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DATE: 6/22/95

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MINORITY
STATE AND LOCAL GOVERNMENT

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STATE OF MAINE
HOUSE OF REPRESENTATIVES
117TH LEGISLATURE
FIRST REGULAR SESSION

COMMITTEE AMENDMENT "B" to H.P. 806, L.D. 1123, Bill, "An Act to Ensure That Rulemaking by Agencies Does Not Exceed the Intent of Authorizing Legislation"

Amend the bill by striking out everything after the enacting clause and before the statement of fact and inserting in its place the following:

'Sec. 1. 5 MRSA §8057-A, sub-§1, as enacted by PL 1989, c. 574, §7, is amended to read:

1. Preparation of rules. At the time that an agency is preparing a rule, the agency shall consider the goals and objectives for which the rule is being proposed, possible alternatives to achieve the goals and objectives and the estimated impact of the rule. The agency's estimation of the impact of the rule shall must be based on the information available to the agency and any analyses conducted by the agency or at the request of the agency. The agency Secretary of State shall establish a single form or fact sheet that provides the citation of the statutory authority of the rule for use by agencies in notifying the Secretary of State of proposed rulemaking under section 8053, subsection 1 and in providing rule-making information to the Legislature under section 8053-A, subsection 1. In addition, the agency, to the best of its ability, shall also include in the to other information required by law, the form or fact sheet must include the following:

A. The principal reasons for the rule;

A-1. Identification of the type of rulemaking proposed, including adoption of a new rule or amendment or repeal of an existing rule;

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2 B. A comprehensive but concise description of the rule that accurately reflects the purpose and operation of the rule;

4 C. An estimate of the fiscal impact of the rule, including
6 an indication of whether the rule will increase costs of
8 local units of government, the segment of the public regulated or affected by the rule and whether the level of fees or license charges of the agency are increased; and

10 D. An analysis of the rule, including a description of how
12 the agency considers whether the rule would impose an economic burden on small business as described in section 8052, subsection 5-A;

14 E. An indication of whether the rule is necessary to comply
16 with federal requirements and whether the rule exceeds the federal requirements; and

18 F. An indication of whether the rule was identified on the
20 agency's current regulatory agenda as provided in section 8060.

22 Sec. 2. 5 MRSA §8057-A, sub-§1-A is enacted to read:

24 1-A. Negotiated rulemaking following receipt of a
26 rule-making petition. If, following receipt of a citizen's
28 petition for rulemaking under section 8055, an agency determines
30 negotiated rulemaking is appropriate under the criteria in
32 subsection 1, it must notify the petitioner or petitioners and
34 commence negotiated rulemaking as provided in section 8055 for
regular rulemaking. If an agency commences negotiated rulemaking
in response to a rule-making petition, the petitioner or a
representative of the petitioner must be a member of the
rule-making committee under section 8501.

36 Sec. 3. 5 MRSA §8060, sub-§1, as enacted by PL 1989, c. 547,
38 §8, is amended to read:

40 1. Contents of agenda. Each agency regulatory agenda to
42 the maximum possible extent shall must contain the following
44 information:

46 A. A list of rules that the agency expects to propose prior
48 to the next regulatory agenda due date;

50 A-1. Identification of rules on the list provided in
paragraph A, the drafting of which requires the exercise of
significant agency discretion or interpretation of the
authorizing legislation or, because of their subject matter
or anticipated impact, are reasonably expected to result in

2 a significant increase in the cost of doing business, a
4 significant reduction in property values, the loss or
6 significant reduction of government benefits or services,
8 the imposition of state mandates on units of local
10 government as defined in the Constitution of Maine, Article
12 IX, Section 21 or other serious burdens on the public or
14 units of local government;

16 A-2. Identification of rules on the list provided in
18 paragraph A that are appropriate for application of the
20 negotiated rule-making provisions of subchapter II-A;

- 22 B. The statutory or other basis for adoption of the rule;
- 24 C. The purpose of the rule;
- 26 D. The contemplated schedule for adoption of the rule;
- 28 E. An identification and listing of potentially benefited and regulated parties; and
- 30 F. A list of all emergency rules adopted since the previous regulatory agenda due date.

32 **Sec. 4. 5 MRSA §8060, sub-§2,** as amended by PL 1993, c. 362,
34 §7, is further amended to read:

36 **2. Due date.** ~~A regulatory agenda must be issued between~~
38 ~~the beginning of a regular legislative session and~~ 100 days after
40 ~~adjournment of a regular session and the beginning of the next~~
42 ~~regular session.~~
44 regular session.

46 **Sec. 5. 5 MRSA §8060, sub-§§ 4 and 5,** as enacted by PL 1989, c.
48 547, §8, are amended to read:

50 **4. Availability.** An agency which that issues an agency
regulatory agenda shall provide copies to interested persons.

5. Legislative review of agency regulatory agendas. Each
regulatory agenda shall must be reviewed by the appropriate joint
standing committee of the Legislature at a meeting called for the
purpose. The committee may review more than one agenda at a
meeting. Annually by January 15, each agency shall contact the
appropriate joint standing committee or committees to schedule a
meeting under this subsection.

Sec. 6. 5 MRSA c. 375, sub-c. II-A is enacted to read:

SUBCHAPTER II-A

NEGOTIATED RULEMAKING

2 **§8501. Determination of need for negotiated**
4 **rule-making committee**

6 1. Determination of need by the agency. An agency may
8 establish a negotiated rule-making committee to negotiate and
10 develop a proposed rule if the head of the agency determines that
12 the use of the negotiated rule-making procedure is in the public
14 interest. In making that determination, the head of the agency
16 shall consider whether:

18 A. There is a need for a rule;

20 B. There are identifiable interests that will be
22 significantly affected by, or will be significantly
24 interested in, the rule;

26 C. A committee can be convened with a balanced
28 representation of persons who:

30 (1) Can adequately represent the interests identified
32 under paragraph B; and

34 (2) Are willing to negotiate in good faith to reach a
36 consensus on the proposed rule;

38 D. There is a reasonable likelihood that the committee will
40 reach a consensus on a proposed rule within a fixed period
42 of time;

44 E. The negotiated rule-making procedure will advance the
46 proposed rule-making proceeding and the issuance of the
48 final rule;

50 F. The agency has adequate resources and is willing to
commit those resources, including technical assistance as
needed, to the committee; and the issues confronting the
agency in rulemaking are of a nature that justify committing
those resources; and

G. The agency will consider the consensus of the committee
as the basis for the rule proposed by the agency pursuant to
section 8052.

2 **§8502. Publication of notice; applications for membership**
4 **on committee**

6 1. Publication of notice. If an agency decides to
8 establish a negotiated rule-making committee, the agency shall
10 publish notice of the intended negotiated rulemaking.

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A. Notice to the public must be given:

- (1) By publication at least twice in a newspaper of general circulation in the affected area of the State;
- (2) By mailing to, or publication in, any trade, industry, professional, interest group or regional publication that the agency determines effective in reaching the persons who may have an interest in the rulemaking;
- (3) To any person who has filed within the past year a written request with the agency for notice of rulemaking;
- (4) To any person specified by the statute authorizing agency rulemaking to receive notice; and
- (5) In any other manner determined appropriate by the agency.

B. The notice must include:

- (1) An announcement that the agency intends to establish a negotiated rule-making committee to negotiate and develop a proposed rule;
- (2) A description of the subject matter and scope of the rule to be developed and the general issues to be considered;
- (3) A proposed schedule for completing the work of the committee, including a target date for publication by the agency of a proposed rule for notice and comment pursuant to section 8052;
- (4) A solicitation of comments on the proposal to establish the committee; and
- (5) An explanation of the application and nomination procedures for membership on the committee, as provided under subsection 2.

2. Applications for membership on committee. Interested persons or organizations may apply for, or nominate another person or organization for, membership on the negotiated rule-making committee. Each application or nomination must be in writing and include:

2 A. The name of the applicant or nominee and a description
of the interests that person will represent; and

4 B. For applicants, a commitment that the applicant will
actively participate in good faith in the development of the
6 proposed rule under consideration.

8 **§8503. Establishment of committee**

10 1. Establishment. The following apply to establishment of
negotiated rule-making committees.

12 A. If, after considering comments and applications
14 submitted under section 8502, the agency determines that a
negotiated rule-making committee can be formed with a
16 balanced representation of persons who can adequately
represent the interests that will be significantly affected
18 by or otherwise significantly interested in a proposed rule
and that the committee will be helpful in the particular
20 rule-making proceeding, the agency may establish a
negotiated rule-making committee.

22 B. Any negotiated rule-making committee that is established
24 must include at least one person from the agency, who has
the same rights and responsibilities as other members of the
26 committee.

28 C. If, after considering comments and applications, the
agency decides not to establish a negotiated rule-making
30 committee, the agency shall send a copy of its decision and
the reasons for that decision to any person or organization
32 that commented upon the proposal or applied for or nominated
another person or organization for membership on the
34 negotiated rule-making committee.

36 **§8504. Conduct of committee activities**

38 1. Duties of committee. Each negotiated rule-making
committee established under this subchapter shall consider the
40 matter proposed by the agency and shall attempt to reach a
consensus concerning a proposed rule with respect to that matter.

42 2. Facilitator or facilitators. A person or persons from
44 outside the committee nominated by the agency to facilitate
committee discussions may be retained if approved by the
46 committee through consensus. A person or persons nominated and
approved by the committee to serve as facilitator may be retained
48 if approved by the agency. The facilitator or facilitators, if
selected, shall conduct the meetings of the committee in lieu of
50 a chair and assist committee members in reaching a consensus on a

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2 proposed rule. If a facilitator is not used, the committee shall
3 select a chair from among its members, subject to approval of the
4 agency.

6 3. Committee procedures. A negotiated rule-making
7 committee may adopt procedures governing the operation of that
8 committee to the extent consistent with this subchapter and other
9 applicable law.

10 4. Report of committee. If a committee reaches consensus
11 on a proposed rule at the conclusion of negotiations, the
12 committee shall transmit to the agency that established the
13 committee a report containing the proposed rule. If the
14 committee does not reach a consensus on a proposed rule, the
15 committee may transmit to the agency a report specifying any
16 areas in which the committee did reach a consensus. The
17 committee may include in the report any other information,
18 recommendations or materials that the committee considers
19 appropriate. Any committee member may include as an addendum to
20 the report additional information, comments, recommendations or
21 materials.

22 5. Agency rulemaking. A proposed rule reported by a
23 committee may serve as the basis for rulemaking by the agency.
24 If the agency commences rulemaking, it must comply with the
25 provisions of subchapter II.

28 **§8505. Termination of committee**

30 Unless terminated earlier by the committee, a negotiated
31 rule-making committee terminates upon submission of its final
32 report under section 8504, subsection 4, unless the agency in
33 establishing the committee sets a different termination date or
34 the agency, after consulting the committee, specifies a different
35 termination date.

38 **§8506. Judicial review**

40 An agency action to establish, assist or terminate a
41 negotiated rule-making committee under this subchapter is not
42 subject to judicial review. Nothing in this section bars
43 judicial review of a rule adopted by the agency following
44 negotiated rulemaking, if such a review is otherwise available by
45 law. A rule that is the product of negotiated rulemaking and is
46 subject to judicial review is not accorded any greater deference
47 by a court than a rule that is the product of other rule-making
48 procedures.

50 **Sec. 7. 5 MRSA c.377-B is enacted to read:**

CHAPTER 377-B
LEGISLATIVE REVIEW OF PROPOSED AGENCY RULES

2
4 **§11201. Definitions**

6 The definitions in chapter 377-A apply to this chapter.

8 **§11202. Application for review**

10 Within 30 days after the publication of newspaper notice of
12 an agency rule-making proposal, any group of 100 or more
14 registered voters who would have a substantial interest in the
16 proposed rule if adopted or any person who may be directly,
18 substantially and adversely affected by the application of the
20 proposed rule if adopted, may file an application for review with
22 the director. With respect to any application or petition for
review pursuant to this section, the petition or application must
be verified and certified in the same manner as provided in Title
21-A, section 354, subsection 7, paragraphs A and C. The
applicant shall state with specificity on a form prepared by the
director the following:

24 1. Name of agency; identification of rule. The name of the
agency and identification of the proposed rule by number, title
or other means;

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

32 3. Statement. A statement of why the proposed rule, in the
34 opinion of the applicant, is inappropriate, unnecessary or
otherwise requires legislative review; and

36 4. Recommendation. A recommendation proposing changes in
38 the proposed rule or the statute that the rule implements.

40 **§11203. Committee review**

42 The director shall, upon receipt of an application for
44 review, determine the appropriate joint standing committee of the
46 Legislature responsible for review of the rule in question and
48 send the application and a copy of the proposed rule in question
to each member of the committee. Each committee member shall
review the application to determine whether the applicant or
applicants have shown the level of interest in the rule required
by section 11202 and whether the public interest would be served
by a review of the rule in question by the full committee. If a
50 committee member decides that the review should be made, the

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2 member shall notify the director within 15 days after the notice
3 pursuant to section 11202 was sent. If 1/3 or more of the full
4 committee notify the director that a review of the rule should be
5 made, the director shall advise the chairs of the committee, who
6 shall schedule a meeting of the committee to review the rule. If
7 fewer than 1/3 of the committee members elect to review the rule,
8 a report to that effect must be prepared by the director and sent
9 to the applicant and the Legislative Council.

10 The applicant and the affected agency must be notified of a
11 decision to review the rule and may make expanded statements of
12 their position to the full committee. The committee, in the
13 course of its review, may hold a public hearing, request and
14 obtain opinions of the Attorney General, obtain information from
15 the agency and conduct further investigation approved by the
16 Legislative Council. The committee shall make its determination
17 and report within 60 days of the first notification to the
18 committee chairs that a review must be made if the Legislature is
19 in regular session when that notification is made. If the
20 Legislature is not in regular session at that time, the review
21 must be completed within 60 days of the next convening of a
22 regular session.

24 **§11204. Committee meetings; suspension of adoption**

26 **1. Meetings.** Legislative committees may meet any time
27 while the Legislature is in session to review proposed rules as
28 provided in section 11203. If necessary, the Legislative Council
29 may authorize committee meetings out of session for that purpose.

30 **2. Suspension, modification or withdrawal of rulemaking**
31 **during review.** If a petition for review of a proposed rule is
32 submitted and approved while the Legislature is not in session,
33 the committee may request the agency to suspend adoption of the
34 rule pending completion of the committee's review. An agency may
35 suspend without prejudice rule-making procedures on a proposed
36 rule under review by the committee pending completion of that
37 review. An agency may also modify or withdraw a proposed rule at
38 any time while the rule is under or being considered for review.
39 If an agency modifies or withdraws a rule after a petition for
40 review is filed, the agency shall notify the Secretary of State
41 of the modification or withdrawal and arrange for one weekly
42 publication of notice of that change through the Secretary of
43 State as provided by section 8053, subsection 5. The agency
44 shall provide notice of the change as provided in section 8053,
45 subsection 1, paragraphs A, B and C. The agency need not repeat
46 other steps in the rule-making process to continue the
47 rule-making process with a proposed rule that has been modified
48 or suspended as a result of or during committee review.

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§11205. Criteria for review

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

8 1. Consistency with legislation. Whether the rule is
10 consistent with and necessary to the intent of the statute that
12 the rule implements;

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

20 3. Circumstances. Whether circumstances have changed since
22 the passage of the statute that the rule implements;

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

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

§11206. Committee recommendation

34 If the committee determines that any of the criteria for
36 review have not been met, it may discuss its findings with the
38 agency. An agency may not, on the basis of these discussions or
40 any subsequent report of the committee, terminate a rule that is
42 required by law. If the committee determines that the rule in
44 question is inappropriate or unnecessary, it shall notify the
46 applicant and the agency of its decision and may direct the
48 Office of Policy and Legal Analysis 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 may legislation be introduced to amend or enact
legislation pursuant to this section. Legislation may not be
introduced to implement a decision of a minority of the committee.

After approval, draft legislation must 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.

§11207. Limitation

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1. Debt obligations. A joint standing committee may not review an agency rule that is part of an official action toward 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 does 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 of a rule is not an implied legislative authorization of the rule's substantive or procedural lawfulness and may not be considered for any purpose in a judicial proceeding. A legislative review of a rule may not supersede the judicial review granted in section 8058 or 11001.

Sec. 8. Secretary of State review; streamlined forms. In addition to the consolidation of forms required by the Maine Revised Statutes, Title 5, section 8057-A, subsection 1, the Secretary of State shall review the various agency filing requirements under the Maine Administrative Procedure Act, including those imposed by Title 5, section 8053-A, subsection 4; section 8056, subsection 1, paragraph B; section 8056-A, subsection 1; and section 8057-A, subsection 4. The Secretary of State shall consider ways to reduce the number of filing requirements and forms while continuing or improving the information available to the public and the Legislature. The Secretary of State shall include any recommendations on streamlining the filing requirements in its annual report to the Governor and the Joint Standing Committee on State and Local Government in February 1996.'

Further amend the bill by inserting at the end before the statement of fact the following:

FISCAL NOTE

The new rule-making provisions of the bill will result in increased General Fund costs to the Legislature from legislator per diem, expenses and public hearing costs if legislative committees are required to meet during an interim between sessions. While the total number of legislative committee meetings and public hearings that could occur during the interim to review proposed rules is not expected to be significant, per diem and expense costs would amount to approximately \$1,375 per

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2 day. Additional appropriations may be required for advertising costs and committee staff.

4 State departments and agencies may also incur costs related to negotiated rule-making committees and to the potential increase in the number of formal public hearings. The amount of the costs and the departments and agencies affected can not be determined at this time.

10 The Department of the Secretary of State will incur some minor additional costs to consolidate certain forms, to review agency filing requirements under the Maine Administrative Procedure Act and to make recommendations in its annual report in February 1996. These costs can be absorbed within the department's existing budgeted resources.

18 **STATEMENT OF FACT**

20 This amendment replaces the bill. It amends the current legislative review of agency rules law to allow members of the public affected by certain rules to petition the Legislature for review of proposed agency rules. Upon citizen request, the legislative committee of jurisdiction would decide whether to review a proposed rule. Standards for review are set and, if a rule is found to violate those standards, legislation could be introduced to override the rule. The amendment also amends the Maine Administrative Procedure Act in several ways. It reduces the number of forms required to be filed providing notice of proposed rulemaking and increases the information provided to the Legislature at the proposal stage. The amendment requires all agencies to meet with the committee of jurisdiction to review the agency's regulatory agenda and expands the information required to be provided to the Legislature as part of the regulatory agenda. Negotiated rule-making guidelines are incorporated into the Maine Administrative Procedure Act and agencies are encouraged to use those procedures during appropriate rule-making proceedings. The amendment also adds a fiscal note to the bill.

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