

360 CMR 1.00: ADJUDICATORY PROCEEDINGS

Section

GENERAL RULES

- 1.01: Authority
- 1.02: Purpose and Applicability
- 1.03: Severability
- 1.04: Definitions
- 1.05: Representation
- 1.06: Filing, Receipt of Papers and Notices, and Computation of Time
- 1.07: Filings Generally
- 1.08: *Ex Parte* Communications
- 1.09: Withdrawal and Disqualification of Presiding Officer
- 1.10: Docket/Decision Index
- 1.11: Availability of Rules
- 1.12: Amendments to 360 CMR 1.00

HEARING RULES

- 1.20: Initiation of Adjudicatory Proceeding, Answer, and Amendment of Pleadings
- 1.21: Motions
- 1.22: Discovery
- 1.23: Intervention and Participation
- 1.24: Hearings and Conferences
- 1.25: Subpoenas
- 1.26: Decisions
- 1.27: Stipulations and Agreements

GENERAL RULES

1.01: Authority

360 CMR 1.00 are the rules and regulations of the Massachusetts Water Resources Authority, promulgated pursuant to St. 1984, c. 372, to govern the conduct of administrative adjudicatory proceedings held by the Authority.

1.02: Purpose and Applicability

- (1) 360 CMR 1.00 is intended to:
  - (a) Govern the conduct of all Adjudicatory Proceedings, as defined in 360 CMR 1.00, held by the Massachusetts Water Resources Authority; and
  - (b) Provide for a just and speedy determination of the legal rights, duties, and privileges of the parties to Adjudicatory Proceedings before the Massachusetts Water Resources Authority.
- (2) 360 CMR 1.00 is applicable to every Adjudicatory Proceeding, as defined in 360 CMR 1.00, held by the Authority.

1.03: Severability

The provisions of 360 CMR 1.00 are severable. If any provision of 360 CMR 1.00, or the application to any Person or circumstance, is held invalid, the invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

1.04: Definitions

Unless the context specifically indicates otherwise, the meaning of the terms used in 360 CMR 1.00 shall be those defined in 360 CMR 2.04: *Definitions* and 10.004: *Definitions* and as follows:

1.04: continued

Adjudicatory Proceeding shall mean a proceeding before the Authority in which the legal rights, duties, or privileges of specifically named persons are required by constitutional right, or by any provision of Massachusetts law or regulations to be determined after opportunity for a hearing before the Authority, but does not include:

- (a) proceedings solely to determine whether the Authority shall institute or recommend institution of proceedings in a court;
- (b) proceedings for the arbitration of labor disputes voluntarily submitted by the parties to such disputes;
- (c) proceedings for the disposition of grievances of employees of the Authority; or
- (d) proceedings to classify, reclassify, allocate, or reallocate appointive offices and positions in the Authority.

Agency shall mean any department, board, commission, division, authority, or other entity within the executive branch of the federal government or the state government, any subdivision of any of the foregoing, any municipality, or any official of the executive branch of the federal government or of a state government or municipality.

Authorized Representative shall mean an attorney, legal guardian, or other person authorized by a Party to represent it in an Adjudicatory Proceeding.

Electronic Medium. Any device used to transmit information electronically including, but not limited to, facsimile and e-mail.

Notice of Action shall mean a document required to be issued by the Authority whenever an Adjudicatory Proceeding may be initiated as a result of an action taken or intended to be taken by the Authority. The documents that are Notices of Action shall include Penalty Assessment Notices, rulings on requests for reconsideration issued pursuant to 360 CMR 2.21(3), and Orders to Show Cause.

Papers shall mean all written communications filed in an Adjudicatory Proceeding, including motions, pleadings, and other documents.

Party shall mean the specifically named Person whose legal rights, duties, or privileges are being determined in an Adjudicatory Proceeding; any Person who as a matter of constitutional right or by any provision of Massachusetts law or regulation is entitled to participate in the Adjudicatory Proceeding and who makes an appearance pursuant to 360 CMR 1.05; and any Person allowed by the Presiding Officer to intervene in the Adjudicatory Proceeding.

Petitioner shall mean the Person who initiates an Adjudicatory Proceeding.

Presiding Officer shall mean the individual authorized by law or duly designated by the Authority to conduct Adjudicatory Proceedings.

Respondent shall mean the Person who must respond to a Notice of Claim for Adjudicatory Proceeding or Order to Show Cause.

1.05: Representation

(1) Appearance. An individual may appear on his or her 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. Any Party to an Adjudicatory Proceeding shall have the right to be represented by an Authorized Representative.

(2) Notice of Appearance. The filing of any pleading, motion, or other Paper shall constitute an appearance by the attorney who signs it, unless the Paper states otherwise. Where a Party is not represented by an attorney, the Party shall file a written notice with the Authority, identifying the name, address, affiliation, if any, and telephone number of the Party's Authorized Representative. Where the Party represents himself or herself, he or she shall notify the Authority in writing.

1.06: Filing, Receipt of Papers and Notices, and Computation of Time

- (1) Timely Filing. Papers required or permitted to be filed under 360 CMR 1.00 or any provision of applicable law, must be filed within the time limits set by law or regulation and shall be filed at the Authority office or wherever designated by the Authority. Papers filed in the following manners shall be deemed filed as stated:
- (a) Hand-delivery During Business Hours. Papers so filed shall be deemed filed on the day delivered.
  - (b) Hand-delivery During Nonbusiness Hours. Papers so filed shall be deemed filed on the next regular business day.
  - (c) Mailing. Papers filed by placing in the U.S. Mail shall be deemed filed on the date placed in the mail.
  - (d) Electronic Medium. Where Papers may be filed by Electronic Medium and are received during regular business hours, they shall be deemed filed on the date received by the Authority during usual business hours but not later than 5:00 P.M. Papers received after regular business hours shall be deemed filed on the following business day. Papers served by Electronic Medium shall indicate the date transmitted and the telephone number or electronic address used for transmittal.
- (2) Date Stamping. All Papers shall show the date received by the Authority. The Authority shall cooperate in giving date receipts to Persons filing Papers by hand-delivery.
- (3) Receipt of Papers and Notices. All Papers and notices shall be deemed to be received as follows:
- (a) If delivered in hand, the Paper or notice shall be deemed to be received when delivered:
    1. Personally to the Party or his or her attorney;
    2. Personally to any officer, employee, or agent of the Party authorized by appointment of the Party or by law to accept service;
    3. To the Person's last known address in the Commonwealth; or
    4. To the last known address of any officer, employee, or agent of the Party authorized by appointment of the Party or by law to accept service.
  - (b) If sent by certified mail, return receipt requested, the Paper or notice shall be deemed to be received either:
    1. When signed for by:
      - a. The Party of his or her attorney; or
      - b. The Party's officer, employee, or agent including, without limitation, any officer, employee, or agent authorized by appointment of the Party or by law to accept service; or
    2. When returned by the U.S. Postal Service to the Authority as unclaimed, unless the Authority is persuaded that the Paper or notice was not claimed for reasons beyond the control of the Party to whom the Paper or notice was sent.
  - (c) If delivered by regular mail, the Paper or notice shall be deemed to be received no later than the third business day after it is mailed to the Party or his or her attorney, or where the Paper is issued by the Authority, the Authority is persuaded otherwise by the Party to whom the Paper or notice was mailed.
  - (d) Electronic Medium. Where Papers may be filed by Electronic Medium and are received during regular business hours, shall be deemed filed, as provided in 360 CMR 1.06(1)(d), on the date received by the Authority during usual business hours but not later than 5:00 P.M. If Papers received after regular business hours shall be deemed filed on the following business day. Papers served by Electronic Medium shall indicate the date transmitted and the telephone number or electronic address used for transmittal.
- (4) Computation of Time. Unless otherwise specifically provided by 360 CMR 1.00 or any ruling issued under 360 CMR 1.00, computation of any time period referred to in 360 CMR 1.00 shall begin with the first day following the act which initiates the running of the time period. The last day of the time period so computed is to be included unless it is a Saturday, Sunday, legal holiday, or any other day on which the office of the Authority is closed, in which event the period shall run until the end of the next following business day. When the time period is less than seven days, only days when the offices of the Authority are open shall be included in the computation.

## 1.06: continued

(5) Additional Time after Service by Mail. Whenever a person has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or other Papers upon him or her and the notice or paper is served upon him or her and the notice or paper is served upon him or her by mail, three days shall be added to the prescribed period.

(6) Extension of Time. Except for any time period set forth either in 360 CMR 1.20(1) or in 360 CMR 2.21(4) or 360 CMR 2.22(1) or elsewhere regarding any time limitation within which an Adjudicatory Proceeding must be commenced, the Presiding Officer shall have the discretion to extend any time limit contained in 360 CMR 1.00 for good cause shown. 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 such motion shall toll the time period sought to be extended until the Presiding Officer acts on the motion. A motion for an extension of time made after the expiration of the time period may be granted only where the failure to act was the result of excusable neglect.

1.07: Filings Generally

(1) Title. Papers filed with the Authority shall state the docket number, if any, the title of the Adjudicatory Proceeding, and the names of the Parties. Papers not containing all this information shall be accepted for filing if they contain sufficient identifying information.

(2) Signatures. Papers filed with the Authority shall be signed and dated by the Party making the filing or by the Party's Authorized Representative, and shall state the address and telephone number of the Party or Authorized Representative. The signature of the Party or Authorized Representative constitutes a certification by the signer that he or she has read the document, knows the content thereof, that to the best of his or her knowledge, information, and belief there is a good ground to support it, and that it is not interposed for delay and, if the document is signed by an Authorized Representative, that he or she has full power and authority to do so.

(3) Agency as a Party. An Agency named a Party to an Adjudicatory Proceeding shall be designated by its name and not by the name(s) of particular individual(s) holding office. If a change occurs in an individual(s) holding office while the Adjudicatory Proceeding is pending, the Adjudicatory Proceeding shall not abate, and no substitution of Parties shall be necessary.

(4) Form.

(a) All Papers, except submittals and documents which are kept in a larger format during the ordinary course of business, shall be handwritten or typewritten on paper 8 to 8 ½ inches wide by 10 to 11 inches long, with left hand margins not less than one inch. The impression shall be on only one side of the page, unless there are more than four pages, and shall be double-spaced except that quotations in excess of three lines shall be single-spaced and indented. Photocopied Papers will be accepted as handwritten or typewritten. All Papers shall be clear and legible.

(b) Notwithstanding 360 CMR 1.07(4)(a), all interrogatories, requests for admission of fact, and requests for production of documents may be single spaced.

(c) The Authority may provide forms to be used by the Parties.

(5) Service: When Required. Except as otherwise provided by 360 CMR 1.00, or unless the Presiding Officer otherwise orders, every Paper shall be served upon each Party.

(6) Service: How Made. Whenever under 360 CMR 1.00 service is required or permitted to be made upon a Party represented by an attorney, service shall be made upon the attorney, unless service upon the Party is ordered by the Presiding Officer. Service upon the attorney or upon a Party shall be made by delivering a copy to him or her or by mailing it to him or her or to his or her last known address, or, where permitted, by Electronic Medium at his last known address. The last page of every Paper served under 360 CMR 1.00 shall contain a brief signed certification showing the date and manner of service. Papers served by Electronic Medium shall indicate the date transmitted and the telephone number or electronic address used for transmittal. Service by mail is complete upon mailing.

1.07: continued

(7) Filing. Except as otherwise provided in 360 CMR 1.07(8), the original of every Paper required to be served upon a Party shall be filed with the Authority either before service or within a reasonable time thereafter.

(8) Papers not Filed. Unless the Presiding Officer orders otherwise, the following shall not be presented or accepted for filing: transcripts of depositions; requests for documents and/or things and responses thereto; and interrogatories and responses thereto. The Party taking a deposition or obtaining material through discovery is responsible for its preservation and delivery to the Presiding Officer if needed or when so ordered. Notwithstanding 360 CMR 1.07, any Party pressing or opposing any motion may file any document pertinent thereto.

NON-TEXT PAGE

1.08: Ex Parte Communications

No Party or other person directly or indirectly involved in an Adjudicatory Proceeding shall submit to the Presiding Officer, or any Authority employee involved in the decision making process, any evidence, arguments, analysis, or advice, whether written or oral, regarding any matter at issue in an Adjudicatory Proceeding, unless such submission is part of the record or made in the presence of all Parties. 360 CMR 1.08 does not apply to consultation among the Authority's members concerning the Authority's internal administrative functions or procedures.

1.09: Withdrawal and Disqualification of Presiding Officer

A Presiding Officer may at any time withdraw 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 alleging bias or other ground for disqualification of a Presiding Officer, and the Presiding Officer does not disqualify himself or 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 Presiding Officer may rule on the motion as part of the Decision in the Adjudicatory Proceeding or at such earlier time as justice may require.

1.10: Docket/Decision Index

(1) Docket. Unless otherwise prescribed by law, the Authority 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.

(2) Decision Index. Unless otherwise prescribed by law, the Authority 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 by the Authority and shall contain a further cross reference 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.

(3) Public Inspection. Unless prescribed 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 Authority. The rate for copying shall be the rates as set by the Executive Office for Administration and Finance.

1.11: Availability of Rules

Copies of all rules shall be available upon request to any Person from the offices of the Authority. Fees for copies shall be the cost of public records as determined by the Executive Office for Administration and Finance.

1.12: Amendments to 360 CMR 1.00

All amendments to 360 CMR 1.00 shall be effective as of the date of publication thereof unless otherwise specifically provided.

1.20: Initiation of Adjudicatory Proceeding, Answer, and Amendment of Pleadings

(1) Claim for Adjudicatory Proceeding. Any Person having a right to an adjudicatory proceeding shall commence such a proceeding by filing a written Claim for Adjudicatory Proceeding. Such Claim shall be filed with the Authority within the time prescribed by any applicable provision of law or regulation or, in the absence of a prescribed time period, within 21 days from the date of said Person's receipt of a Notice of Action from the Authority giving rise to the right to the Adjudicatory Proceeding.

## 1.20: continued

A Claim for Adjudicatory Proceeding shall state clearly and concisely the facts and issues which are grounds for the proceeding, the relief sought, and any additional information required by applicable statutes and regulations. The Authority may provide forms to be used for a Claim for Adjudicatory Proceeding.

(2) Order to Show Cause. Whenever the Authority desires to initiate an Adjudicatory Proceeding it may commence a proceeding by issuing an Order to Show Cause setting forth the grounds for the Order. An Order to Show Cause shall contain a statement of the legal and factual grounds for the Order, including the legal authority for commencing the proceeding and issuing the relief sought.

(3) Answer. Within 21 days of the filing of a Claim for Adjudicatory Proceeding or an Order to Show Cause, the Respondent shall file an Answer. The Answer shall contain full, direct and specific responses to each claim set forth in the Claim or Order and shall admit or deny the averments contained therein. If the Party filing the Answer is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. The Answer shall contain all affirmative defenses to the claims stated in the Claim or Order and may cite the statute(s) and/or regulation(s) which form the basis of each defense. All averments contained in the Claim or Order which are not specifically admitted in the Answer shall be deemed denied. All new matters contained in the Answer shall be treated as if denied.

(4) Authority Answer. The Authority shall not be required to file an Answer if, at the time the Authority took the action being appealed, the Authority disclosed to the Petitioner the material facts upon which the Authority relied in taking such action and the statutes and/or regulations which authorized or required the Authority to take such action. Notwithstanding the foregoing, the Presiding Officer may on his own initiative or upon the motion of any Party, order the Authority to file an Answer.

(5) Amendment of Pleadings. A Party may amend its pleadings only by leave of the Presiding Officer or by written consent of the adverse Party; leave shall be freely given when justice requires.

1.21: Motions(1) General

(a) Presentation of and Opposition to Motions. Any Party may request of the Presiding Officer any order or action not inconsistent with law or 360 CMR 1.00. Such a request shall be called a motion. The provisions of 360 CMR 1.21(2) through (10) shall not be construed to limit a Party's right to make a motion, not listed in 360 CMR 1.21(2) through (10), not inconsistent with law or 360 CMR 1.00. Motions may be made in writing at any time after the commencement of an Adjudicatory Proceeding or may be made orally during a hearing. Each motion shall set forth the grounds for the desired order or action and state whether a hearing is desired. A Party filing a motion shall serve together with the motion a statement of reasons, including supporting authorities, why the motion should be granted and shall include any other information required by 360 CMR 1.00. Affidavits and other documents setting forth or evidencing facts on which the motion is based shall be filed and served with the motion.

Any time within ten days after a written motion is filed, any Party may file a written opposition to the motion and shall request a hearing if one is desired. With the opposition, the Party may file and serve a statement of reasons, together with supporting authorities, why the motion should not be allowed. Affidavits and other documents setting forth or evidencing facts on which the opposition is based shall be filed and served with the opposition.

1.21: continued

- (b) Hearings and Rulings on Motions. The Presiding Officer may, in his discretion, act upon any motion, with or without a hearing; except that where a Party requests a hearing on a motion to dismiss or for summary decision, the Presiding Officer shall not act on the motion without a hearing unless it appears from the Papers filed with the Authority that failure to rule on the motion before a hearing is held will cause irreparable harm to the moving Party, or the public health, safety, welfare or the environment. The decision to hold a hearing on any other motion shall be within the discretion of the Presiding Officer. The Presiding Officer shall make the decision and based upon whether a hearing would be necessary or helpful to a disposition of the motion, or is required by law. If the Presiding Officer acts on a motion without a hearing, he shall consider all timely filed Papers regarding the motion. If a motion is made orally at a hearing, the Presiding Officer may act on the motion during the hearing. If the Presiding Officer holds a subsequent hearing on a motion made orally at a hearing, notice of the time and place of the hearing shall be given to the Parties at least three days in advance. The Presiding Officer may grant requests for continuances for good cause shown, or in the event of an unexcused absence of a Party, may permit the hearing to proceed and the unexcused Party's motion or opposition will be considered on the basis of the Papers timely filed by the Party. If the Presiding Officer grants a motion that results in a termination of the proceeding, he shall issue a written decision pursuant to 360 CMR 1.26(c).
- (c) Factual Basis. At a motion hearing, a Party may offer only evidence relevant to the motion. The evidence may consist of facts presented orally by sworn testimony, by affidavit, or through records, files, depositions, answers to interrogatories, or requests for admission of fact.
- (2) Motion for a More Definite Statement. If a pleading to which a responsive pleading is required is so vague or ambiguous that a Party cannot reasonably be required to frame a response, the responding Party may, within the time permitted for the responsive pleading, move for a more definite statement before filing his responsive pleading. The motion shall set forth the defects complained of and the details desired. If the motion is granted, the more definite statement shall be filed within ten days after the Presiding Officer rules on the motion, or within such other time set by the Presiding Officer. If the more definite statement is not filed within the prescribed deadline, the Presiding Officer may dismiss the Adjudicatory Proceeding, strike the pleading to which the motion was directed, or make any other order he deems just.
- (3) Motion to Strike. Any Party, or the Presiding Officer on his own initiative, may move to strike from any pleading any insufficient allegation or defense, or any redundant, immaterial, impertinent, or scandalous matter.
- (4) Motion for Directed Verdict. Any Party may move for a directed verdict at the close of an opponent's evidence and may offer evidence in the event that the motion is not granted, without having reserved the right to do so to the same extent as if the motion had not been made. A Party may also move for a directed verdict at the close of all the evidence. A motion for a directed verdict shall state the grounds it is based upon. The Presiding Officer may act upon the motion when it is presented, or may wait until the close of all the evidence.
- (5) Motion to Dismiss for Failure to Prosecute or Comply with Orders. Any Party may move to dismiss for failure of another Party to prosecute or to comply with 360 CMR 1.00, or with any order of the Presiding Officer. When the record shows that the Party has failed to file Papers required by 360 CMR 1.00, or file a responsive pleading, or respond to notices or comply with any order, or if the record otherwise indicates an intention not to prosecute a claim or action, the Presiding Officer may issue an order requiring the Party to show cause why his claim or action should not be dismissed for failure to prosecute. If the Party fails to show cause, the claim or action may be dismissed with prejudice.

1.21: continued

(6) Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted. In place of filing an Answer, or otherwise, a Party may move that the Claim for Adjudicatory Proceeding or Order to Show Cause be dismissed for failure to state a claim upon which relief can be granted. In deciding whether to grant or deny a motion to dismiss, the Presiding Officer shall assume to be true all facts alleged in the Claim or Order, but not conclusions of law alleged therein. If, on a motion to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the Presiding Officer, the motion shall be treated as one for summary decision and disposed of as provided in 360 CMR 1.21(8), and all Parties shall be given reasonable opportunity to present all material made pertinent to such a motion by 360 CMR 1.21(8).

The Presiding Officer may treat a motion to dismiss for failure to state a claim upon which relief can be granted as a motion for more definite statement. If the Presiding Officer determines that a motion for more definite statement would be allowed and that the Claim or Order states a claim upon which relief can be granted, the motion to dismiss shall be denied, and the Presiding Officer shall order a more definite statement to be filed. If the Party ordered to file a more definite statement fails to do so within the time prescribed by the Presiding Officer, the Adjudicatory Proceeding shall be dismissed with prejudice. If a more definite statement is filed, the Presiding Officer shall read it, together with the Claim or Order, and shall order the Proceeding to go forward if the Claim or Order read together with the more definite statement can be answered and states a claim upon which relief can be granted. Otherwise, the Adjudicatory Proceeding shall be dismissed with prejudice.

If the Presiding Officer determines that a motion for more definite statement would not be allowed and that the Claim or Order fails to state a claim upon which relief can be granted, the motion to dismiss shall be granted and the Adjudicatory Proceeding shall be dismissed with prejudice.

(7) Motion for Decision on the Pleadings. After the pleadings are closed and within such time as not to delay the Adjudicatory Proceeding, any Party may move for a decision on the pleadings. If matters outside the pleadings are presented and not excluded by the Presiding Officer, the motion shall be treated as one for summary decision and all Parties shall be given reasonable opportunity to present all material made pertinent to such a motion by 360 CMR 1.21(8).

(8) 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 Proceeding.

(a) Contents of Motion. A motion for summary decision shall identify with particularity the issues on which summary decision is sought, and shall state whether a hearing is requested or the Party will allow the motion to be decided on the Papers filed in support and opposition. The motion shall be accompanied by a memorandum containing:

1. a statement of the issue or issues presented;
2. an argument in summary form; and
3. a short conclusion stating precisely the relief sought.

(b) Affidavits. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all Papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Presiding Officer may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, requests for admission of fact, or further affidavits.

When a motion for summary decision is made and supported as provided in this rule, a Party opposing the motion may not rest upon the mere allegations or denials of the Party's pleading, but must respond, by affidavits or as otherwise provided herein, setting forth specific facts showing that there is a genuine issue for hearing on the merits. If the Party does not so respond, summary decision, if appropriate, shall be entered against him.

## 1.21: continued

Should it appear from the affidavits of a Party opposing the motion that he or she cannot for reasons stated present by affidavit facts essential to justify his 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 discovery to be had or may make such other order as is just.

Should it appear to the satisfaction of the Presiding Officer at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the Presiding Officer shall order the Party filing the affidavits to pay the other Party the amount of the reasonable expenses which the filing of the affidavits caused him or her to incur, including reasonable attorney's fees.

(c) Decision on the Motion. The Presiding Officer shall enter summary decision for the moving party 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 decision in its favor as a matter of law. A summary decision, interlocutory in character, may be rendered on any issue although there is a genuine controversy as to other issues. When appropriate, summary decision may be rendered against the moving Party. A ruling on a motion for summary decision shall contain a statement of the reasons for the decision, including a determination of every issue of fact or law necessary to the ruling.

If on motion for summary decision a decision is not rendered upon the whole case or for all the relief asked and a hearing on the merits is necessary, the Presiding Officer, by examining the pleadings and evidence, and by interrogating counsel if there is a hearing on the motion, if practicable, shall ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The Presiding Officer shall thereupon make an order specifying the facts that appear without substantial controversy including the extent to which the amount of damages, costs, or penalties, or other relief is not in controversy, and directing further proceedings as are just. At the hearing on the merits, the facts so specified shall be deemed established and said hearing shall be conducted accordingly.

(9) Motion for Substitution of Parties. The Presiding Officer may, on motion, at any time in the course of an Adjudicatory Proceeding, permit such substitution of Parties as justice or convenience may require.

(10) Motion for Consolidation of Proceedings. Where there is more than one pending Adjudicatory Proceeding and these Proceedings involve common questions of law or fact any Party may move for consolidation of the Proceedings, and in making said motion shall identify with particularity the common questions of law or fact and the Presiding Officer may in his or her discretion consolidate the Proceedings.

(11) Motion to Amend or Supplement Pleadings. A party may move to amend or supplement a Claim for an Adjudicatory Proceeding, an Answer or any other pleading, such motion to amend shall be heard by the Presiding Officer, and amendments shall be granted when justice so requires.

1.22: Discovery

(1) Scope of Discovery. Unless otherwise provided by the Presiding Officer or 360 CMR 1.22, the scope of discovery shall be the same as that allowed under Massachusetts law and 360 CMR 1.22 shall be construed in accordance with Massachusetts law.

(a) General. Subject to the limits of 360 CMR(1)(b) and (c), discovery may be obtained as to any matter, not privileged, which is relevant to the subject matter involved in the Adjudicatory Proceeding, whether it relates to the claim or defense of the Party seeking discovery or to the claim or defense of any other Party, including the description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

## 1.22: continued

(b) Material Prepared in Anticipation of Adjudicatory Proceeding. Subject to the provisions of 360 CMR 1.22(c), a Party may obtain discovery of documents and tangible things otherwise discoverable under 360 CMR 1.22 and prepared in anticipation of or in preparation for an Adjudicatory Proceeding by or for another Party or by or for that other Party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the Party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Presiding Officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a Party concerning the subject matter of the Adjudicatory Proceeding.

A Party may obtain without the required showing a statement concerning the subject matter of the Proceeding which was previously made by that Party. Upon request, a person not a Party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for an order from the Presiding Officer. For purposes of 360 CMR 1.22(1)(b), a statement previously made is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(c) Experts Retained for Purposes of Adjudicatory Proceeding. Discovery of facts known and opinions held by experts, otherwise discoverable under 360 CMR 1.22(1)(a) and acquired or developed in anticipation of or in preparation for an Adjudicatory Proceeding may be obtained only as follows:

1. A Party may through interrogatories require any other Party to identify each person whom the other Party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
2. A Party may through interrogatories require any other Party to identify facts known or opinions held by an expert who has been retained or specially employed by another Party in anticipation of an Adjudicatory Proceeding or in preparation therefor and who is not expected to be called as a witness at the hearing, only upon a showing of exceptional circumstances under which it is impracticable for the Party seeking discovery to obtain facts or opinions on the same subject by other means. Unless manifest injustice would result, the Presiding Officer shall require the Party seeking the discovery to pay the expert a reasonable fee for time spent in responding to such discovery and may require the Party seeking discovery to pay the other Party a fair portion of its fees and expenses reasonably incurred by the latter party in obtaining the discovery responses of the expert.

(2) Methods of Discovery. Discovery may be obtained through requests for production of documents or other tangible things, depositions, interrogatories, and requests for admission of fact, as provided in 360 CMR 1.22(3) through (6). Discovery requests may be served by Hand Delivery, prepaid U.S. Mail or by Electronic Medium.

(3) Requests for Production of Documents or Other Tangible Things and Entry upon Land for Inspection and Other Purposes. Any Party may request any other Party to produce or make available for inspection or copying any documents or tangible things, not privileged, not previously supplied, and which are in the possession, custody, or control of the Party upon whom the request is made. Any Party may request any other Party to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of gathering information within the scope of 360 CMR 1.22.

(a) Procedure. The request may be served upon a Party after commencement of the action and shall set forth the items to be inspected by individual item or category with reasonable particularity. Where the request is directed to the Authority, inspection shall be made at the office of the Authority or such other place as the Authority shall designate. The Party upon whom request is served shall respond within 30 days, unless the Presiding Officer has established a shorter time period.

1.24: continued

3. Proof of Violations. Notwithstanding 360 CMR 1.24(5)(d)2., where the appeal concerns Authority action under 360 CMR 2.00, the Authority shall have the burden of going forward with and of proving the occurrence of any contested alleged violations. The proof may consist of facts known to the Authority at the time it took the action and facts that became known to the Authority after that date. Following presentation of the Authority's evidence, the Person appealing the action shall have the burden of presenting and of going forward with any defense to the Authority's allegations. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

4. Penalty Amount. In an appeal of a penalty assessment notice in which the amount of the penalty is at issue, after the Authority has met its burden of going forward as required by 360 CMR 1.24(5)(d)3., the Petitioner shall have the burden of going forward with and of proving facts to alter the amount of the penalty assessed in the penalty assessment notice. Following presentation of the Petitioner's evidence, the Authority may prove facts to support the amount of the penalty assessed in the penalty assessment notice or an alternative penalty amount. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

(6) Witnesses and Evidence.

(a) Witnesses. A witness' testimony shall be under oath or affirmation.

(b) Rules of Evidence. Unless otherwise provided by any law, the rules of evidence observed by courts need not be observed in these Adjudicatory Proceedings, but the rules of privilege recognized by law shall be observed. Evidence may be admitted and given probative effect if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. In a Proceeding involving Authority action taken under 360 CMR 2.00, the results of sampling and analysis of wastewater conducted according to required sampling and analysis procedures and contained in the official records of the Authority shall be admissible and such results shall be afforded a rebuttable presumption of validity. The weight to be given evidence presented will be within the discretion of the Presiding Officer.

(c) Offer of Proof. An offer of proof made in connection with an objection taken to a ruling of the Presiding Officer rejecting or excluding proffered testimony shall consist of a statement of the substance of the evidence which the Party contends would be adduced by such testimony; if the excluded evidence consists of evidence in documentary or written form or reference to documents or records, a copy of such evidence shall be marked for identification and shall constitute the offer of proof.

(d) Evidence Included. All evidence, including any records, investigative reports, documents and stipulations, which is to be relied upon in making a Decision must be offered and made a part of the record. Documentary evidence may be received in evidence in the form of copies, excerpts or incorporation by reference. The Presiding Officer may require any Party to submit additional evidence on any matter relevant to the Adjudicatory Proceeding.

(e) Administrative Notice. The Presiding Officer may take notice of any fact which may be judicially noticed by Massachusetts courts and, in addition may take notice of general, technical or scientific facts within the specialized knowledge of the Authority. The Presiding Officer shall notify the Parties of the facts so noticed and shall provide the Parties the opportunity to contest the facts. The Presiding Officer may utilize the experience, technical competence and specialized knowledge of the Authority in evaluating the evidence presented.

(f) Objections. A Party seeking to object to a ruling on evidence or procedure shall, at the time a ruling is sought, make a timely objection or motion to strike and shall state the grounds for the objection or motion. If a Party does not have the opportunity to object to the ruling at the time it is made, or to request a particular ruling at an appropriate time, the Party shall make his objection and state the grounds for it, within three days of being notified of the action taken or refused.

1.24: continued

- (g) Scope of Examination and Cross Examination. A Party may interrogate any unwilling or hostile witness by leading questions. A Party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate by leading questions and contradict and impeach him in all respects as if he had been called by the adverse Party, and the witness may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse Party only upon the subject matter of his examination in chief. Any other witness may be cross-examined without regard to the scope of his testimony, subject only to the Presiding Officer's discretion.
- (7) Briefs. At the close of the evidence, the Presiding Officer shall fix the terms for the filing briefs. The Presiding Officer may require the Parties to submit proposed findings of fact and conclusions of law, a proposed order, and supporting briefs.
- (8) Transcript of Proceeding.
- (a) Recordings and Transcripts. Testimony and argument at a hearing before the Presiding Officer shall be recorded either electronically or stenographically. If the Presiding Officer or any Party arranges for preparation of a hearing transcript, a copy of the transcript shall be supplied to each other Party upon request and the other Party shall pay the cost of the copy. Any Party, upon motion and at his own expense, may order a stenographer to transcribe the proceedings. In such event, a stenographic record shall be provided to the Presiding Officer at no expense to the Authority and upon such other terms as the Presiding Officer shall order.
- (b) Correction of Transcript. The official transcript may be corrected only to make it conform to the evidence presented at the hearing. Transcript corrections must be agreed to by all Parties and may be incorporated into the record only upon approval by the Presiding Officer. Such corrections shall be made during the hearing or as soon as practicable after the close of evidence, but not more than ten days after termination of the hearing or receipt of the transcript, unless the Presiding Officer orders otherwise. The Presiding Officer may call for the submission of proposed corrections and may rule on the corrections at appropriate times during the course of the Adjudicatory Proceeding.
- (9) Settling the Record.
- (a) Contents of Record. The record of an Adjudicatory Proceeding shall include all evidence, including any records, investigation reports, documents, and stipulations which any Party wishes to be considered by the Presiding Officer in making his decision. The record may include evidence that was the subject of an offer of proof. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. The record may also include pleadings, memoranda of law, responses to discovery requests, deposition transcripts, electronic tapes, printouts of electronically stored documents, exhibits, and other Papers or documents which the Presiding Officer has specifically designated a part of the record. The record shall be available for inspection by the Parties upon reasonable notice.
- (b) Evidence After Completion. Other than post-hearing briefs and memoranda, no evidence shall be entered into the record after the close of evidence, unless otherwise ordered by the Presiding Officer.
- (10) Reopening of Proceeding. On his own motion or on motion of any Party, the Presiding Officer may at any time before a Tentative or Final Decision is issued reopen the Proceeding for the purpose of receiving new evidence.
- (11) Motion for Reconsideration. Any Party may move for reconsideration of any decision by the Presiding Officer, including a Final Decision, by filing a motion setting forth specifically the grounds or statutory provision relied upon to sustain the motion. Such a motion shall be filed within ten days from the date a copy of the Final Decision is mailed.
- (12) Further Review. After the issuance of Final Decision, any Party who has the right to seek administrative or judicial review of the Decision may file with the appropriate administrative agency or court.

1.27: continued

(3) Settlement by Agreement of the Parties. The parties may agree to dispose of an Adjudicatory Proceeding at any time, by means of a Voluntary Dismissal pursuant to 360 CMR 1.27(2), or by a Settlement by Agreement of the Parties pursuant to 360 CMR 1.27(3). If at any time all Parties to the Adjudicatory Proceeding agree to dispose of the Proceeding by agreed settlement, the Parties shall proceed as follows:

(a) Proposed Agreement. The parties shall put such agreement in writing and submit it for approval as a Final Decision. Every Settlement by Agreement of the Parties shall include a provision that, if the Authority approves the agreement, the Parties waive whatever rights they have to:

1. judicial or administrative review of the Authority action or decision that is the subject of the Adjudicatory Proceeding;
2. rehearing, reargument, and reconsideration;
3. notice of the Parties' rights of appeal and of rehearing, reargument and reconsideration; and
4. a Tentative or Final Decision.

(b) Final Decision. If the Authority determines that the proposed agreement is in accordance with the Authority's responsibilities to protect the interests entrusted to it by law, the Authority shall issue a final decision approving the agreement. The final decision shall be signed by the Executive Director of the Authority. The final decision shall not be subject to the rule concerning tentative decisions. If the Authority determines that the proposed agreement is not in accordance with the Authority's responsibilities to protect the interests entrusted to it by law, the Authority shall refuse to approve the agreement, shall notify the Parties to that effect, and the Adjudicatory Proceeding shall go forward.

#### REGULATORY AUTHORITY

360 CMR 1.00: St. 1984, c. 372, §§ 6 and 8.