

MAINE STATE LEGISLATURE

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

January 8, 1981

Representative Bonnie Post
State House
Augusta, Maine 04333

Dear Representative Post:

You have addressed three inquiries to this office concerning a Department of Marine Resources regulation^{1/} and statement of policy^{2/} pertaining to the transshipment of illegal-size lobsters through the State of Maine pursuant to 12 M.R.S.A. § 6431(6).^{3/}

1. Are the regulation and "policy" of the Department consistent with the provisions of 12 M.R.S.A. § 6431?

^{1/} See copy of regulation attached as Appendix 1.

^{2/} See copy of policy statement attached as Appendix 2.

^{3/} 12 M.R.S.A. § 6431 provides in relevant part:

1. Minimum and maximum length. It shall be unlawful to buy, sell, give away, transport, ship or process any lobster which is less than 3 3/16 inches or more than 5 inches in length, as determined by the State double gauge lobster measure.

.....

6. Exception for wholesale dealer in certain instances; authority for regulations. This section shall not apply to lobsters reconsigned intact in the original crates by a holder of a wholesale seafood license to another license holder if the crates are sealed in accordance with regulations adopted by the commissioner. The commissioner may adopt or amend regulations to prescribe the time, manner and method of sealing crates for the effective operation of this subsection. The regulations may contain provisions for inspection of the crates, contents and seals.

2. Are the regulation and "policy" statement properly adopted under the Administrative Procedure Act, 5 M.R.S.A. c. 375?
3. If the answer to either of the two prior questions is negative, what is the legal status of this regulation or "policy?"

The issue addressed in your second question, the validity of the promulgation of the regulation and the policy statement under the Administrative Procedure Act, will be addressed first, as it is determinative of the issues addressed in your first and third questions.

The Maine Administrative Procedure Act, 5 M.R.S.A. § 8001 et seq., sets forth the requirements for valid adoption of an agency rule. 5 M.R.S.A. § 8002(9) defines a rule:

'Rule' means the whole or any part of every regulation, standard, code, statement of policy, or other agency statement of general applicability, including the amendment, suspension or repeal of any prior rule, that is or is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency, or describes the procedures or practices of the agency.
(emphasis added)

Thus, both the 1957 Department regulation and subsequently adopted statement of policy must be considered "rules" of the Department of Marine Resources, and therefore must comply with the promulgation requirements of the Administrative Procedure Act.

5 M.R.S.A. § 8057 sets forth the promulgation requirements for rules in effect prior to July 1, 1978:

Rules in effect prior to July 1, 1978 shall become void and of no legal effect on July 1, 1979, unless originally adopted after notice published in a newspaper of general circulation in some area of the State and opportunity for hearing or unless adopted in accordance with chapter 375, subchapter II.

Thus, in order for a rule promulgated prior to July 1, 1978 to be valid, 5 M.R.S.A. § 8057 requires that the original promulgation procedure must have included newspaper notice and an opportunity for hearing.

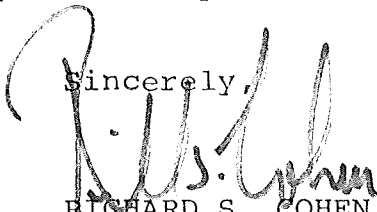
Representative Bonnie Post
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Our research indicates that these promulgation requirements were not satisfied with respect to either the regulation or the statement of policy in issue. The Department of Marine Resources has no record of newspaper notice or opportunity for hearing in connection with either the 1957 regulation or the statement of policy. Department officials have advised this office that there was never an opportunity for hearing or newspaper notice concerning the statement of policy. With respect to the regulation, Department officials are uncertain as to whether there was a hearing or newspaper notice. A search of the May 1957 issues of the Bangor Daily News, Portland Press Herald and Kennebec Journal has not produced any evidence of notice and hearing in connection with the 1957 regulation. In the absence of evidence to the contrary, we are constrained to conclude that there was no newspaper notice or opportunity for hearing provided in the promulgation of the 1957 regulation. Therefore in answer to your second question, we must conclude that neither the 1957 regulation nor the statement of policy were properly adopted under the Administrative Procedure Act.

This conclusion provides the answer to your third question. Whatever validity the regulation and policy may have had prior to July 1, 1979, both the regulation and policy were void and of no legal effect as of July 1, 1979, as required by 5 M.R.S.A. § 8057 in cases of noncompliance with promulgation requirements. This determination of invalidity obviates the need for a response to your first question.

If you have any questions, please do not hesitate to ask our assistance.

Sincerely,



RICHARD S. COHEN
Attorney General

RSC:mfe

STATE OF MAINE
DEPARTMENT OF SEA AND SHORE FISHERIESPUBLIC NOTICE

Acting in accordance with the provisions of section 18, Chapter 38 of the Revised Statutes as revised, the following regulations are prescribed to become effective May 22, 1957.

REGULATIONS

The laws of the state of Maine regulating minimum and maximum sizes of lobsters will not apply to lobsters from any other state, country or territory that are passing through the state of Maine consigned to another state, country or territory provided they are packed, labeled and sealed in accordance with the following specifications:

1. Lobsters shall be packed in standard wooden lobster crates.
2. Each crate shall be labeled with name and address of consignor and consignee and shall be marked "LARGE LOBSTERS" or "SMALL LOBSTERS," as the case may be.
3. Each crate shall be sealed by the consignor with a metal self-locking seal procured from the Commissioner of Sea and Shore Fisheries, State House, Augusta, Maine, at the price of one cent each.

The seal shall bear the marks ME SSF CHAP 38 and a serial number. The seal shall be attached to the crate through a hole $\frac{1}{2}$ inch in diameter bored in the center of front slat of cover, 1 inch from the front edge of said slat and a hole of like diameter bored in center of upper front slat of crate, 1 inch from the upper edge of said slat.
4. Whenever lobster crates sealed in accordance with these regulations are opened by a United States Customs Inspector, they may be resealed immediately by a coastal warden at the point where they were thus opened but not otherwise.

Dated at Augusta, Maine this twenty-second day of May,
A. D., 1957.

Ronald W. Green

RONALD W. GREEN
Commissioner of Sea and Shore Fisheries

All wholesale seafood dealers, who shall buy or receive lobsters from any other state, country, or territory, and shall notify their respective local Coastal Warden or Coastal Warden Supervisor of date of entry, port of entry, and for each load and date shall produce a copy of Federal manifest or some other Federal document, may unload said lobsters at his regular place of business in this State. After released to do so by the above mentioned Warden or Supervisor, he may cull said lobsters and keep in his holding tanks or pound only those lobsters which are of legal size in this State. Any other lobsters may be sealed in accordance with regulations as prescribed by the Commissioner under Public Notice dated at Augusta, Maine, the twenty-second day of May, A. D., 1957. Any lobsters found in any place of business which are not culled, handled and sealed as prescribed above and are of illegal size shall be a violation of State statutes and owner or possessor subject to prosecution.

Under this policy and for purposes of inspection, representatives of the Department of Sea and Shore Fisheries shall have at all times free and unobstructed access to any area on board any vessel or transport vehicle, or shore facility where lobsters are landed, handled, stored or processed.

The said sealed crates of lobsters may be reshipped to any place outside this State as long as they remain sealed and in original crate.

I hereby prescribe to the above policy as outlined and agree to its content and understand that any deviation from it would terminate it in its entirety.