

MAINE STATE LEGISLATURE

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(New Title)
New Draft of H. P. 1287, L. D. 1502
FIRST REGULAR SESSION

ONE HUNDRED AND TENTH LEGISLATURE

Legislative Document

No. 1657

H. P. 1542

House of Representatives, May 26, 1981

Reported by Representative Kany from the Committee on State Government. Printed under Joint Rules No. 2.

EDWIN H. PERT, Clerk

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED AND EIGHTY-ONE

AN ACT to Amend the Rule-making and Review Process of the Maine Administrative Procedure Act.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. 5 MRSA § 8052, sub-§ 2, as enacted by PL 1977, c. 551, § 3, is amended by adding at the end a new sentence to read:

Any public hearing shall be held and conducted as follows.

Sec. 2. 5 MRSA § 8052, sub-§ 2, ¶¶ A and B are enacted to read:

A. In the case of a rule authorized to be adopted by more than one agency member, at least 1/3 of the agency members shall be present.

B. In the case of a rule authorized to be adopted by a single agency member, either the agency member or a person in a major policy-influencing position, as listed in section 711, who has a policy-making responsibility over the subject matter to be discussed at the hearing, shall hold and conduct the hearing.

Sec. 3. 5 MRSA § 8052, sub-§ 4, as enacted by PL 1977, c. 551, § 3, is amended to read:

4. Relevant information considered. The agency shall consider all relevant information available to it, including ~~public comments~~ **statements and arguments filed**, before adopting any rule.

Sec. 4. 5 MRSA § 8052, sub-§ 5, as enacted by PL 1977, c. 551, § 3, is amended by adding at the end a new sentence to read:

The agency shall specifically address representative comments and state its rationale for adopting or failing to adopt suggested changes.

Sec. 5. 5 MRSA § 8052, sub-§ 6, as enacted by PL 1979, c. 425, § 4, is amended to read:

6. Effective date. No rule, except emergency rules adopted under section 8054, shall may become effective until at least 5 days after filing with the Secretary of State under section 8056, subsection 1, paragraph B.

Sec. 6. 5 MRSA § 8052, sub-§ 7 is enacted to read:

7. Adoption of rule. The agency shall, in adopting rules, be consistent with the terms of the proposed rule, except to the extent it determines necessary to address concerns raised in comments and makes specific findings supporting such changes. The agency shall act to adopt proposed rules within 120 days of the final date by which data, views or arguments may be submitted to the agency for consideration in adopting the rules, or otherwise shall reinitiate public notice.

Sec. 7. 5 MRSA § 8053, sub-§ 1, last ¶, as enacted by PL 1979, c. 425, § 5, is amended by adding at the end a new paragraph to read:

Subscribers under paragraph B may request to receive a copy of each proposed rule with the written notice. The agency shall provide the copy at the same time the notice is sent.

Sec. 8. 5 MRSA § 8053, sub-§ 3-A is enacted to read:

3-A. Copies of proposed rules available upon request. At least 20 days prior to hearing on any proposed rule and at least 20 days prior to the adoption of any rule without a hearing, the agency shall make copies of the proposed rule available to persons upon request.

Sec. 9. 5 MRSA § 8053, sub-§ 4, as enacted by PL 1979, c. 425, § 5, is amended to read:

4. Fee schedule. The agency may establish a fee schedule for notice and for proposed rules under subsection 1, paragraph B, imposing a cost reasonably related to the actual expense entailed.

Sec. 10. 5 MRSA § 8053, sub-§ 5, ¶ A, 2nd and 3rd sentences, as amended by PL 1979, c. 596, § 2, are further amended to read:

Notice of each rule-making proceeding shall be published ~~twice, at least 14 days apart once~~. The 2nd notice shall be published at least ~~3 and not more than 10~~ 14 days prior to the public hearing on the proposed rule or the same period prior to the last date on which data, views and arguments may be submitted to the agency for consideration if no public hearing is scheduled;

Sec. 11. 5 MRSA § 8056, sub-§ 1, ¶¶ B and C, as enacted by PL 1977, c. 551, § 3, are amended to read:

B. File a certified copy of the rule with the Secretary of State in a form prescribed by the Secretary of State, which form shall be susceptible to frequent and easy revision; ~~and~~

C. Supply, without cost or at actual cost, copies of each such rule to any person who has filed with the agency within the past year a written request to be supplied with all copies of the agency's rules; and

Sec. 12. 5 MRSA § 8056, sub-§ 1, ¶ D is enacted to read:

D. Publish, pursuant to the procedures set forth in section 8053, subsection 5, a notice containing the following information: A statement that the rule has been adopted, its effective date, a brief description of the substance of the rule, and the address where a copy may be obtained.

Sec. 13. 5 MRSA § 8056, sub-§ 6 is enacted to read:

6. Attorney General review. The review required in subsection 1 shall not be performed by any person involved in the formulation or drafting of the proposed rule.

Sec. 14. 5 MRSA c. 377, as enacted by PL 1977, c. 683, § 4, is repealed.

Sec. 15. 5 MRSA c. 377-A is enacted to read:

CHAPTER 377-A

LEGISLATIVE REVIEW OF AGENCY RULES

§ 11111. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Agency, person and rule. "Agency," "person" and "rule" are defined in section 8002, except that "rule" also means a proposed rule.

2. Committee. "Committee" means a joint standing committee of the Legislature.

3. Director. "Director" means the Legislative Administrative Director.

§ 11112. Application for review

Any group of 100 or more registered voters, who have a substantial interest in a rule, or any person who may be directly, substantially and adversely affected by the application of a rule, may file an application for review with the Legislative Administrative Director. The applicant shall state with specificity on a form prepared by the director, the following:

1. Name of agency; citation of rule. The name of the agency and the citation of the rule, including section and paragraph if applicable;

2. **Affect on applicant.** A statement of how the rule may directly, substantially and adversely affect the operations or interests of the applicant, or the nature and extent of the applicant's interest in the rule;

3. **Statement.** A statement of why the rule, in the opinion of the applicant, is appropriate or unnecessary; and

4. **Recommendation.** A recommendation proposing changes in the rule or the statute which the rule implements.

§ 11113. Committee review

The Legislative Administrative Director shall, upon receipt of an application for review, determine the appropriate joint standing committee of the Legislature responsible for review of the rule in question and send the application and a copy of the rule in question to each member of the committee. Each member of the committee shall individually review the application to determine whether the applicant is qualified and whether the public interest would be served by a review of the rule in question by the full committee. If a committee member decides that the review should be made, he shall notify the director within 15 days after notice was sent. If 1/3 or more of the full committee notify the director that a review of the rule should be made, the director shall advise the chairman of the committee, who shall schedule a meeting of the committee to review the rule. If the committee votes not to review the rule, a report to that effect shall be prepared by the director and sent to the applicant and the Legislative Council.

The applicant and the affected agency shall be notified of a decision to review the rule and shall be permitted to make expanded statements of their position to the full committee. The committee, in the course of its review, may hold a public hearing, request and obtain opinions of the Attorney General, obtain information from the agency and conduct further investigation approved by the Legislative Council. The committee shall make its determination and report within 90 days of the first notification to the committee chairmen that a review shall be made.

§ 11114. Criteria for review

When reviewing a rule under this chapter, the committee shall consider, in addition to any matters proposed by the applicant, the following:

1. **Consistency with legislation.** Whether the rule is consistent with and necessary to the intent of the statute which the rule implements;

2. **Reasonableness of effects.** Whether the effects of the rule are reasonable, including its benefits and costs, and including costs of compliance and administration;

3. **Circumstances.** Whether circumstances have changed since the passage of the statute which the rule implements;

4. **Abuse of discretionary powers.** Whether the rule may tend to promote abuse of discretionary powers of the agency; and

5. Fee. Whether any fee established by rule is reasonable and whether the sums collected relate to the costs of administration.

§ 11115. Committee recommendation

If the committee determines that any of the criteria for review have not been met, it may discuss their findings with the agency. No agency may, on the basis of these discussions or any subsequent report of the committee, terminate a rule that is required by law. If the committee determines that the rule in question is inappropriate or unnecessary, it shall notify the applicant of its decision and may direct the Office of Legislative Assistants to draft legislation to amend the law to provide that the authority of the agency to adopt the rule is clarified, modified or limited. Only by a majority vote of the committee shall legislation be introduced to amend or enact legislation pursuant to this section. No legislation may be introduced to implement a decision of a minority of the committee.

After approval of the draft legislation, it shall be submitted according to the legislative rules for final preparation and introduction to the Legislature, if the Legislature is in session, or if not, to the next regular session of the Legislature.

If the committee determines that no legislative action is required it shall prepare a brief report of its findings and transmit it to the applicant, agency and Legislative Council.

§ 11116. Limitation

1. Debt obligations. A joint standing committee may not review an agency rule which is part of official action towards issuance or securing repayment of bonds, notes or other debt obligations of the State, its instrumentalities or political subdivisions.

2. Review on committee's own motion. This chapter shall not limit a committee from reviewing a rule on its own motion.

3. Failure to review. The failure of a committee to review a rule or to recommend modification or termination is not an implied legislative authorization of its substantive or procedural lawfulness and shall not be considered for any purpose in a judicial proceeding. No legislative review of a rule may supersede the judicial review granted in section 8058 or 11001.

Sec. 16. 38 MRSA § 345, sub-§ 1, as enacted by PL 1977, c. 300, § 9, is amended to read:

1. Hearings. Except as provided in section 347 and the Maine Administrative Procedure Act, Title 5, chapter 375, whenever the board or Department of Environmental Protection is required or empowered to conduct a hearing pursuant to any provision of law, such hearing may be held and conducted by any member of the board or any employee or representative of the Department of Environmental Protection so authorized by the board.

Sec. 17. Appropriation. The following funds are appropriated from the General Fund to carry out the purposes of this Act.

	1981-82	1982-83
FINANCE AND ADMINISTRATION, DEPARTMENT OF		
Unallocated	\$ 7,500	\$10,000
	<hr/>	<hr/>
Total	\$ 7,500	\$10,000

These funds shall be used to reimburse state departments and agencies to cover additional costs relating to the additional requirements imposed by this bill under amendments to Title 5, section 8052, subsection 2, paragraphs A and B.

LEGISLATURE

Positions	(2)	(2)
Personal Services	\$26,600	\$40,000
Capital Expenditures	1,500	
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Total	\$28,100	\$40,000

These funds permit readjustment in committee assignment by legislative assistants to accommodate the increased workload.

Sec. 18. Effective date. This Act is effective 91 days after the adjournment of the Legislature.

STATEMENT OF FACT

This new draft has the following provisions:

1. It requires that rule-making hearings be conducted as follows:

A. In the case of an agency headed by more than one agency member, at least 1/3 of the agency members shall be present. This would apply to the rule-making powers of a board such as the Board of Environmental Protection; and

B. In the case of an agency headed by a single agency member, the meeting

shall be held and conducted by the agency member or a person in a major policy-influencing position as listed in Title 5, section 711. This would mean, for example, that either the Commissioner of Finance and Administration or the Director of Public Improvements could hold and conduct a rule-making hearing for a proposed rule under authority of that bureau, but another employee of that bureau could not. (Sections 1 and 2 of the bill.)

2. It requires that an agency, in adopting a rule:

A. Consider statements and arguments filed;

B. Specifically address representative comments and state its rationale for adopting or failing to adopt suggested changes in its written statement explaining the basis for a rule;

C. Be consistent with the terms of the proposed rule, except to address concerns raised in comments; and

D. Observe a deadline for adopting. (Section 3 of the bill.)

3. It permits a subscriber to receive a copy of proposed rules with the written notice and permits the agency to charge for the copy. (Sections 4 and 5 of the bill.)

4. It requires the notice of rulemaking to be given once, at least 14 days prior to the public hearing, on the date by which comments may be submitted to the agency if no hearing is held. (Section 6 of the bill.)

5. It requires copies of proposed rules to be available to the public. (Section 7 of the bill.)

6. It requires publication of a notice that a rule has been adopted. (Sections 8 to 10 of the bill.)

7. It prohibits any employee of the Attorney General who helped formulate or draft the rule from passing on the rule's legality as is required by the Maine Administrative Procedure Act Title 5, chapter 375. (Section 11 of the bill.)

8. It repeals the law requiring legislative review of rules and substitutes a new law. It provides that joint standing committees of the Legislature shall review agency rules, upon application of 100 or more substantially interested registered voters or any persons directly, substantially or adversely affected. A 1/3 affirmative vote, 100 or more, of the committee is necessary for a review to be undertaken. Review of existing or proposed rules is permitted and the committee must report within 90 days of notice that the review is to be made.