

o6 Department of Environmental Protection

o6-096 Department of Environmental Protection

2024-022: Chapter 167, Tracking and Reporting Gross and Net Annual Greenhouse Gas Emissions

Statutory Authority: 38 M.R.S. § 576-A(4)

Type: Routine Technical

Emergency?: No

Fiscal impact: *The proposed rule updates do not impose a compliance requirement on any entity, and therefore do not directly impose any costs on any regulated entities. As explained above, the proposed rule updates establish methods for the calculation of gross and net annual greenhouse gas emissions in the State for the purpose of assessing attainment of the emissions reduction and carbon neutrality goals set out at 38 MRS §§576-A(1), (2) and (3). [see §8057-A(1)(C)]*

Principal purpose: *As stated in 38 M.R.S. §576-A (4), “By July 1, 2021, the Department shall adopt rules to track and report to the Legislature on gross annual greenhouse gas emissions and net annual greenhouse gas emissions.” Chapter 167: Tracking and Reporting Gross and Net Annual Greenhouse Gas Emissions was originally adopted in July 2021 to meet this requirement. Chapter 167 establishes methods for the calculation of annual greenhouse gas emissions as required, outlining the methods, data sources, and assumptions used to compile and report these inventories. Methods and data sources used to calculate greenhouse gas emissions and compile the inventory are regularly updated. The Department proposes updates to Chapter 167 to best align with these recent updates.*

Basis Statement: *As stated in 38 M.R.S. §576-A (4), “By July 1, 2021, the Department shall adopt rules to track and report to the Legislature on gross annual greenhouse gas emissions and net annual greenhouse gas emissions.” Chapter 167: Tracking and Reporting Gross and Net Annual Greenhouse Gas Emissions was originally adopted in July 2021 to meet this requirement. Chapter 167 establishes methods for the calculation of annual greenhouse gas emissions as required, outlining the methods, data sources, and assumptions used to compile and report these inventories. Methods and data sources used to calculate greenhouse gas emissions and compile the inventory are regularly updated. The Department proposes updates to Chapter 167 to best align with these recent updates.*

These emissions estimates are used to assess Maine’s progress toward meeting the gross greenhouse gas reductions set out in 38 M.R.S. § 576-A (1) and (3). The net emissions estimate will be used to gauge Maine’s progress toward the 2045 carbon neutrality goal as stated in 38 M.R.S. § 576-A (2-A). The Department will use these methods to measure progress toward these reductions and toward the goals of the climate action plan described in 38 M.R.S. § 577.

On September 26, 2023, the Department opened a public comment period on the proposed revisions to Chapter 167. The Department received comments on the proposal from two interested parties during the public comment period and has summarized these comments and provided its responses below.

o6-096 Department of Environmental Protection

2024-024: Chapter 80, Reduction of Toxins in Packaging

Statutory Authority: 32 M.R.S. Ch. 26-A

Type: Routine Technical

Emergency?: No

Fiscal impact: *No significant fiscal impact on municipalities or counties is anticipated. No significant economic impacts are anticipated as the majority of manufacturers are already shifting toward PFAS free alternatives.*

Principal purpose: *The purpose of this rulemaking proposal is to update the existing Chapter 80 in accordance with changes in the law and to update language and formatting. The proposed changes include the incorporation of an existing statutory sales prohibition on the use of phthalates in food packaging. The proposal also adds a new section 5, establishing a sales prohibition on the use of specific applications of intentionally added PFAS to certain types of food packaging. The addition of the new section 5 is major substantive rulemaking.*

Basis Statement: *The purpose of this rule is to establish sales prohibitions on the use of specific additives in packaging under the authority of 32 M.R.S. Chapter 26-A.*

Chapter 80 was first adopted in 1992, as Chapter 130 at the Maine Waste Management Agency, and has not been substantively amended since. This rulemaking process was undertaken to implement recent statutory changes of Public Law 2019, ch. 277, An Act To Protect the Environment and Public Health by Further Reducing Toxic Chemicals in Packaging, to implement recommendations from Department staff, and to update the structure and language of the Chapter.

This amendment updates the existing Chapter 80 in accordance with applicable changes in Statute. The amendment also includes updated language and formatting, and the addition of an existing statutory sales prohibition on the use of phthalates in food packaging. The proposal adds a new Section 5, establishing a sales prohibition on the use of specific applications of intentionally added PFAS to certain types of food packaging. The addition of the Section 5 is major substantive rulemaking.

Public notice of this rulemaking was initially posted on the Department's rulemaking page and published in the Secretary of State's rulemaking notices on October 23, 2023, to comply with the Maine APA notice requirements. A public hearing was held on November 16, 2023. And the period for submitting public comments closed on November 30, 2023. The Department received four public comments prior to the close of the comment period.

o6-096 Department of Environmental Protection	
2024-025: Chapter 305, Natural Resources Protection Act - Permit by Rule Standards	
Statutory Authority:	38 M.R.S. § 344(7)
Type:	Routine Technical
Emergency?:	Yes
Fiscal impact:	None
Principal purpose:	<i>This emergency rule revision puts into immediate effect the provisions of Public Law 2023, ch. 97, which directed the Department to allow the use of biodegradable stabilization materials in dune restoration projects through a Natural Resources Protection Act Permit by Rule. This emergency rulemaking is in response to the unprecedented erosion of coastal sand dune systems caused by this winter's storms.</i>
Basis Statement:	<p>FINDINGS OF EMERGENCY</p> <p><i>On January 10, 2024, and January 13, 2024, Maine experienced two severe storms that resulted in historic flooding along the coast. Coastal infrastructure, including homes, buildings, docks, and roads, were damaged and destroyed and significant erosion occurred, with some coastal sand dunes eroding by tens of feet. In response to these events, Governor Mills declared a State of Civil Emergency and requested the Federal Emergency Management Agency begin the assessment process for a Major Disaster Declaration.</i></p> <p><i>Coastal sand dune systems serve as natural barriers to protect the shoreline from storm events. Coastal erosion, specifically erosion of dune systems, caused by these storm events removed tens of feet of protective dunes in some areas, eliminating an important line of defense. This poses an immediate threat to public safety in cases where homes and other necessary structures supporting general welfare are currently, or may soon be, structurally undermined due to the erosion. The Department finds that these storm events, and the resulting erosion, constitute an emergency as described in 5 M.R.S. § 8054.</i></p> <p>BACKGROUND</p> <p><i>Public Law 2023, ch. 97 directed the Department to undertake rulemaking to amend Chapter 305 Natural Resources Protection Act (NRPA) – Permit By Rule to allow for the use of biodegradable stabilization materials in dune restoration projects. The Department consulted with coastal geologists at the Maine Geological Survey and internal subject matter experts during the development of these revisions. While drafting these revisions, the Department determined that additional changes to Chapter 305 are warranted to allow biodegradable stabilization materials to be used in other shoreline stabilization projects, outside of coastal sand dune systems. The Department expects to propose those additional changes to Chapter 305 to the Board of Environmental Protection later this year.</i></p> <p><i>Due to the erosion caused by the storm events earlier this month, some property owners located in coastal sand dune systems have lost an important line of defense. Their homes may be in danger of becoming structurally undermined in the next storm, constituting a threat to public safety. Therefore, in light of this emergency, the Department has undertaken emergency rulemaking as authorized by 5 M.R.S. § 8054 to put into effect the revisions to Chapter 305 described in P.L. 2023, ch. 97. This emergency rulemaking allows property owners to receive NRPA Permits by Rule for dune restoration and construction projects that use biodegradable stabilization materials. This gives property owners dealing with unprecedented</i></p>

coastal erosion an immediate new tool for protecting their homes.

The immediate nature of emergency rulemaking is especially important due to the timing constraints on dune restoration and construction projects. Because of the arrival and nesting activity of endangered Least Tern and Piping Plover birds, dune restoration and construction activities conducted through permit by rule must occur between October 1 and March 15 unless written approval from the Department of Inland Fisheries and Wildlife is obtained by the applicant. This leaves a narrow time window to complete such projects without disturbing endangered species. While the Department may authorize dune restoration and construction projects using biodegradable materials through an individual NRPA permit, the processing timeline for individual NRPA applications would place most approved permits beyond the March 15 construction window this year.

By law, the emergency rulemaking will expire after 90 days (5 M.R.S § 8054(3)). During this period, the Department will initiate a normal rule revision process to implement Public Law 2023, ch. 97 that the Department expects to be part of the larger Chapter 305 rulemaking package concerning shoreline stabilization described above.

PROCEDURAL MODIFICATIONS

In order to mitigate the threats to public safety and general welfare posed by the erosion of coastal sand dunes as a result of the storms this winter, the rulemaking procedures set forth in 5 M.R.S. § 8052 and § 8053 have been modified in the following ways:

- Public Notice – Notice has been sent via email to those members of the public who have requested notice of the Department’s rulemaking activities. This email was sent on January 29, 2024, three days prior to the February 1, 2024, Board meeting, at which the Board voted on the adoption of this emergency rulemaking. In addition, notice was posted on the Department’s rulemaking website on January 29, 2024.*
- Public Comment – No official public comment period or public hearing was held; however, members of the public in attendance at the February 1, 2024, Board meeting were given the opportunity to offer comments on the proposed emergency rulemaking.*

06-096 Department of Environmental Protection	
2024-035: Chapter 526, Cooling Water Intake Structures	
Statutory Authority:	38 M.R.S. §§ 341-H and 414-A(6)
Type:	Routine Technical
Emergency?:	No
Fiscal impact:	<i>The proposed rule does not contain any substantive changes to the existing rule as currently administered by USEPA. Therefore, there should be not fiscal impact to facilities subject to the proposed Chapter 526.</i>
Principal purpose:	<i>The purpose of the rulemaking proposal is to enable the Department to seek delegated authority under USEPA's Clean Water Act 316(b), as required by Maine's Memorandum of Agreement with USEPA.</i>
Basis Statement:	<p><i>The purpose of this rule is to enable the Department to request delegated authority under USEPA's Clean Water Act § 316(b), thereby reducing the time and effort required for regulated entities to comply. Chapter 526 is be based on the EPA rules found a 40 CFR part 125, subpart I and subpart J and does not include any substantive changes to the requirements of the EPA rules. Affected entities are obligated to comply with the standards regardless of which agency has authority to administer the rules. The federal rule includes text with specific deadlines for dates that are long past or are otherwise not applicable in the proposed draft, this text is replaced with [Reserved], in order to retain the overall outline structure of the rule to avoid unnecessary revisions to cross-references.</i></p> <p><i>Chapter 526 establishes requirements that apply to cooling water intake structures at new and existing facilities that are subject to section 316(b) of the Clean Water Act (CWA), 33 U.S.C. § 1326(b) These requirements include standards for minimizing adverse environmental impact associated with the use of cooling water intake structures and required procedures (e.g., permit application requirements, information submission requirements) for establishing the appropriate technology requirements at certain specified facilities as well as monitoring, reporting, and record keeping requirements to demonstrate compliance. In combination, these components represent the best technology available for minimizing adverse environmental impact associated with the use of cooling water intake structures. These requirements are to be established and implemented in Maine Pollutant Discharge Elimination System (MEPDES) permits issued under the State's delegated authority under the CWA.</i></p> <p><i>Public notice of this rulemaking was initially posted on the Department's rulemaking page on November 14, 2023, and published in the Secretary of State's rulemaking notices on November 15, 2023, to comply with the Maine APA notice requirements. The Board held a public hearing on the proposed rulemaking on December 7, 2023, and the period for submitting public comments closed on December 18, 2023.</i></p> <p><i>The Department received two letters with comments from interested persons or organizations prior to the close of the comment period. No testimony was presented at the Public Hearing. The Department made no substantive changes to the draft rule. The public comments and the Department's responses and changes to the proposed rule are provided below. Changes to sections 5.A and 12.A to clarify</i></p>

applicability of the rule are proposed. In addition, the Department also made grammatical, formatting, and other non-substantive revisions to the final proposal.

o6-096 Department of Environmental Protection	
2024-095: Chapter 355, Coastal Sand Dunes	
Statutory Authority:	38 M.R.S. §§ 341-H and 480-A - 480-J
Type:	Major Substantive
Emergency?:	No
Fiscal impact:	None
Principal purpose:	<i>The purpose of this rulemaking is to update Chapter 355 Coastal Sand Dune Rules to replace outdated references by citing the most recent Coastal Sand Dune Geology Maps prepared by the Maine Geological Survey and dated 2023. This reflects our best scientific understanding of where coastal sand dunes, which are protected natural resources, exist in the State.</i>
Basis Statement:	<p><i>Coastal sand dune systems are a protected natural resource under Maine’s Natural Resources Protection Act (NRPA), 38 M.R.S. §§480-A-480-JJ. They are fragile, dynamic resources that serve as natural barriers to protect the shoreline from storm events. They also provide vital habitat for wildlife, including endangered Least Terns and Piping Plovers. NRPA permitting within this protected natural resource is governed by the Department’s Chapter 355 Coastal Sand Dune Rules. In 38 M.R.S. §480-B and Chapter 355, coastal sand dune systems are defined based on their sediment characterization, locations, and the depositional processes that created them. The definition of coastal sand dune systems in Chapter 355 also states that: Most coastal sand dune systems have been identified by the Maine Geological Survey and are shown on photos entitled Beach and Dune Geology Aerial Photos dated 2001. Coastal Sand Dune Maps, previously produced by MGS and dated 1990, have been discontinued.</i></p> <p><i>The purpose of this rulemaking is to update this reference to cite the most recent Coastal Sand Dune Maps prepared by the Maine Geological Survey dated 2023. This does not change the defining features set forth in the rule but it reflects the best scientific understanding of where these protected natural resources exist in Maine and will provide clarity to the regulated public by pointing them to a more helpful reference to understand this resource.</i></p> <p><i>These revisions to Ch. 355 require major substantive rulemaking because they relate to development in coastal sand dune systems (38 M.R.S. §480-AA).</i></p>

o6-096 Department of Environmental Protection	
2024-099: Chapter 534, Wastewater Treatment Plant Operator Certifications - Revocation or Suspension	
Statutory Authority:	32 M.R.S. §§ 4179, 4175-A; 5 M.R.S. §§ 8001 - 11008
Type:	Routine Technical
Emergency?:	No
Fiscal impact:	<i>The Department does not anticipate any increased cost due to this rule. Revocation and suspension of Operator Certification is very rare. This rule would not change the decision criteria and provides procedures to ensure operators rights under MAPA are protected. This rule will save staff time in the event of revocation or suspension by having established procedures.</i>
Principal purpose:	<i>This rule sets forth procedures that may be used by the Commissioner to consider revoking or suspending a wastewater treatment plant operator certification.</i>
Basis Statement:	<p><i>Public Law 2021, Chapter 173, An Act to Amend the Laws Governing Wastewater Treatment Plant Operator Certification amended 32 M.R.S. Chapter 62 to include 32 M.R.S. §4175-A, Compliance and enforcement. This new section provides for revocation, suspension, and reinstatement of operator certification. This rule establishes procedures that may be used by the Department to consider revoking or suspending a wastewater treatment plant operator certification. The purpose of this rule is to provide a specific procedure that is compliant with the Maine Administrative Procedures Act.</i></p> <p><i>Public notice of this rulemaking was initially posted on the Department’s rulemaking page on February 8, 2024, and published in the Secretary of State’s rulemaking notices on February 14, 2024, to comply with the Maine APA notice requirements. No public hearing was scheduled nor requested during the public comment period. The period for submitting public comments closed on March 18, 2024. The Department received no public comments prior to the end of the public comment period. The Department made grammatical, formatting, and other non-substantive revisions highlighted in the mark-up version of the rule.</i></p>

o6-096 Department of Environmental Protection

2024-100: Chapter 80, Reduction of Toxins in Packaging

Statutory Authority: 32 M.R.S. Ch. 26-A

Type: Major Substantive

Emergency?: No

Fiscal impact: *No significant fiscal impact on municipalities or counties is anticipated. No significant economic impacts are anticipated as the majority of manufacturers are already shifting toward PFAS free alternatives.*

Principal purpose: *The purpose of this rulemaking proposal is to update the existing Chapter 80 in accordance with changes in the law and to update language and formatting. The proposed changes include the incorporation of an existing statutory sales prohibition on the use of phthalates in food packaging. The proposal also adds a new section 5, establishing a sales prohibition on the use of specific applications of intentionally added PFAS to certain types of food packaging. The addition of the new section 5 is major substantive rulemaking.*

Basis Statement: *The purpose of this rule is to establish sales prohibitions on the use of specific additives in packaging under the authority of 32 M.R.S. Chapter 26-A.*

Chapter 80 was first adopted in 1992, as Chapter 130 at the Maine Waste Management Agency, and has not been substantively amended since. This rulemaking process was undertaken to implement recent statutory changes of Public Law 2019, ch. 277, An Act To Protect the Environment and Public Health by Further Reducing Toxic Chemicals in Packaging, to implement recommendations from Department staff, and to update the structure and language of the Chapter.

This amendment updates the existing Chapter 80 in accordance with applicable changes in Statute. The amendment also includes updated language and formatting, and the addition of an existing statutory sales prohibition on the use of phthalates in food packaging. The proposal adds a new Section 5, establishing a sales prohibition on the use of specific applications of intentionally added PFAS to certain types of food packaging. The addition of the Section 5 is major substantive rulemaking.

Public notice of this rulemaking was initially posted on the Department’s rulemaking page and published in the Secretary of State’s rulemaking notices on October 23, 2023, to comply with the Maine APA notice requirements. A public hearing was held on November 16, 2023. And the period for submitting public comments closed on November 30, 2023. The Department received four public comments prior to the close of the comment period.

06-096 Department of Environmental Protection	
2024-128: Chapter 200, Metallic Mineral Exploration, Advanced Exploration and Mining	
Statutory Authority:	PL 2023, c. 398, 38 M.R.S. § 341-H
Type:	Major Substantive
Emergency?:	No
Fiscal impact:	None
Principal purpose:	<i>This rule revision is proposed in accordance with P.L. 2023 ch. 398, which directs the Department to undertake rulemaking to implement changes to the Maine Metallic Mineral Mining Act. In accordance with the law, this rulemaking creates a process for a person to apply for an exemption from the requirements of Chapter 200 for certain activities involving certain metallic mineral deposits and provides criteria for the Department’s decision on such applications.</i>
Basis Statement:	<p><i>This rulemaking is in response to P.L. 2023, ch. 398 (An Act to Support Extraction of Common Minerals by Amending the Maine Metallic Mineral Mining Act). The amendments enacted by P.L. 2023, ch. 398, now codified at 28 M.R.S. §§490-MM(11)(A) and 490-NN(4)&(5), directed the Department to revise its rules to allow a person to apply for exclusion from the requirements of Chapter 200 for the physical extraction, crushing, grinding, sorting, or storage of metallic minerals provided certain criteria are met. Importantly, the law does not allow chemical processing of metallic minerals to be excluded from the requirements of Chapter 200. The law also requires that, for a project to be excluded from the requirements of Chapter 200, it must be regulated under another existing law: either by the performance standards for quarrying, the performance standards for excavations, the Site Location of Development Law, or by the Land Use Planning Commission’s statutes.</i></p> <p><i>The Maine Metallic Mineral Mining Act (the Act) (38 M.R.S. §§ 490-LL - 490-TT) and Chapter 200 were primarily designed to protect Maine’s natural resources from the risks of acid rock drainage resulting from the mining of sulfide minerals. The strong environmental and financial protections of the Act are appropriately protective considering the high environmental risks associated with sulfide mining. The Act and rule were not designed with other, non-sulfide minerals in mind, such as silicate minerals or carbonate minerals, which do not pose the same level of environmental risks. However, until passage of P.L. 2023, ch. 398, all metallic mineral mining was subject to the requirements of Chapter 200 regardless of the environmental risks posed by a particular deposit.</i></p> <p><i>This rule revision creates a framework to govern the Department’s exclusion determinations and further develops the criteria that must be met for an exclusion to be granted. Exclusion may only be granted if the disturbed material does not have the potential to create acid rock drainage or alkali rock drainage, expose radioactive or other materials that could endanger human health or the environment, or violate water quality standards, with the exception of sedimentation and turbidity, which are otherwise regulated. Other criteria and conditions are also included in the rule revision.</i></p>

o6-096 Department of Environmental Protection	
2024-157: Chapter 140, Part 70 Air Emission License Regulation	
Statutory Authority:	38 M.R.S. §§ 590 and 585-A
Type:	Routine Technical
Emergency?:	No
Fiscal Impact:	<p><i>Removal of the emergency affirmative defense provisions will have no fiscal impact on facilities that are operating in compliance with their Part 70 operating permits.</i></p> <p><i>None of the other proposed changes are expected to increase costs to either the public or regulated facilities, and some may result in cost savings such as the ability to publish public notices online rather than in a newspaper.</i></p>
Principal purpose:	<p><i>The U.S. Environmental Protection Agency (EPA) requires major stationary sources of air pollutants to obtain operating permits. Maine operates an EPA-approved Operating Permits Program (also known as Part 70 or Title V permitting) pursuant to 40 C.F.R. Part 70. The Department implements this program through its rule Part 70 Air Emission License Regulation, Chapter 140.</i></p> <p><i>Chapter 140 includes provisions that establish an affirmative defense that sources can use in an enforcement case to avoid liability for noncompliance with licensed emission limits. To rely on affirmative defense and avoid liability, the source must demonstrate that any excess emissions occurred as the result of an “emergency” as defined in the regulations, and must also make several other demonstrations.</i></p> <p><i>On July 21, 2023, EPA published a final rule that removed the emergency affirmative defense provisions from 40 C.F.R. Part 70. EPA removed these provisions because they are inconsistent with the EPA’s interpretation of the enforcement structure of the Clean Air Act in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit.¹</i></p> <p><i>As a state with an EPA-approved Operating Permits Program, Maine must have licensing rules that align with federal requirements. As discussed in EPA’s final rule,² EPA has directed states to remove impermissible affirmative defense provisions from their rules by August 21, 2024.</i></p> <p><i>In addition to the change described above, the Department is taking this opportunity to make minor changes that are considered clarifications, that correct grammar, that codify longstanding practices, or that are necessary to utilize an expected future electronic application system.</i></p>
Basis Statement:	<i>The U.S. Environmental Protection Agency (EPA) requires major stationary sources of air pollutants to obtain operating permits. Maine operates an EPA-approved Operating Permits Program (also known as Part 70 or Title V permitting) pursuant</i>

¹ See *Natural Res. Def. Council v. Envtl. Prot. Agency*, 749 F.3d 1055 (D.C. Cir. 2014).

² “Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program.” 88 Fed. Reg. 47029 (July 21, 2023).

to 40 C.F.R. Part 70. The Department implements this program through its rule Part 70 Air Emission License Regulation, Chapter 140.

Chapter 140 includes provisions that establish an affirmative defense that sources can use in an enforcement case to avoid liability for noncompliance with licensed emission limits. To rely on affirmative defense and avoid liability, the source must demonstrate that any excess emissions occurred as the result of an “emergency” as defined in the regulations, and must also make several other demonstrations.

On July 21, 2023, EPA published a final rule that removed the emergency affirmative defense provisions from 40 C.F.R. Part 70. EPA removed these provisions because they are inconsistent with the EPA’s interpretation of the enforcement structure of the Clean Air Act in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit.³

As a state with an EPA-approved Operating Permits Program, Maine must have licensing rules that align with federal requirements. As discussed in EPA’s final rule,⁴ EPA has directed states to remove impermissible affirmative defense provisions from their rules by August 21, 2024.

In addition to the change described above, the Department is taking this opportunity to make minor changes that are considered clarifications, that correct grammar, that codify longstanding practices, or that are necessary to utilize an expected future electronic application system.

In accordance with 38 M.R.S. § 585, the formal rulemaking process began on March 7, 2024, when the Department presented its proposal to the Board of Environmental Protection (Board). The proposed rulemaking did not establish new emission standards or make changes to existing emission standards; therefore, a public hearing was not required pursuant to 38 M.R.S. § 585. However, this rule implements a federal program, and federal regulations require the opportunity for a public hearing, so a hearing was held on April 18, 2024. No persons attended the hearing to provide testimony. Comments were received during the written comment period, which closed on April 29, 2024.

The Department received comments on the proposed rule from two interested parties during the public comment period. The final proposed rule incorporates minor changes from what was posted. It reinstates a paragraph that was originally proposed to be removed and adds a note clarifying the Commissioner’s authority pursuant to 38 M.R.S. § 349(9).

³ See *Natural Res. Def. Council v. Envtl. Prot. Agency*, 749 F.3d 1055 (D.C. Cir. 2014).

⁴ “Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program.” 88 Fed. Reg. 47029 (July 21, 2023).

06-096 Department of Environmental Protection	
2024-158: Chapter 145, NO_x Control Program	
Statutory Authority:	38 M.R.S. § 585-A
Type:	Routine Technical
Emergency?:	No
Fiscal Impact:	<p><i>Clarifying the rule’s applicability will have no fiscal impact on Maine’s sources. The affected sources located outside of the current OTR boundaries have consistently been covered by a NO_x waiver and considered by the Department not to be subject to this regulation. This clarification confirms that they will continue to not be subject to the regulation.</i></p> <p><i>Removal of obsolete provisions also has no fiscal impact.</i></p>
Principal purpose:	<i>The Department is initiating rulemaking to revise its rule NO_x Control Program, 06-096 C.M.R. ch. 145 (Chapter 145) to clarify applicability and to remove obsolete requirements.</i>
Basis Statement:	<p><i>When promulgated in 2001, NO_x Control Program, 06-096 C.M.R. ch. 145, (Chapter 145) applied to affected sources located in areas of the state that were not covered by a waiver of NO_x control requirements pursuant to Section 182(f) of the 1990 Clean Air Act (CAA) Amendments. Section 182(f) applies to ozone nonattainment areas and areas within the Ozone Transport Region (OTR). At the time, the entire state was part of the OTR. The NO_x waiver provisions of the CAA recognized that requiring additional NO_x emission reductions was not appropriate in certain cases. Chapter 145 acknowledged this and limited applicability to areas of the state that were not covered by such a waiver. Maine applied for and received a Section 182(f) NO_x waiver on several occasions, including a state-wide waiver in 2014.</i></p> <p><i>In February 2020, the State of Maine petitioned EPA to remove the majority of the state from the OTR. EPA granted the State’s petition, and the change became effective on March 14, 2022. The approval of the State’s petition made the question of a Section 182(f) NO_x waiver irrelevant for much of the state, in that it permanently removed portions of the state from the OTR.</i></p> <p><i>This rulemaking clarifies that the provisions of Chapter 145 apply to affected sources that are located both within the OTR and in a county that has not received a NO_x waiver. This was always the intent of the rule. The affected sources located outside of the current OTR boundaries have consistently been covered by a NO_x waiver and considered by the Department not to be subject to this regulation. They have historically not been subject to the requirements of Chapter 145; thus, this clarification has no effect on any actual or potential emissions from those sources.</i></p> <p><i>In addition to the applicability clarification, the rule contains several provisions for interim standards for which the compliance date has passed. These obsolete provisions have been removed.</i></p> <p><i>In accordance with 38 M.R.S. § 585, the formal rulemaking process began on March 7, 2024, when the Department presented its proposal to the Board of Environmental Protection (Board). The proposed rulemaking did not establish new</i></p>

emission standards or make changes to existing emission standards; therefore, a public hearing was not required under 38 M.R.S. § 585. However, this rule is included in Maine's State Implementation Plan, and federal regulations require the opportunity for a public hearing, so a hearing was held on April 18, 2024. No persons attended the hearing to provide testimony. The written comment period closed on April 29, 2024. No comments were received.

06-096 Department of Environmental Protection

2024-212 Chapter 2, Processing of Applications and Other Administrative Matters

Statutory Authority:	22 M.R.S. §§ 8703(1), 8704(1) & (4) and PL 2023, Ch. 276 [22 M.R.S. § 1728]
Type:	Routine Technical
Emergency?:	No
Fiscal Impact:	<i>The proposed rule is not expected to have an adverse fiscal impact on persons subject to the Chapter 2 requirements.</i>
Principal purpose:	<i>The purpose of this amended rulemaking proposal is to incorporate changes to the Board’s responsibilities and duties pursuant to P.L. 2024, ch. 512 (L.D. 865, An Act to Clarify the Roles and Responsibilities of the Board of Environmental Protection.</i>
Basis Statement:	<p><i>In accordance with 38 M.R.S. § 341-H and 5 M.R.S. § 8051-8064 (the Maine Administrative Procedure Act or MAPA), on December 7, 2023, the Department of Environmental Protection (Department or DEP) initiated rulemaking to repeal and replace its previous Chapter 2 rule, Rule Regarding the Processing of Applications and Other Administrative Matters. That Department rule was initially adopted in 1994 and has since been amended several times, most recently on June 9, 2018. For clarity, this Response to Comments document will refer to the previous Chapter 2 rule as “the 2018 version of Chapter 2” and the proposed repeal and replace version as “the proposed Chapter 2 rule” or “the proposed rule.”</i></p> <p><i>Chapter 2 governs the administrative procedures of the Department, including the Board of Environmental Protection (Board), for actions including the processing of license applications, appeals of Commissioner license decisions and insurance claim-related decisions made pursuant to 38 M.R.S. § 568-A, administrative consent agreements, license revocations, suspensions, and surrenders, and other administrative matters, such as requests for advisory rulings.</i></p> <p><i>The primary purposes of this rulemaking are to improve the clarity, organization and grammar of the rule and to incorporate recent legislative changes to the Board’s responsibilities and duties. Additionally, the Department is utilizing this rulemaking action to revise its procedures based on the Department’s experience applying Chapter 2 across a wide range of programs since the rule was last amended in 2018.</i></p> <p><i>Due to the large number of proposed organizational changes to the rule, the Department chose to repeal and replace, rather than amend, the 2018 version of Chapter 2, consistent with the principles set forth by the Department of the Secretary of State in 29-250 C.M.R. ch. 800, § (2)(1)(A), Procedures for the Electronic Filing of Rules.⁵</i></p> <p><i>Considering the broad scope and applicability of the Department’s Chapter 2 rule, Department staff recommended that the Board hold a public hearing on the proposed rule in addition to posting the proposed rule for public comment. The</i></p>

⁵ “Rather than amend small parts of a chapter, agencies are encouraged to repeal and replace the entire chapter. Many potential errors are avoided by working with the entire chapter.”

Board exercised its statutory discretion to hold a public hearing on the proposed rule and held that hearing on January 18, 2024. Public notice of the hearing was made in accordance with the rulemaking requirements of the Maine Administrative Procedure Act, 5 M.R.S. §§ 8051–8064, the Board’s rulemaking authority in 38 M.R.S. § 341-H, and the notice of public proceedings requirements in 1 M.R.S. § 406 (the Freedom of Access Act). Notice of the hearing was posted on the Department’s rulemaking and comment opportunity webpage (<https://www.maine.gov/dep/rules/index.html>) on December 21, 2023. Notice also was published on the Secretary of State’s website (<https://www.maine.gov/sos/cec/rules/notices.html>) on December 27, 2023, and in the Bangor Daily News, Kennebec Journal, Lewiston Sun Journal, Morning Sentinel, and Portland Press Herald, and also was sent to each person who previously had submitted a request for notice of Department rulemaking activities. Ron Huber of Penobscot Bay Watch, Jillian Howell of Upstream Watch, and Greg Robie testified on the proposed rule at the public hearing. The Board accepted written comments on the proposed rule from December 19, 2023, through January 29, 2024, and the Board received written comments from the following 19 persons during this initial comment period.

06-096 Department of Environmental Protection

2024-277: Chapter 428, Stewardship Program for Packaging

Statutory Authority:	38 M.R.S. § 2146. Stewardship program for packaging
Type:	Routine Technical
Emergency?:	No
Fiscal Impact:	<i>The proposed rule imposes direct costs to producers of packaging material that is sold, offered for sale, or distributed for sale in or into the State. The rule provides payments to municipalities that choose to participate, and all municipalities will likely see indirect cost savings as a result of a reduction in the amount of packaging material, improved packaging material design and recyclability, and improvements to the State’s waste management system.</i>
Principal purpose:	<i>The Department is proposing the new rule: Chapter 428: Stewardship Program for Packaging, which will allow the Department to implement, administer, and enforce Stewardship program for packaging, 38 M.R.S. § 2146. It characterizes packaging material, provides a method for determining municipal reimbursement and producer fees, provides a method and criteria for investing in infrastructure and education, details alternative collection programs, establishes a cap for the packaging stewardship fund, and provides mechanisms for ongoing assessment and updates to the program. The rule is being re-posted with changes based on the first round of public input.</i>
Basis Statement:	<i>In 2019 the Legislature passed L.D. 1431, Resolve, To Support Municipal Recycling Programs, directing the Department of Environmental Protection (Department) to present draft legislation to the Committee on Environmental and Natural Resources to establish a stewardship program for packaging. In 2021, the Legislature passed Public Law 2021 c. 455, An Act to Support and Improve Municipal Recycling Programs and Save Taxpayer Money, now codified as Stewardship Program for Packaging, 38 M.R.S. § 2146. The overall goals of 38 M.R.S. § 2146 are to reduce the burden to municipalities for managing packaging material and to improve the design and management of packaging material. The legislation enumerated certain topics to be covered in routine technical rulemaking and others to be covered in major substantive rulemaking in 38 M.R.S. § 2146(13)(A) and 38 M.R.S. § 2146(13)(D), respectively. The Board held a meeting on January 18, 2024, during which it voted to post the proposed draft rule for public comment. Public notice of this rulemaking was initially published on February 5, 2024, on the Department’s website and in the Secretary of State’s rulemaking notices on February 14, 2024, to comply with the Maine Administrative Procedure Act, 38 M.R.S. § 8052(1) notice requirements. During the public hearing held on March 7, 2024, the Board heard testimony from the regulated community, interested parties, and the public. The 30-day public comment period closed on March 18, 2024. The Department received and reviewed comments from 118 interested persons and parties. The Department and the Board then held two deliberative sessions: one on May 16, 2024, and another on June 20, 2024. In response to public comments and direction from the Board, the Department made substantive changes to the proposed draft rule which required reposting. The reposted draft rule was published on July 10, 2024, for a 45-day public comment period that closed on August 26, 2024. The reposted draft rule incorporated</i>

significant changes to the proposed draft rule suggested during the public hearing, public comment periods, and deliberative sessions with the Board, including:

- *Changes to the definition of toxics*
- *Inclusion of a new goal for recycling access*
- *Changes to litter audits*
- *Simplification of packaging material types*
- *Addition of a relative cost measure to the criteria used to determine whether a packaging material type is readily recyclable*
- *Changes to the transitional period*
- *Removal of references to reimbursable from Section 6, Defining Cost by Packaging Stream*
- *Removal of alternative management from Section 7, Calculation of the Per Ton Cost by Commodity*
- *Allowance for estimation of sales data for producer start up registration*
- *Clarification that producers must report on packaging material that may have been received by the consumer of the product if they cannot verify it was not*
- *Changes to producer reporting requirements that remove brand-specific reporting*
- *Simplification of packaging material type fees*
- *Change to reduction of litter incentive fee*
- *Addition of a fee for proposing an alternative collection program*
- *Reduction in the annual fee for an alternative collection program*
- *Changes to municipal reimbursement*
- *Clarification on cost studies*
- *Relaxation of audit requirements*
- *Addition of a detailed procedure for the calculation of median per ton costs*
- *Removal of reporting on and calculation of the tons of material managed through alternative management*
- *Clarification of the point at which packaging material is considered recycled*
- *Changes to the process of fulfilling major investment needs*
- *Allowance for the Department to treat information on investment proposals that is identified as proprietary in accordance with Confidential information, 38 M.R.S. § 1310-B (1979)*
- *Changes to the size of the cap on the Packaging Stewardship Fund*

The Department received and reviewed 47 comments regarding the reposted draft rule. In addition to the change based on the legislative history, which is discussed at length in the Department's memo to the Board, the Department made minor clarifying changes, resulting in the rule for adoption.

The rule for adoption will allow the Department to implement, administer, and enforce 38 M.R.S. § 2146. It addresses all rulemaking topics specified in 38 M.R.S. § 2146(13)(A) and some additional topics the Department deemed necessary to implement the law. The rule for adoption characterizes packaging material, provides a method for determining municipal reimbursement and producer fees, provides a method and criteria for investing in infrastructure and education, details alternative collection programs, and provides mechanisms for ongoing assessment and updates to the program. Notable additions to the rule that are not required by

the statute include a definition of consumer, clarifying adjustments to the definition of producer, a process for the identification and funding of major investment needs, and a cap on the Packaging Stewardship Fund.

Public comments and the Department's responses to those comments are provided below.

Commenters have been assigned numbers, and comments received during the second comment period have been identified with the letter "R".

The Department's responses refer to three versions of the draft rule: 1) the proposed draft rule, which was published on February 14, 2024; 2) the reposted draft rule, which was published on July 10, 2024; and 3) the rule for adoption, included in this Board packet.