STATE OF MAINE

81-79

Inter-Departmental Memorandum Date October 1, 1981

To J. William Peppard, Deputy Commissioner Dept. Inland Fisheries and Wildlife

From Cabanne Howard, Senior Assistant Dept. Attorney General

Subject Administrative Procedure Act Questions

This is in response to three questions which remained unanswered from our meeting with various members of your Department on September 11, 1981, with regard to the implementation of various amendments to the Maine Administrative Procedure Act which were made by the Legislature at its 1981 Regular Session.

I. Attendance of Advisory Council Members at Rule-Making Hearings.

The first question concerned the amendment to the APA which provides that when a public hearing is held in a rule-making proceeding, it must be presided over, in the case of a single agency member, by the agency member himself, or a person in a major policy influencing position as defined by 5 M.R.S.A. § 711 (which, in the case of the Department of Inland Fisheries and Wildlife means the Deputy Commissioner); or, in the case of a multi-member agency, such a hearing must be presided over by at least one-third of the agency members. 5 M.R.S.A. § 8052(2). The question posed was whether the Advisory Council of the Department of Inland Fisheries and Wildlife was encompassed by this provision such as to require one-third of its members to be present at all rule-making hearings conducted by the Commissioner or the Deputy Commissioner. In my opinion, the APA does not require such attendance on the part of the members of the Council. The evident purpose of the amendment in question was to insure that the person or persons actually making rule-making decisions should personally hear the testimony of the public regarding proposed rules before their adoption. That purpose is clearly served by the requirement that the Commissioner or his Deputy conduct all rule-making hearings. Rather than being regarded as part of the agency for purposes of the APA, the Advisory Council is better viewed as simply another check upon the Commissioner's discretion, which leads to the conclusion that the Legislature would not have intended for it to be present at any hearing. As constituted by statute, the Advisory Council consists of eight members, each representing one of the wildlife management units established by the Commissioner. This territorial distribution of the membership of the Council is clearly intended to provide a cross-section of public sentiment which is to be brought to bear on the adoption of rules by the Commissioner. The Council, therefore, cannot be regarded as part of the agency for purposes of the APA; rather, it is an alternative means by which the Legislature has sought to insure that the rule-making decisions of the Commissioner are informed by public opinion.

II. Adoption of Rules Outside of the 120-Day Period.

The next question left unanswered at our meeting concerns the amendment to the APA which requires that an agency "act to adopt proposed rules within 120 days of the final date [on which the record is closed]." 5 M.R.S.A. § 8052(7). The question concerns the procedure which has recently been employed in the adoption of fishing rules, both for open water and for ice fishing. Because of the number of changes which are annually made in these rules, it was determined shortly after the passage of the original APA that the Secretary of State would accept the annual booklets published by the Department for open water and ice fishing as the rules of the Department, rather than requiring individually-typed rules to be filed with him. As a result, the Department has been in the practice of conducting hearings throughout the year with regard to changes in the fishing rules, but waiting until the publication of the respective booklets before filing the new rules with the Secretary of State. This means that in some cases there may be a gap of greater than 120 days between the closing of the record (regardless of whether a hearing has been held or not) and the adoption of the rule. It was suggested at the September 11 meeting that perhaps the agency could adopt the rule within the 120 day period but simply not file it with the Secretary of State until later so as to avoid this problem. The question posed was whether this would be acceptable under the APA.

After some consideration, it is my view that such a procedure would violate the intention of the Legislature in enacting this amendment to the APA. The purpose of the amendment is to ensure that the agencies act within a specified period of time after they have solicited public comment, so as to ensure that rules which they adopt are informed by reasonably current public opinion. To attempt to adopt a rule but delay its effectiveness until sometime later would appear to circumvent this policy. Consequently, I cannot advise you that such a procedure would not violate the APA.

It would appear, however, that it may be possible to resolve the practical difficulty with which the Department is faced administratively with the Secretary of State. My suggestion would be that, since the text of a proposed rule change would obviously be in existence following the closure of the record, it would be a

relatively simple matter for the Department to send a copy of such an amendment, along with a cover sheet and a basis statement, to the Secretary of State immediately. It might also be possible, at the time of the publishing of the Department's annual booklets, to submit those also to the Secretary of State in substitution for all of the amendments which have been previously adopted during the year. The Secretary of State could then destroy the individual amendments and retain the booklet as the complete set of current rules, after which the Department could send the booklets to the respective Clerks of Court so that they might be used in all judicial proceedings taking place in the Courts. I recognize that such a procedure would still require the preparation of each individual rule, which is an increase in work over what has been taking place recently, but, in view of the expanded requirements for a basis statement, it may be that such additional effort is now required anyway.

III. Legal Effect of Executive Order No. 11.

A final question into which inquiry was made at the September 11 meeting was the significance of Executive Order No. 11, which has recently been issued by the Governor, and which adds various additional requirements as to the content of basis statements which must be appended to each new rule. The question raised was simply whether this Executive Order is of any legal effect. After consultation with other members of my office, it is my view that the Order is of no legal effect. Rather, it is simply a directive from the Governor of the State to his subordinates that in discharging their rule-making powers under State law, they should undertake certain additional steps. The consequence of their failure to take such steps, however, is not that the rules in question become invalid, as would be the case if the officers in question failed to follow the requirements of the Administrative Procedure Act, but rather that the officers would be subject to whatever internal discipline the Governor would choose to impose upon them. Consequently, in reviewing the rules presented to it pursuant to 5 M.R.S.A. § 8056(1) for approval as to form and legality, the Attorney General's Office does not intend to review such rules for compliance with Executive Order No. 11, nor do we anticipate that the Courts of the State would invalidate any rule for such noncompliance.

I hope this satisfactorily answers your questions. Please feel free to reinquire if further clarification is necessary.
/d

bc: Steve Diamond