

MAINE STATE LEGISLATURE

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STATE OF MAINE

OFFICE
OF THE
SECRETARY OF STATE

MATTHEW DUNLAP
SECRETARY OF STATE

January 30, 2006

Honorable Elizabeth M. Schneider, Senate Chair
Honorable Christopher R. Barstow, House Chair
Members of the Joint Standing Committee on State and Local Government
2 State House Station
Augusta, Maine 04333-0002

Dear Senator Schneider, Representative Barstow and Members of the Joint Standing Committee on State and Local Government:

Pursuant to 5 M.R.S.A. Section 8056-A, the Secretary of State is hereby submitting its report on the progress of the Maine Administrative Procedure Act.

During the year 2005, there were 365 proposed rule filings and 544 adopted rule filings. This represents an increase of 25 proposed rules and a decrease of 63 adopted rules from 2004. There are fewer proposals than adoptions because of emergency adoption filings, most of which are Marine Resources closed areas. There were 29 major-substantive filings submitted to the Legislature during 2005. This is an increase of 12 filings over 2004. Additionally, during 2005, the cost of publishing the rule-making notices was \$413,434.29. This was an increase of \$30,067.26 from 2004. This amount was spread among the rule-making agencies *pro rata*. At the end of 2005 there were 1,939 current rule chapters on file with the Secretary of State. This is an increase of 48 from the rule chapters in effect at the end of 2004.

The Secretary of State solicited comments on the progress of the Maine Administrative Procedure Act by publishing a notice in five daily Maine newspapers and on the Internet. We received written comments from Jeff Austin of the Maine Municipal Association, and Kitty Purington of the Maine Association of Mental Health Services. Copies of these comments are attached.

Direct access to the full texts of Maine's rule chapters and regulatory agendas may be found on the Department's website at: www.maine.gov/sos/cec/rules.

If you have any questions regarding the Administrative Procedure Act, please contact Julie Flynn, Deputy Secretary of State at 624-7650.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Matthew Dunlap". A curved line extends from the end of the signature towards the right edge of the page.

Matthew Dunlap
Secretary of State

101 State House Station, Augusta, ME 04333. USA. Phone (207) 624-7650.

COVERS 2005

January 30, 2006

Honorable John E. Baldacci
Governor of Maine
1 State House Station
Augusta, Maine 04333

Dear Governor Baldacci:

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Sincerely yours,

Matthew Dunlap
Secretary of State

101 State House Station, Augusta, ME 04333. USA. Phone (207) 624-7650.

January 25, 2006

Don Wismer, APA Coordinator
Department of the Secretary of State
101 State House Station
Augusta, Maine 04333

Re: PROPOSED RULE NUMBER 2006-P0
SOS Annual Report on the Administrative Procedures Act

Dear Mr. Wismer,

Please accept these as the comments of the Maine Municipal Association (“MMA”) with respect to the Secretary of State’s 2005 Annual Report on the Administrative Procedures Act (“APA”).

1. Disclosure of Major Substantive

Current practice of state agencies is to not disclose in any of the public notices whether a particular rule is a “major substantive” rule pursuant to the APA.

As I read the form notices that are listed on the Secretary of State’s (“Secretary”) website, it appears that the only form document which requires disclosure of this fact is the “Rulemaking Cover Sheet.” The website indicates that the Cover Sheet is only required to be sent to the Secretary’s Office. Neither of the Public Notices (MAPA-3 or MAPA-4) require this information.

Furthermore, the Secretary’s listing of public notices does not list this information either.

Accordingly, the public is not informed as to the procedural status of these rules without inquiry. Some times a state agency is responsive and discloses this information, other times it is not without a formal, written inquiry as part of the process. This is important information which should be part of the routine public notice process. As noted below, a mere 3% of rules are major substantive, so it should not be too burdensome to add this line on to approximately 15-20 notices per year.

MMA requests that the Public Notice forms contain a declaration as to whether the rulemaking is major substantive. MMA also requests that the Secretary’s Notice of State Rule-Making publication include this information.

2. Calculation of “Fiscal Impact.”

Current law, 5 MRSA §8063, requires the agency conducting rulemaking to disclose any fiscal impact the proposed rule may have.

“Every rule proposed by an agency must contain a fiscal impact note at the end of the rule. The note must be placed on the rule prior to any public hearing and, in the case of rules adopted without a hearing, prior to the sending of notice under section 8053. The fiscal impact note must describe the estimated cost to municipalities and counties for implementing or complying with the proposed rule. If the proposed rule will not impose any cost on municipalities or counties, the fiscal impact note must state that fact.”

This obligation is either ignored or misunderstood by various state agencies. For example, the DEP is currently in the rulemaking process related to the operation of municipal transfer stations. The rule establishes for the first time an obligation for the municipality to draft, adopt and follow an inspection and handling plan for treated wood (Proposed DEP Chapter 402). The DEP fiscal statement indicates, “*the rule will not impose additional costs on municipalities.*”

Regardless of the merits of this proposal, establishing a new plan specifically designed to manage treated wood is going to cost the towns *something*.

MMA requests that the Secretary disclose any guidance document that exists to assist state agencies in calculating a fiscal impact statement. If none exists, MMA requests that the Secretary initiate rulemaking on this topic.

3. The Current Application of the Major Substantive Rulemaking Standard by the Legislature and State Agencies is unclear.

According to Secretary’s 2004 Annual Report the total number of rules adopted in 2003 and 2004 was 1,179. Of that number, a total of 34 were “major substantive,” less than 3%. An objective analysis of the statutory language defining “major substantive” compared to the 1,145 rules which were adopted as non-major substantive would be instructive on whether the policy underlying the APA has been embraced.

MMA encourages the Secretary of State to either conduct or support a study of the APA and whether the Legislative process has completely undermined the policy goal of the APA.

Conclusion

Thank you for allowing me to comment on these rules.

Yours,

Jeffrey Austin
Maine Municipal Association

From: Kitty Purington [mamhspa@gwi.net]
Sent: Thursday, January 26, 2006 5:06 PM
To: don.wismer@maine.gov
Cc: Ron Welch (E-mail); Kelly Sawyer (E-mail)
Subject: Comments on the APA process

I am writing to you regarding rule number 2006-PO, the request for comment on the Maine Administrative Procedures Act. The Maine Association of Mental Health Services represents 40 providers of mental health services across the state, and as such, we are very frequently involved in the rulemaking process, providing comment on MaineCare and other proposed regulation. Through this advocacy, we have found certain shortcomings in the process which serve to reduce communication and create more burdensome regulation. Accordingly, we offer the following observations and recommendations on the process:

1. Make rulemaking more participatory: Unless an agency, individual, or trade association has been working closely with regulators, proposed rules can often be the first opportunity for review and comment. A frustrating aspect of this is that, at least as is the case with DHHS, regulatory agencies cannot answer questions or have discussions regarding the proposed rule. This can be very inefficient, leading to unintended consequences that, had affected parties been able to have discussion prior to finalization, could probably have been avoided. The Association of Mental Health services recommends that in addition to public comment, agencies hold public question and answer hearings, with the results posted on agency websites prior to the end of the final comment period. I believe that this dialogue could be helpful in shaping better policy.
2. Cost Benefit Analysis of Regulation: Complying with regulations costs providers of mental health services, and Maine taxpayers, millions of dollars each year. There is very little disincentive for regulators to address this cost - the cost is typically shifted to providers and absorbed when possible into existing budgets, with no reflection of the actual cost of this mounting regulatory burden. There is no direct accountability anywhere in state government for determining how much the additional regulation is costing the provider of the service. The Association recommends that all new regulation be proposed with an analysis of the actual cost of compliance and the specific benefit expected, and all assumptions and data supporting this analysis.
3. Duplication: Related to the burden of compliance is that oftentimes proposed regulation conflicts, overlaps, or duplicates existing requirements found in licensing or other regulatory sources. The Association recommends that rulemaking should require a statement of due diligence from regulators that pertinent regulation, including licensing, has been reviewed for possible conflict, overlap, or duplication.
4. Response to Comments: It is unclear under the current APA process how regulators are expected to respond to comments, what weight, if any, needs to be given to multiple comment of similar issues, etc. The Association recommends that regulatory agencies should be required to not only explain its factual and policy basis, but to analyze each comment and note why it took into account or failed to take into account that comment.

I welcome any questions or the opportunity to provide you with further information. Thank you very much for your consideration of these comments.

Kitty Purington
Policy Analyst
Maine Association of Mental Health Services
1-207-623-6229
1-207-215-3711

Wismer, Don

From: Wismer, Don
Sent: Monday, January 30, 2006 4:08 PM
To: 'Kitty Purington'
Subject: RE: Comments on APA process

Ms. Purington:

Attached is the finalized Annual Report, which did include the two comments we received. The Report was printed on letterheads, signed, and delivered to the appropriate offices.

Best,

Don

Don Wismer, Ph.D.
APA Coordinator/Webmaster
Bureau of Corporations, Elections and Commissions
Department of Secretary of State
101 State House Station
Cross Office Building, 111 Sewall Street, 4th Floor
Augusta, Maine 04333

e-mail: don.wismer@maine.gov
phone: (207) 624-7647

-----Original Message-----

From: Kitty Purington [mailto:mamhspsa@gwi.net]
Sent: Thursday, January 26, 2006 5:06 PM
To: Wismer, Don
Cc: Ron Welch (E-mail); Kelly Sawyer (E-mail)
Subject: Comments on APA process

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Kitty Purington
Policy Analyst
Maine Association of Mental Health Services
1-207-623-6229
1-207-215-3711

Rule filings for the most recent decade

Note: The number of filings is not the same as the number of notices published, which we do not track. The reason is that there are many rule adoptions, primarily Marine Resources closed areas, which we do not publish (they are published locally by Marine Resources and not statewide).

Year	Cost	Increase	Decrease	# rule filings	Increase	Decrease	# rule chapters	Increase	Decrease
2006	\$451,256.15	\$37,821.86		889		20	1,924		15
2005	\$413,434.29	\$30,067.26		909		38	1,939	48	
2004	\$383,367.03	\$38,283.46		947	153		1,891	22	
2003	\$345,083.57	\$34,938.91		794		58	1,869		3
2002	\$310,144.66		\$17,712.78	852		14	1,872	31	
2001	\$327,857.44	\$37,283.08		866		3	1,841	8	
2000	\$290,574.36	\$30,126.80		869	28		1,833		3
1999	\$260,447.56	\$6,904.56		841	22		1,838	86	
1998	\$253,543.00	\$10,177.89		819	75		1,752		5
1997	\$243,365.11	\$22,886.28		744		98	1,757	55	

The general increase in cost is probably attributable to two factors: rising advertising rates at the newspapers; and an increasing sensitivity among the rule-making agencies regarding the detail needed in public notices.

-- Don Wismer
Secretary of State (Maine)
May 18, 2007