations may specify different time periods or prescribe that the time periods be calculated differently. E.g. 310 CMR 10.05(1) requires an appeal to be filed within ten business days.

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- (b) Form and Content. The notice of claim for adjudicatory appeal shall state specifically, clearly and concisely the facts which are grounds for the appeal, the relief sought, and any additional information required by applicable law or regulation. The Department may provide forms to be used for a notice of a claim for an adjudicatory appeal, and where provided, the form shall be used. A person filing a notice of claim shall include a copy of the document being appealed. A person filing a notice of claim shall include sufficient written facts to demonstrate status as a person aggrieved, an abutter, or a ten person or residents group, and documentation to demonstrate previous participation where required. When the contents of a notice of claim do not meet the requirements of 310 CMR 1.01 and any other applicable regulations, the Presiding Officer shall dismiss the appeal or require a more definite statement. If the person filing the notice of claim fails to file a more definite statement within the period specified, the appeal shall be dismissed.
- (c) Notice of Department Action. Whenever an appeal may result from an action taken or intended to be taken by the Department, a notice of Department action must be sent which shall specify any facts relied upon as the basis for the action, cite any statute or regulation which authorizes the Department to take the action, and inform the person of any right to request an adjudicatory appeal.
- (d) Orders to Show Cause. The Department may initiate an action against a person by issuing an order to show cause containing a statement of the basis for the Department commencing the adjudicatory proceeding, the nature of the relief sought, and the legal basis authorizing the Department to conduct the proceeding and grant the relief it requests. Orders to show cause may also be issued by an Presiding Officer requiring a person to explain or defend an act or failure to act in accordance with 310 CMR 1.01.
- (e) Orders to File, Amendments and Withdrawal of Notices of Claim. Upon a Presiding Officer's own initiative or by motion of any party, the Presiding Officer may order any party to file any pleading, reply to any pleading, or permit any party to amend or withdraw its notice of claim or other pleading upon conditions just to all parties.
- (f) Substitution of Parties. The Presiding Officer may permit the substitution of parties as justice or convenience may require at any time in the course of an adjudicatory appeal.
- (g) Consolidation of Hearings. A party may notify the Department when multiple adjudicatory appeals involve common issues, stating with particularity the common issues. The Presiding Officer may consolidate the appeals.
- (h) Stays. Upon notice or a motion by any party, the Department or the Presiding Officer shall stay administratively any appeal of a superseding determination or order of conditions issued under M.G.L. c. 131, § 40 when the determination or order is denied under a local wetlands bylaw and the denial is appealed to court. Upon notice or motion by any party, the Department or the Presiding Officer shall stay administratively any appeal of a Surface Water Discharge Permit when the NPDES permit issued by the Environmental Protection Agency for the same discharge has been appealed under the federal Clean Water Act. Upon notice or a motion by any party, the Department or the Presiding Officer shall stay administratively an appeal when an applicant is required to comply with the Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61 through 62H. Upon a motion to proceed, the Department will proceed with the adjudicatory hearing upon proof of the approval under the relevant local, state or federal law or other ruling providing a basis for lifting the stay, or a certification by the Department or another public agency that immediate resolution of the appeal may be necessary to protect public health and safety.
- (i) Expedited Appeals. Requests to expedite appeals must be submitted to, and may be granted by, the Commissioner according to Department policy.
- (j) Prescreening. The Department may establish a process, conducted by a Presiding Officer, to encourage parties to consider alternatives to formal adjudication under 310 CMR 1.01(8), to make initial determinations on dismissal of cases, and any other action as designated by the Commissioner.
- (k) The Presiding Officer shall, absent good cause shown, limit the issues for adjudication to the issues identified in the notice of claim, more definite statement, and any motions to participate or intervene, or as identified at the prescreening conference.

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(7) Intervention and Participation.

(a) Initiation. Any person not initially a party, who with good cause wishes to intervene in, or participate in, an adjudicatory proceeding shall file a motion for permission to intervene or participate in the adjudicatory proceeding.

(b) Form and Content. The motion shall state the name and address of the person making the motion. If the motion is filed by a group of persons seeking to intervene collectively as a group pursuant to M.G.L. c. 30A, § 10A, or other applicable statute, the motion shall state the name and address of each person who will be the group's authorized representative. The representative shall have the sole authority to sign papers and accept service for the group. Any paper served on the representative of the group shall be deemed served on the entire group. If no representative is specifically stated in the motion, the first person mentioned in the motion as a member of the group shall be deemed the representative of the group. All motions for permission to intervene or participate shall state:

1. why intervention or participation should be allowed;
2. the relief sought;
3. the law in support of intervention and of the relief sought; and
4. the effect of the adjudicatory proceeding on whomever is making the motion.

(c) Filing the Motion. Unless an applicable law requires otherwise, the motion may be filed at any time following commencement of the adjudicatory proceeding but not later than the close of the prehearing conference, unless a different time is established by the Presiding Officer in the interest of justice. Subject to 310 CMR 1.01(11)(a), the granting of such motions shall be within the discretion of the Presiding Officer.

(d) Intervenors. Intervenors shall be persons substantially and specifically affected by the adjudicatory proceeding, or persons who have the constitutional or statutory right to intervene without showing that they are substantially and specifically affected. A motion to intervene shall be filed prior to the prehearing conference, absent good cause shown for a later filing. A group that intervenes shall be collectively deemed one party as defined in 310 CMR 1.01(1)(c). Every person permitted to intervene as a party, whether individually or collectively, shall have all the rights of and be subject to all limitations imposed upon a party. The Presiding Officer may exclude repetitive or irrelevant material. Every motion to intervene shall be treated in the alternative as a motion to participate.

(e) Participants. A person affected by an adjudicatory proceeding shall be permitted to participate. A motion to participate shall be filed prior to the prehearing conference, absent good cause shown for a later filing. Permission to participate shall be limited to the right to argue orally at the close of the hearing and the right to file a brief. Permission to participate, unless otherwise stated, shall not be deemed to constitute an expression that the person allowed to participate is a party in interest who may be aggrieved by any final decision. Persons who moved to intervene and who were allowed only to participate may participate without waiving their right to judicial review of the denial of the motion to intervene.

(f) Intervention to Protect the Environment. Pursuant to M.G.L. c. 30A, § 10A, any group of ten or more persons may intervene collectively as a party in any adjudicatory proceeding in which damage to the environment as defined in M.G.L. c. 214, § 2A is or might be at issue; provided, however, that such intervention shall be limited to the issue of damage to the environment and the elimination or reduction thereof in order that any decision in such adjudicatory proceeding shall include the disposition of such issue. Such motion to intervene shall be filed prior to the prehearing conference, absent good cause shown for a later filing. The intervention shall clearly and specifically state the facts and grounds for intervening and the relief sought, and each intervening person shall file an affidavit stating the intent to be part of the group and to be represented by its authorized representative. Intervenors under M.G.L. c.30A, § 10A shall specifically describe the damage to the environment as defined in M.G.L. c. 214, § 7A and the elimination or reduction sought. Such intervention shall be by motion filed in accordance with 310 CMR 1.01(11)(a). In any proceeding pursuant to M.G.L. c. 91, at least five of the ten persons shall reside in the municipality in which the license or permitted activity is located.

(8) Alternatives to Formal Adjudication.(a) Simplified Hearing.

1. Upon notice or motion by any party, the Presiding Officer may provide an opportunity for a simplified hearing as an alternative to a formal adjudicatory hearing.

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2. Any party may request a simplified hearing. The Presiding Officer also may decide, without consent of the parties, to conduct a simplified hearing when the issues in a permit appeal are limited in number and scope. A simplified hearing normally shall not include the filing of motions and prefiled direct testimony, unless required by the Presiding Officer for good cause.

3. Each party shall have an opportunity to present its view of the disputed issues. Each party and any witnesses shall appear at the simplified hearing to present its case and may offer evidence including statements, documents and papers. Following a party's presentation, each other party shall have an opportunity to cross-examine witnesses and to refute the case presented. All statements shall be provided under oath or affirmation.

4. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. The weight to be attached to any evidence will rest within the discretion of the Presiding Officer. The simplified hearing shall be recorded electronically or otherwise.

5. The Presiding Officer may make any ruling to help ensure brevity, simplicity, informality and fairness. The Presiding Officer shall conform to any timeline established by Directive.

6. The Presiding Officer shall prepare a decision, which may be recommended or final as designated by the Commissioner, in writing or stated in the record, containing a statement of reasons determining every issue of fact or law necessary to the decision. A person aggrieved by a final decision resulting from a simplified hearing shall be entitled to judicial review under M.G.L. c. 30A, § 14. The record shall include the recording of the simplified hearing, any documents submitted, and the recommended and final decision.

(b) Mediation and Other Assisted Negotiation.

1. The Presiding Officer may order attendance at an alternative dispute resolution information session. Upon agreement of the parties, a neutral person may facilitate resolution of some or all of the outstanding issues.

2. Where parties have agreed to mediation, all parties shall make available a person who has the authority to bind the party to a mediated settlement.

3. All parties must agree in writing not to use any information gained solely from the mediation in any subsequent proceeding; not to disclose any information gained solely from the mediation to persons not involved in the mediation; not to subpoena the mediator for any subsequent proceeding; not to disclose to any subsequently assigned presiding officer the content of the prior mediation discussion; and to mediate in good faith.

4. Any agreement of the parties derived from the mediation shall be binding on the parties and, once reduced to writing and signed by all parties, will have the effect of a contract in subsequent proceedings.

5. The confidentiality provision in M.G.L. c. 233, § 23c shall also apply to the person serving as mediator.

6. If a party fails to appear at the mediation, the mediator shall return the matter to the Presiding Officer. The mediator may at any time return the matter to the Presiding Officer.

7. No particular form of mediation is required. The structure of the mediation shall be tailored to the needs of the particular dispute. Where helpful, parties may be permitted to present documents, exhibits, testimony or other evidence which would aid in the attainment of a mediated settlement.

8. If mediation results in agreement, mediation shall be concluded by a settlement agreement. If mediation does not result in agreement resolving the entire matter, the matter shall be returned to the Presiding Officer for scheduling subsequent proceedings at the earliest possible time.

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(c) Settlements. Whenever all parties to the adjudicatory appeal agree to dispose of it by stipulation, settlement, or consent order, the parties shall put such agreement in writing and submit it to the Department, with a copy to the Presiding Officer. Each agreement shall include a provision that if the agreement is approved, the parties waive whatever rights they have to further administrative review before the Department as well as an appeal to court. If the Commissioner approves the proposed agreement, the Commissioner shall issue in writing a final decision incorporating the agreement of the parties. The final decision incorporating the settlement agreement shall not be subject to 310 CMR 1.01(14)(b). If the Commissioner disapproves the proposed agreement, the parties shall be notified. If a party will not sign a stipulation, settlement or consent order that the Department agrees to sign, the burden of going forward to establish why the agreement is inconsistent with law may be placed upon that party by the Presiding Officer or designee of the Commissioner.

(d) Wetlands Permit Appeals. Appeals of Reviewable Decisions, as defined in 310 CMR 10.04, will be conducted in accordance with the provisions set forth in 310 CMR 10.05(7)(j).

(9) Prehearing Conference.(a) Purpose.

1. The Presiding Officer may order the parties to appear for a conference prior to the adjudicatory hearing to:

- a. discuss settlement;
- b. define contested issues on which evidence will be offered, if not otherwise determined under 310 CMR 1.01(6)(k);
- c. consider the possibility of obtaining stipulations, admissions and agreements that will avoid unnecessary evidence;
- d. establish limits on presentations of the parties;
- e. establish a schedule for continuing the appeal, including a date for the adjudicatory hearing; and
- f. consider any other matters that may aid in the disposition of the adjudicatory appeal.

2. Parties shall appear at the prehearing conference with full authority to make binding agreements, including commitments as to scheduling, or shall come to the conference with the name of the person from whom authority is required and be able to communicate directly with the person at the time of the conference. The parties shall be prepared to advise the Presiding Officer as to the prospects of settlement.

3. The Presiding Officer may order the parties to meet or confer prior to the date of the conference to discuss settlement or other matters.

(b) Prehearing Memorandum by Parties.

1. The Presiding Officer may order the parties to file a prehearing memorandum prior to the conference. The memorandum may include:

- a. a concise summary of the evidence that will be offered by the parties;
- b. the facts agreed upon by the parties;
- c. contested issues of fact and law, consistent with 310 CMR 1.01(6)(k);
- d. the amount of time necessary for a party to conduct its case, consistent with 310 CMR 1.01(13)(d) relating to time limits;
- e. a list of witnesses to be called, including the designation of those who will be offered as expert witnesses, and a brief summary of the testimony of each witness;
- f. statements of Department policy or guidance that a party intends to cite or introduce into evidence;
- g. a statement of need to substitute parties or consolidate proceedings, where the need was not previously identified; and
- h. any additional matters likely to facilitate the disposition of the adjudicatory appeal.

2. The Presiding Officer may advise the parties at the conference:

- a. of the availability of alternative dispute resolution that may assist in resolving the adjudicatory appeal prior to the adjudicatory hearing, including without limitation, mediation and nonbinding case evaluation;
- b. of their right to elect a simplified hearing under 310 CMR 1.01(8)(a);
- c. of their right to waive their right to a hearing, and request that their case be decided on the written record only, pursuant to 310 CMR 1.01(13)(g); and
- d. where appropriate, of the perceived merits of the case, based on the filings and representations of the parties at the conference.

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(c) Prehearing Conference Order.

1. At the time of or following the conference the Presiding Officer may issue an order in writing including:
  - a. a statement of the issues to be tried;
  - b. a list of witnesses who will offer testimony;
  - c. limitations in accordance with 310 CMR 1.01(13)(d), (e), and (f);
  - d. whether any disputed issues will be referred to a factfinder, consistent with 310 CMR 1.01(13)(i);
  - e. rulings on motions;
  - f. a schedule for filing motions, prefiled testimony and exhibits, setting the date of the hearing, and deciding motions;
  - g. attendance at an alternative dispute resolution information session when the Presiding Officer determines it could aid in the just and speedy resolution of the appeal without a hearing; and
  - h. incorporation of any matters agreed to by the parties.
2. Failure of parties to comply with any rule or order issued by the Presiding Officer under 310 CMR 1.01(9) may result in the imposition of sanctions in accordance with 310 CMR 1.01(10).

(10) Sanctions. When a party fails to file documents as required, respond to notices, correspondence or motions, comply with orders issued and schedules established in orders or otherwise fails to prosecute the adjudicatory appeal; demonstrates an intention not to proceed; demonstrates an intention to delay the proceeding or resolution of the proceedings; or fails to comply with any of the requirements set forth in 310 CMR 1.01; the Presiding Officer may impose appropriate sanctions on that party. Sanctions include, without limitation:

- (a) taking designated facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with 310 CMR 1.01(4);
- (d) striking pleadings in whole or in part;
- (e) dismissing the adjudicatory appeal as to some or all of the disputed issues;
- (f) dismissing the party being sanctioned from the appeal; and
- (g) issuing a final decision against the party being sanctioned.

(11) Motions.(a) General Requirements.

1. Presentation and Objection to Motions. A person may request of the Presiding Officer any order or action consistent with law and 310 CMR 1.01 that will assist in resolving issues expeditiously by filing a motion. Each motion shall set forth the grounds for the desired order or action. Motions may be made in writing at any time after commencement of an adjudicatory proceeding or orally in the presence of all parties, including during a prehearing conference or hearing, unless the Presiding Officer issues a scheduling order stating otherwise. Any time within seven days after a written motion is filed with the Presiding Officer, any party may file a written objection to the motion, except that objections to a motion for summary decision shall be filed within 14 days as specified in 310 CMR 1.01(11)(f). A failure to file a timely response may result in a grant of the relief requested by the moving party. Moving parties should obtain the assent of other parties, and non-moving parties should assent to motions, wherever reasonable.
2. Summary Ruling. The Presiding Officer may summarily, and without awaiting a response or objection to the motion, act on a motion, with or without prejudice, in appropriate circumstances, which may include:
  - a. non-adversarial or routine motions;
  - b. motions having the assent of non-moving parties;
  - c. motions the Presiding Officer determines were not served in accordance with 310 CMR 1.01(4)(f) or are otherwise deficient as to form;
  - d. motions the Presiding Officer determines would consume time without resolving material issues;

## 1.01: continued

- e. motions the Presiding Officer determines to be frivolous in view of the established law or facts of the appeal; or
  - f. motions to dismiss for failure to prosecute the case. When a party demonstrates a failure to prosecute the case or an intention not to proceed such as failing to respond to an order, the Presiding Officer may summarily dismiss a case *sua sponte*, without awaiting a motion by another party.
- (b) Motion for More Definite Statement. Where a notice of claim for adjudicatory appeal is so vague or ambiguous that it does not provide adequate notice of the issues to be addressed and the relief sought, any party may move for, or the Presiding Officer may order, a more definite statement. The motion or order shall set forth the defects complained of and the details desired. A motion or order for a more definite statement also may seek or require the Petitioner to file sufficient evidence to meet the burden of going forward by producing at least some credible evidence from a competent source in support of the position taken. The more definite statement shall be filed within ten days of the Presiding Officer's order being sent or within another time as may be ordered. If the more definite statement is not filed within the prescribed deadline, the Presiding Officer may either dismiss the adjudicatory appeal, grant the relief sought, or make another order as may be appropriate.
- (c) Motion to Strike. A party may move to strike, or the Presiding Officer may strike from a pleading any insufficient allegation or defense or any redundant, irrelevant, immaterial, impertinent or scandalous matter; and from any testimony material which is unduly repetitious, irrelevant or otherwise inadmissible pursuant to 310 CMR 1.01(13)(h).
- (d) Motion to Dismiss.
1. General Grounds. A party may move to dismiss where another party fails to file documents as required, respond to notices, correspondence or motions, comply with orders issued and schedules established in orders, otherwise fails to prosecute the case or demonstrates an intention not to proceed; for lack of standing, lack of jurisdiction, mootness, untimeliness, or where the record discloses that the proposed project or activity has been denied by a local, state or federal agency or authority pursuant to law other than that relied on by the Department in the decision appealed from, and such denial has become final. Parties may voluntarily dismiss the appeal by filing a stipulation of dismissal signed by all parties.
  2. Motion to Dismiss for Failure to State a Claim on Which Relief Can be Granted. A party may move that the notice of claim for adjudicatory hearing be dismissed for failure to state a claim upon which relief can be granted. In deciding the motion, the Presiding Officer shall assume all the facts alleged in the notice of claim to be true. Such assumption shall not apply to any conclusions of law. Dismissal of an adjudicatory appeal for failure to state a claim upon which relief can be granted, if issued as a final decision, shall be subject to 310 CMR 1.01(14).
- (e) Motion to Dismiss for Failure to Sustain Case. Upon the petitioner's submission of prefiled testimony, or at the close of its live direct testimony if not prefiled, any opposing party may move for the dismissal of any or all of the petitioner's claims, on the ground that upon the facts or the law the petitioner has failed to sustain its case; or the Presiding Officer may, on the Presiding Officer's own initiative, order the petitioner to show cause why such a dismissal of claims should not issue. Decision on the motion or order to show cause may be reserved until the close of all the evidence. The granting of a full dismissal of the petitioner's claims shall be subject to 310 CMR 1.01(14).
- (f) Motion for Summary Decision. Any party may move with or without supporting affidavits for a summary decision in the moving party's favor upon all or any of the issues that are the subject of the adjudicatory appeal. The Presiding Officer shall not act on any motion for summary decision until at least 14 days after filing. During this time, parties opposed to the motion may file opposing affidavits. The decision sought shall be made if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a final decision in its favor as a matter of law. A summary decision interlocutory in character may be made on any issue although there is a genuine controversy as to other issues. Summary decision, when appropriate, may be made against the moving party. The granting of summary decision upon the whole case or for all the relief asked shall be subject to 310 CMR 1.01(14).

## 1.01: continued

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence in Massachusetts courts, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.

Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The Presiding Officer may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits, provided that motions made pursuant to 310 CMR 1.01(11)(e) shall be granted or denied solely on the basis of evidence admissible in Massachusetts courts. When a motion for summary decision is made and supported as provided in 310 CMR 1.01(11)(e), a party opposing the motion may not rest upon the mere allegations or denials of said party's pleading, but must respond, by affidavits or as otherwise provided in 310 CMR 1.01, setting forth specific facts showing that there is a genuine issue for hearing on the merits. If a party does not respond, summary decision, if appropriate, shall be entered against the party. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify opposition to the motion, the Presiding Officer may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other orders as is just.

(12) Discovery, Prefiled Testimony and Subpoenas.(a) Cooperative Discovery.

1. Where necessary to supplement available information, parties to an adjudicatory appeal shall engage in the examination or exchange by agreement of relevant, not privileged documents or tangible things in a party's possession or control.
2. Upon notice and at an agreed time, papers filed in an adjudicatory appeal and part of the record are available for inspection and copying. Subject to provisions of law regarding public records, including fee provisions for providing public records, the Department shall make its public records concerning the matter under appeal available for inspection and copying.
3. A party should also allow entry onto designated land or examination of other property in the possession and control of that party, by agreement at a reasonable place and time, for the purpose of inspection and performing incidental procedures relevant to the issues to be decided in the adjudicatory appeal by measures including, without limitation, surveying, sampling and photographing the property or any designated object or operation thereon.

(b) By Permission of the Presiding Officer. Written interrogatories may be served and testimony taken by deposition only after the filing of a notice of claim and with prior approval of the Presiding Officer. Where such approval has not been sought and granted, a party shall have no obligation to respond or appear.

1. A motion to serve interrogatories on a party may be granted only to obtain relevant, not privileged information not previously provided. The Presiding Officer may establish the scope of discovery including limits on the number of interrogatories served and a schedule for serving and responding to them. Answers to interrogatories shall be signed under the pains and penalties of perjury.
2. A motion to take a deposition may be granted only upon a showing that the parties have agreed to submit the deposition in lieu of testimony or the witness cannot appear before the Presiding Officer without substantial hardship; and the testimony sought is relevant, not privileged and not discoverable by alternative means. The Presiding Officer may establish the timing, scope and conduct of the deposition and its use as evidence in the administrative appeal.

(c) Resolution of Discovery Disputes. Prior to seeking an order to compel under 310 CMR 1.01(12)(d) or a protective order under 310 CMR 1.01(12)(e), parties must demonstrate through written documentation that they have in good faith attempted to resolve discovery disputes without the intervention of the Presiding Officer.

## 1.01: continued

(d) Compelling Discovery. Parties may move to compel discovery where it is alleged that another party has not cooperated in good faith following attempts to conduct discovery that is not overly broad, unduly burdensome, and is reasonably calculated to lead to the discovery of relevant, admissible evidence. A motion to compel entry onto land or other property shall describe with reasonable particularity the land, other property, or portions thereof, to be inspected, shall identify with reasonable particularity the procedures incidental to the inspection which are to be performed, and shall specify a reasonable time, place and manner of making the inspection.

(e) Objections and Protective Orders. Within ten days of service of a discovery request, parties upon whom the request is served may file objections or seek a protective order when the material is privileged or discovery is overly broad, unduly burdensome, or not reasonably calculated to lead to the discovery of relevant, admissible evidence.

(f) Prefiled Testimony. The Presiding Officer may order all parties to file within a reasonable time in advance of the hearing the full written text of the testimony of their witnesses on direct examination, including all exhibits to be offered in evidence. Failure to file prefiled direct testimony within the established time, without good cause shown, shall result in summary dismissal of the party and the appeal if the party being summarily dismissed is the petitioner. The Presiding Officer may exclude direct testimony offered at the hearing that was not included in the prefiled direct testimony but was reasonably available at the time it was filed. The Presiding Officer may also require the filing of written rebuttal testimony within a reasonable time after the filing of the direct testimony. All prefiled testimony shall be subject to the penalties of perjury. All witnesses whose testimony is prefiled shall appear at the hearing and be available for cross-examination. If a witness is not available for cross-examination at the hearing, the written testimony of the witness shall be excluded from the record unless the parties agree otherwise.

(g) Subpoenas. In conducting adjudicatory appeals, the Presiding Officer may issue, vacate, modify and enforce subpoenas requiring the attendance and testimony of witnesses and the production of documents or other evidence in accordance with 310 CMR 1.01(12)(g)1. through 3.:

1. Issuance. A party may have a subpoena issued by a Notary Public or Justice of the Peace in the name of the Department or make written application to the Presiding Officer, who may issue the subpoena requested in the name of the Department. However issued, every subpoena shall show on its face the name and address of the requesting party. Notice shall not be required for issuance of a subpoena. The Department may prescribe the form of subpoena but, as far as practicable, the form shall adhere to the form used in civil cases before the courts.

2. Motion to Vacate or Modify. The Presiding Officer may order, or any person to whom a subpoena is directed may, within a reasonable period, file in writing a motion that the subpoena be vacated or modified. The Presiding Officer shall give prompt notice to the party who requested issuance of the subpoena. The Presiding Officer may grant the motion in whole or in part upon a finding that the testimony or the evidence whose production is requested does not relate with reasonable directness to the issues identified for the hearing or upon a finding that a subpoena is unreasonable or oppressive, or has not been issued a reasonable period in advance of the time when the evidence is requested.

3. Costs. Witnesses summoned by the Presiding Officer shall be paid the same fees for attendance and travel as in civil cases before the courts. The requesting party shall pay all costs associated with the subpoena, including fees for attendance and travel.

(13) Hearings.

(a) When and Where Held. Hearings will be held at a location specified by the Presiding Officer. A party may, by motion, request that a hearing be held at some place other than that designated, where convenience, justice and equity would best be served. Upon motion of a party and upon good cause shown, the Presiding Officer or other designee of the Commissioner may advance an appeal for hearing. Directives, standing orders or policies may establish procedures for advancing appeals.

(b) Conduct of Hearings.

1. General. Hearings shall be as informal as may be reasonable and appropriate under the circumstances.

## 1.01: continued

2. Decorum. All parties, authorized representatives, witnesses and other persons present at a hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in any court. Where such decorum is not observed, the Presiding Officer may take appropriate action, including imposing sanctions as described at 310 CMR 1.01(10).

(c) Order of Presentation.

1. Usual Practice. Except as otherwise required by law or as determined by the Presiding Officer, in hearings initiated by the notice of claim for an adjudicatory appeal on a permit, license or similar decision, it shall be the usual practice for the petitioner to present its evidence first. In hearings resulting from a penalty assessment notice or enforcement order, it shall be the usual practice for the Department to present its evidence first.

2. Discretion of Presiding Officer. In appeals where evidence is peculiarly within the knowledge of a party; multiple appeals have been consolidated; there are multiple parties; or where necessary to ensure fairness, the Presiding Officer may direct who shall open and shall designate the order of presentation.

(d) Time Limits For Adjudicatory Hearing.

1. Absent agreement of the parties to time limits for the hearing acceptable to the Presiding Officer, the Presiding Officer may establish a limit on the amount of time allotted to each party to present its case and examine witnesses. This time shall be allocated equally among opposing parties, unless the Presiding Officer orders otherwise for good cause. In establishing time limits consistent with administrative efficiency, fairness to all parties and adequacy for developing the evidence, the Presiding Officer may consider the number, complexity, and novelty of issues presented; the number of witnesses and substance of their testimony; the length of time allocated for appeals of similar scope and complexity; any applicable directive or standing order; and other factors consistent with a just and speedy determination of the appeal. The Presiding Officer is authorized to monitor and enforce time limits.

2. The Presiding Officer may establish time limits at the prehearing conference and may later modify them, as described in 310 CMR 1.01(13)(d)3..

3. The Presiding Officer may grant a request for modification of time limits only for good cause. In determining whether to grant a request to modify time limits, the Presiding Officer may consider: whether or not the requesting party has used the time since the commencement of the hearing in a reasonable and proper way and has complied with all orders regulating the hearing; the requesting party's explanation as to how the requested added time would be used and why it is necessary to ensure a fair hearing; and any other relevant and material facts the requesting or opposing party may wish to present in support of or opposition to the request.

(e) Limitations On Written Submissions.

1. The Presiding Officer may establish page limits on testimony, motions, and memoranda of law filed in appeals under 310 CMR 1.01. The page limits shall not include the case caption and exhibits. In establishing page limits, the Presiding Officer may consider: the number, complexity, and novelty of issues presented; the number of witnesses and substance of their testimony; any applicable directive or standing order; and other factors consistent with a just and speedy determination of the appeal.

2. The Presiding Officer may establish page limits at the prehearing conference and later modify them for good cause pursuant to 310 CMR 1.01(13)(e)3..

3. The Presiding Officer may modify page limits after considering a party's reason for the request and why additional pages are necessary to ensure a fair hearing.

(f) Number Of Witnesses.

1. The Presiding Officer may establish the number of witnesses that parties may offer and may exclude the testimony of any witness which would be duplicative, irrelevant, or otherwise unnecessary. In establishing the number of witnesses, the Presiding Officer may consider: the number, complexity, and novelty of the issues presented; the summary of each witness's testimony presented by the parties; an applicable directive or standing order and other factors consistent with a just and speedy determination of the appeal.

2. The Presiding Officer may establish the number of witnesses at the prehearing conference and later modify it for good cause shown, pursuant to 310 CMR 1.01(13)(f)3..

## 1.01: continued

3. Prior to any applicable deadline for providing rebuttal testimony, the Presiding Officer may grant a party's request to offer the rebuttal testimony of an additional witness only where necessary to ensure a fair hearing.
- (g) Submission Without a Hearing. Parties may elect to waive participation in a hearing and to submit their case upon the record. Submission of a case without a hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses.
- (h) Evidence.
1. General. Unless otherwise provided by any law, the Presiding Officer need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. The weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. Unduly repetitious or irrelevant evidence may be excluded.
  2. Evidence Included. All evidence, including any records, investigative reports, documents, and stipulations, which is to be relied upon in a final decision must be offered and made a part of the record.
  3. Testimony. All testimony shall be given under oath or affirmation. Witnesses shall be available for cross-examination. If a witness is not available for cross-examination at the hearing, the written testimony of the witness shall be excluded from the record unless the parties agree otherwise. If redirect examination is allowed by the Presiding Officer, it shall be limited to the scope of cross-examination.
  4. Objections. Parties shall object to evidence offered and give their reasons at the time that a ruling is made or sought, or if a party has no opportunity to object or seek a ruling at that time, within three days of notification of the action taken or refused.
  5. Offer of Proof. An offer of proof may be made immediately following the Presiding Officer's decision to sustain an objection and exclude the question. The offer of proof may be made orally or through documents and shall become part of the record.
  6. Regulations, Statutes and Documentary Evidence. Regulations and statutes may be offered into evidence by reference to the citation. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference, at the discretion of the Presiding Officer.
  7. Stipulations. Stipulations of fact or stipulations as to the testimony that would have been given by an absent witness, if agreed upon by the parties, may be used as evidence at the hearing. The parties may, by written stipulation filed with the Presiding Officer at any stage of the appeal or by oral stipulation made at the hearing, agree upon any relevant fact. When making findings, the Presiding Officer need not be bound by any stipulation to which the Department is not a party.
  8. Additional Evidence. The Presiding Officer may require any party, with appropriate notice to other parties, to submit additional evidence on any relevant matter.
- (i) Factfinder.
1. Order of Reference. When there is a factual dispute between the parties, the Presiding Officer may make an order of reference to a designated factfinder to determine the relevant findings of fact in the appeal. The order of reference may specify or limit the factfinder's duties and powers, and may direct the factfinder to report only upon particular issues or to perform particular acts, and fix definite times for the events specified in 310 CMR 1.01(13)(i)3., 4., and 5.. The Presiding Officer may allow the parties to make recommendations to the Presiding Officer to help define the role of the factfinder.
  2. Selection. The factfinder shall be either a qualified Department employee with no prior involvement in the adjudicatory proceeding, or a qualified designated factfinder not employed by the Department. The parties shall be given an opportunity to agree upon the selection of the factfinder. If the parties cannot agree, the Presiding Officer may select a qualified factfinder. The Presiding Officer also may order each party to select a factfinder and require the factfinders to submit a joint report. Any costs incurred in using a factfinder shall be allocated equally among the parties, unless the Presiding Officer determines that fairness dictates otherwise.

## 1.01: continued

3. Site or Property Inspection. The factfinder may visit or inspect the site, property or other places or things with the parties and their witnesses as appropriate to make observations relevant to the factual issues designated in the order of reference.
  4. Factfinder's Report. The factfinder shall prepare a report containing a summary of the observations at the site or property inspection, if any, a review of the testimony, exhibits, and other information identified in the order of reference, and the proposed findings of fact based thereon. The factfinder shall simultaneously file the report with the Presiding Officer and the parties.
  5. Objections to the Report. The parties may object in writing to all or part of the factfinder's report, and shall provide a basis for the objection. If a party does not object within 14 days of the filing of the report, the party waives its right to object to the factfinder's report. Where no party objects to the report, the Presiding Officer will accept the factfinder's findings of fact, unless the Presiding Officer determines they are clearly erroneous. If the parties object to the factfinder's report, the Presiding Officer may adopt the report, strike it in whole or in part, modify it, receive further evidence, allow cross-examination of the witnesses or recommit the report to the factfinder with further instructions.
- (j) Views. The parties may request and the Presiding Officer may order that a view be taken of a site, property or other places and things that are relevant to an appeal to promote understanding of the evidence that has been or will be presented. Notice and a reasonable opportunity to be present shall be given to all parties. Parties shall not present evidence during the view, but may point out objects or features that may assist the Presiding Officer in understanding evidence. The Presiding Officer may rely on the Presiding Officer's observations during a view as evidence to the same extent permissible as if observed in the hearing room.
- (k) Briefs. At the close of the evidence, the Presiding Officer may order the filing of closing briefs and set a schedule for their submission if the Presiding Officer finds they would be of assistance reaching a decision.
- (l) Administrative Notice. The Presiding Officer may take notice of any fact which may be judicially noticed by the courts, and in addition may take notice of general, technical or scientific facts within the Department's specialized knowledge. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. The Presiding Officers may utilize their experience, technical competence and specialized knowledge in the evaluation of the evidence.
- (m) Transcript of Hearings.
1. Recording and Transcripts. Testimony and argument at the hearing shall be either recorded electronically or stenographically. If the Department prepares a transcript of the hearing, a copy of the transcript shall be supplied to a party upon request, at the party's expense. If the Presiding Officer determines in appeals designated major and complex or expedited as those terms may be further defined in Department directives, that a written transcript of the hearing would be useful to the efficient making of a decision, the Presiding Officer may require a party or parties to provide a stenographer to transcribe the hearing, with costs allotted as fairness may require. Where a Party has provided a stenographer to transcribe the hearing, a stenographic record shall be provided to the Presiding Officer at no expense to the Department, and to all other parties upon such other terms as the Presiding Officer shall order.
  2. Correction of Transcript. Corrections in the official transcript may be made only to make it conform to the evidence presented at the hearing. Transcript corrections, agreed to by opposing parties and approved by the Presiding Officer, may be incorporated into the record at any time during the hearing, or within ten days of receipt of the transcript, or another time as shall be allowed by the Presiding Officer.
- (n) Settling the Record.
1. Contents of Record. The record of the hearing may consist of: pleadings, prehearing conference memoranda, prefiled testimony, electronic tapes, orders, briefs, memoranda, answers to interrogatories, depositions, transcripts, exhibits, and other papers or documents which the Presiding Officer has specifically designated be made a part of the record. The record shall at all reasonable times be available for inspection by the parties.

1.01: continued

2. Evidence After Completion. No evidence shall be admitted after completion of a hearing or after a case has been submitted on the record, unless otherwise ordered by the Presiding Officer or the Commissioner. The Presiding Officer may require any party, with appropriate notice to the other parties, to submit additional evidence on any matter relevant to the adjudicatory appeal.

(14) Decisions.

(a) Recommended Decisions and Tentative Decisions. Recommended decisions should include findings of fact, conclusions of law and recommendations on issues necessary to the decision. The recommended decision shall be issued to all parties, and be transmitted with the record to the Commissioner. The Presiding Officer may submit a recommended decision which summarily dismisses a case.

Tentative decisions shall not be issued as a matter of routine, but shall be issued only if a party requests a tentative decision either in writing or orally on the record, prior to the close of the adjudicatory hearing, and there is good cause shown for granting the request; the hearing was conducted by a Presiding Officer other than the one who will write the recommended decision and the recommended decision will be adverse to a party other than the Department; or if the Commissioner, Presiding Officer or other designee of the Commissioner determines that a tentative decision should be issued in the interest of justice. Every tentative decision shall be in writing and shall contain a statement of the reasons, including a determination of every issue of fact or law necessary to the decision. The parties shall have seven days from the receipt of the tentative decision to file objections to the decision and supporting arguments with the Department. The Commissioner shall have the discretion to allow or order the parties to argue orally before the Commissioner.

(b) Final Decisions. Every final decision shall be in writing and shall be signed by the Commissioner or a designee of the Commissioner. With the exception of final decisions approving settlement by agreement of the parties, which shall be subject to the provisions of 310 CMR 1.01(8)(c), every final decision shall contain a statement of reasons, including a determination of every issue of fact or law necessary to the decision. A final decision may adopt, modify, or reject a recommended decision, with a statement of reasons. If a final decision was preceded by a tentative decision, the final decision may incorporate by reference determinations set forth in the tentative decision, subject to such modifications and discussion as the Commissioner may consider appropriate in response to timely filed opposing and concurring views regarding the tentative decision.

(c) Presiding Officer Unavailable. When a Presiding Officer becomes incapacitated or unavailable to make a decision, a tentative decision shall be made by a substitute Presiding Officer upon the record. When the substitute Presiding Officer determines that the credibility of a material witness is an issue necessary to the decision, a new hearing may be held, and may be limited to the examination of that witness.

(d) Motion for Reconsideration. Where a finding of fact or ruling of law on which a final decision is based is clearly erroneous, a party may file a motion for reconsideration setting forth specifically the grounds relied on to sustain the motion. Where the motion repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments, it may be summarily denied. The motion shall be filed within seven days from the date the decision is mailed to the parties by the Department. The filing of a motion for reconsideration is not required to exhaust administrative remedies.

(e) Reopening of Hearings. On the motion of any party, or on his or her own initiative, the Presiding Officer may at any time before a final decision is issued reopen the hearing for the purpose of receiving new evidence. A moving party shall show that the evidence to be introduced was not reasonably available for presentation at the hearing. The Commissioner may remand a case to the Presiding Officer for the purpose of receiving new evidence or for additional recommended findings of fact or conclusions of law based upon the record or new evidence.

(f) Further Appeal. After the issuance of a final decision, a person who has the right to seek judicial review of the decision may file with the appropriate Superior Court, pursuant to M.G.L. c. 30A, § 14.

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1.01: continued

(g) Withdrawal of Exhibits. After a decision has become final and all appeal periods have lapsed, the Presiding Officer may upon motion permit the withdrawal of original exhibits by the party or person entitled to them.

(15) Effective Date.

(a) Claims Filed after July 3, 1995. This revision of 310 CMR 1.01 takes effect on July 3, 1995 and shall apply to all adjudicatory appeals in which a notice of claim for adjudicatory appeal is filed on or after July 3, 1995.

(b) Certain Claims Filed before July 3, 1995. This revision of 310 CMR 1.01 shall also apply to all adjudicatory appeals where the notice of claim for an adjudicatory appeal is filed prior to July 3, 1995, but the prehearing conference as described in 310 CMR 1.01(9) is scheduled to occur on or after July 3, 1995 or where the Presiding Officer has, after July 3, 1995, lifted an order staying the appeal.

(c) Other Claims Filed before July 3, 1995. All adjudicatory appeals not described in 310 CMR 1.01(15)(a) or (b) shall continue under the prior applicable regulations, 310 CMR 1.01, dated December 31, 1986.

(d) Claims Filed after January 1, 2005. Revisions to 310 CMR 1.01 promulgated in 2004 shall apply to all adjudicatory appeals in which a notice of claim for an adjudicatory hearing is filed on or after January 1, 2005.

1.02: (Not Applicable to Proceedings before the Department of Environmental Protection pursuant to 310 CMR 1.01(1))

1.03: Miscellaneous Provisions Applicable to All Adjudicatory Proceedings

(1) Citation. 310 CMR 1.00 may be cited as 310 CMR 1.00: *Adjudicatory Proceedings*.

(2) Availability of 310 CMR 1.00. Copies of 310 CMR shall be available upon request to any person from the Office of the Secretary of the Commonwealth and the Agency. Fees for copies shall be the cost of public records as determined by the Executive Office for Administration and Finance.

(3) Severability. If any rule contained in 310 CMR 1.00 is found to be unconstitutional or invalid by a Court of competent jurisdiction, the validity of the remaining rules will not be so affected.

(4) Exemptions. 310 CMR 1.00 shall not apply to any Agency within the executive offices for which M.G.L. c. 30A is not applicable. Any other Agency within each of the executive offices shall submit in whole or in part its rules for the conduct of Adjudicatory Proceedings to the Commissioner of Administration who shall approve or disapprove the filing of these proposed substitute rules. Such substitute rules shall be promulgated pursuant to the rulemaking procedures of M.G.L. c. 30A and shall be filed with the Secretary of the Commonwealth within 60 days of the publication of 310 CMR 1.00 and shall take effect at the same time as the standard rules. Thereafter, substitute rules shall be filed subject to the approval of the Commissioner of Administration and in accordance with section six.

Any substitute rules shall follow the headings and to the extent possible the subheadings as set forth in 310 CMR 1.00.

(5) Non-english Speaking Parties.

(a) Communications. All communications which may result in the commencement of an Adjudicatory Proceeding shall contain a notice printed in English, Spanish, Portugese, Italian, Greek, French and Chinese that informs the reader that the document is important and should be translated immediately.

(b) Interpreters. If any Party to a proceeding cannot communicate effectively in English, the Agency, or Presiding Officer shall stay the proceeding until someone can be found who can communicate effectively in both English and the language of the non-English speaking Party.

1.03: continued

(6) Withdrawal and Disqualification of Presiding Officer. A Presiding Officer may at any time withdraw himself/herself from an Adjudicatory Proceeding, in which case another Presiding Officer shall be appointed. If a Party files a timely and sufficient motion and supporting affidavit of bias or other ground for disqualification of a Presiding Officer, and the Presiding Officer does not disqualify himself/herself pursuant to such motion, such motion and all material submitted in support of and opposition to such motion shall be made part of the record, and the Agency may rule on the motion as part of the Decision in the Adjudicatory Proceeding, or at such earlier time as justice may require.

(7) Ex-Parte Communications. No Party or other Person directly or indirectly involved in an adjudicatory appeal shall submit to the Presiding Officer or any Agency employee involved in the Decision-making process, any evidence, argument, analysis or advice, whether written or oral, regarding any matter at issue in an adjudicatory appeal, unless such submission is part of the record or made in the presence of all Parties. This provision does not apply to consultation among Agency members concerning the Agency's internal administrative functions or procedures.

(8) Docket/Decision Index.

(a) Docket. Unless otherwise prescribed by law, each Agency shall maintain on a current basis, a docket of all proceedings which shall list separately in chronological order all Papers filed and actions taken in each Adjudicatory Proceeding.

(b) Decision Index. Unless otherwise prescribed by law, each Agency shall maintain on a current basis, a decision index and compilation of decisions. Said index shall contain an alphabetical listing by name and subject matter of all adjudicatory decisions rendered and shall contain a further crossreference as to the page number in the compilation where the subject Decision may be found. All names and addresses of Parties shall when appropriate be deleted from the Decisions in the compilation in order to protect confidentiality.

(c) Public Inspection. Unless proscribed by law, the docket, Decision index, and compilation of Decisions shall be available for inspection and copying by the public during the office hours of the Agency. The rate for copying shall be rates as set by the Executive Office for Administration and Finance.

## REGULATORY AUTHORITY

310 CMR 1.00: M.G.L. c. 30A, § 9.

NON-TEXT PAGE