

MAINE STATE LEGISLATURE

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

January 8, 1981

Glenn H. Manuel, Commissioner
Inland Fisheries and Wildlife Department
284 State Street
Augusta, Maine 04330

Dear Commissioner Manuel:

This is to confirm our discussion of earlier today in which I indicated that the Attorney General's Office could not approve your Department's proposed regulation Chapter 4, Section 4.01(G), entitled "Season on Furbearing Animals." My decision to withhold approval is predicated on the fact that at the time of the public notice and at the time of the hearings the Department had not formulated the text of a proposed rule which could be reviewed by the public.

The legal question at issue here is whether, at the time an administrative agency gives notice of its intent to adopt a rule, there must be an actual text of the proposed rule which is either included in the notice or otherwise accessible to the public. The relevant statute is 5 M.R.S.A., Section 8053 (2)(D) which requires that the notice shall:

D. If possible, contain the express terms of the proposed rule or, otherwise, describe the substance of the proposed rule, stating the subjects and issues involved and indicate where a copy of the proposed rule may be obtained.

In light of the maxim that statutory language should be given its plain meaning, see Central Maine Power Company v. Public Utilities Commission, 405 A.2d 153, 159 (Me. 1979), we believe that the above provision must be read as reflecting a legislative design that the text of the proposed rule actually be in existence when the notice of rulemaking is given. The absence of any case law or legislative history to the contrary makes even more compelling the need to rely on the clear wording

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of the statute.

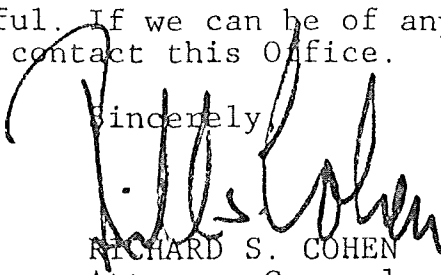
I would emphasize that our conclusion should not be read as suggesting that the procedure utilized by the Department was in any way prompted by improper motives. I understand that when the Department gave notice, it was uncertain as to precisely what the rule should provide, and thus, it determined that even a tentative formulation of the rule should be deferred until after it had the opportunity to receive public comments. However well motivated and reasonable this approval was, it ran afoul of the absolute requirement established by the Legislature that there be a proposed rule at the time the rulemaking process is formally commenced.

I should also note that my Office bears a major responsibility for the Department's procedural error. Prior to giving notice, you were orally advised by a member of my staff that it was not necessary to have the text of a proposed rule. With the benefit of further research and analysis, I now believe that this advice was erroneous, and thus, I must reverse our earlier advice. While I regret the inconvenience which our change of position is likely to cause you, I am certain you will agree that in the final analysis, it is of paramount importance that the Department's actions be legally correct.

Given our conclusion, then, we would recommend that if the Department still wishes to adopt rules establishing seasons for furbearing animals, it should commence the rule-making process again and should include in the notice either the text of the proposed rule or information indicating where a copy may be obtained.

I hope this information is helpful. If we can be of any further service, please feel free to contact this Office.

Sincerely,



RICHARD S. COHEN
Attorney General

RSC:ks