

MAINE STATE LEGISLATURE

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117th MAINE LEGISLATURE

FIRST REGULAR SESSION-1995

Legislative Document

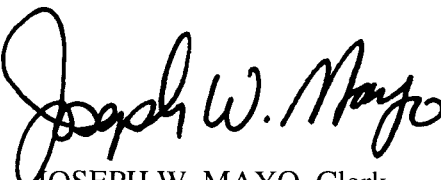
No. 1123


H.P. 806

House of Representatives, March 30, 1995

**An Act to Ensure That Rulemaking by Agencies Does Not Exceed the
Intent of Authorizing Legislation.**

Reference to the Committee on State and Local Government suggested and ordered printed.


JOSEPH W. MAYO, Clerk

Presented by Representative CAMPBELL of Holden.
Cosponsored by Senator CIANCHETTE of Somerset and
Representatives: AHEARNE of Madawaska, AIKMAN of Poland, AULT of Wayne,
BAILEY of Township 27, BARTH of Bethel, BIGL of Bucksport, BIRNEY of Paris, 
BRENNAN of Portland, BUCK of Yarmouth, BUNKER of Kossuth Township, CAMERON
of Rumford, CARLETON of Wells, CHASE of China, CHICK of Lebanon, CHIZMAR of
Lisbon, CLARK of Millinocket, CLOUTIER of South Portland, CLUKEY of Houlton,
CROSS of Dover-Foxcroft, DAGGETT of Augusta, DAVIDSON of Brunswick, DEXTER of
Kingfield, DiPIETRO of South Portland, DONNELLY of Presque Isle, DORE of Auburn,
DUNN of Gray, FARNUM of South Berwick, FISHER of Brewer, FITZPATRICK of
Durham, GAMACHE of Lewiston, GATES of Rockport, GERRY of Auburn, GOOLEY of
Farmington, GOULD of Greenville, GREENLAW of Standish, GUERRETTE of Pittston,
GWADOSKY of Fairfield, HARTNETT of Freeport, HATCH of Skowhegan, HICHBORN of
LaGrange, JACQUES of Waterville, JONES of Pittsfield, JOSEPH of Waterville, JOY of
Crystal, JOYCE of Biddeford, JOYNER of Hollis, KEANE of Old Town, KERR of Old
Orchard Beach, KILKELLY of Wiscasset, KNEELAND of Easton, LaFOUNTAIN of
Biddeford, LABRECQUE of Gorham, LANE of Enfield, LAYTON of Cherryfield,
LEMAIRE of Lewiston, LEMKE of Westbrook, LEMONT of Kittery, LIBBY of Buxton,

Additional cosponsors on next page

LINDAHL of Northport, LOOK of Jonesboro, LOVETT of Scarborough, LUMBRA of Bangor, MADORE of Augusta, MARSHALL of Eliot, MARTIN of Eagle Lake, MARVIN of Cape Elizabeth, MAYO of Bath, McALEVEY of Waterboro, McELROY of Unity, MITCHELL of Vassalboro, MORRISON of Bangor, MURPHY of Berwick, NADEAU of Saco, NASS of Acton, NICKERSON of Turner, O'GARA of Westbrook, O'NEAL of Limestone, OTT of York, PEAVEY of Woolwich, PENDLETON of Scarborough, PERKINS of Penobscot, PINKHAM of Lamoine, PLOWMAN of Hampden, POULIN of Oakland, POULIOT of Lewiston, POVICH of Ellsworth, REED of Falmouth, REED of Dexter, RICE of South Bristol, RICHARDSON of Portland, ROSEBUSH of East Millinocket, ROTONDI of Madison, SAVAGE of Union, SIMONEAU of Thomaston, SIROIS of Caribou, SPEAR of Nobleboro, STEDMAN of Hartland, STONE of Bangor, TAYLOR of Cumberland, TRIPP of Topsham, TRUE of Fryeburg, TRUMAN of Biddeford, TUFTS of Stockton Springs, TYLER of Windham, UNDERWOOD of Oxford, VIGUE of Winslow, WATERHOUSE of Bridgton, WHEELER of Bridgewater, WHITCOMB of Waldo, WINN of Glenburn, WINSOR of Norway, YACKOBITZ of Hermon, Senators: BEGLEY of Lincoln, BENOIT of Franklin, BUTLAND of Cumberland, CAREY of Kennebec, CARPENTER of York, CASSIDY of Washington, ESTY of Cumberland, FERGUSON of Oxford, GOLDTHWAIT of Hancock, HALL of Piscataquis, HANLEY of Oxford, HARRIMAN of Cumberland, HATHAWAY of York, KIEFFER of Aroostook, LAWRENCE of York, LORD of York, O'DEA of Penobscot, PARADIS of Aroostook, PENDEXTER of Cumberland, RUHLIN of Penobscot, SMALL of Sagadahoc, STEVENS of Androscoggin.

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

2 **Sec. 1. 5 MRSA §8002, sub-§1-A**, as enacted by PL 1993, c. 362,
4 §1, is amended to read:

6 **1-A. Adopt.** "Adopt" means action certified by the dated
signature of an authorized representative that a rule is accepted
8 as official by an agency and includes provisional adoption and
final adoption of rules. "Provisional adoption" and
10 "provisionally adopted" mean the agency rule-making steps
described in subchapter II that occur prior to final adoption by
12 an agency. "Final adoption" and "finally adopted" mean formal
acceptance of a rule, which may occur only following
14 authorization by the Legislature for the agency to finally adopt
a rule.

16 **Sec. 2. 5 MRSA §8002, sub-§9, ¶C** is enacted to read:

18 C. Unless adopted as an emergency rule pursuant to section
20 8054, a rule is only a proposal by an agency for legislative
approval and has no legal effect until finally adopted by
22 the agency under the specific authorization of the
Legislature.

24 **Sec. 3. 5 MRSA §8050** is enacted to read:

26 **§8050. Purpose**

28 Because properly adopted rules have the legal effect of
30 laws, the Legislature finds that delegation of its authority to
agencies of State Government through authorized rulemaking
32 requires that agency rules adopted under that authority be
subject to thorough legislative review before the rules are
34 enforced against the citizens of this State. That review must be
conducted in accord with the principle of separation of powers
36 but is essential given the legal effect of rules and the fact
that legislative authority rests ultimately with the
38 Legislature. The purpose of this subchapter is to establish
uniform open procedures by which agencies must conduct their
40 rule-making activities, which include appropriate defined
procedures for legislative review of the exercise of delegated
42 rule-making authority.

44 Any grant of general or specific rule-making authority
46 authorized by law is considered to be only permission to
provisionally adopt rules subject to legislative review. Final
48 adoption may occur only after legislative review of provisionally
adopted rules and specific authorization by the Legislature to
finally adopt the rules.

50 **Sec. 4. 5 MRSA §8052**, as amended by PL 1993, c. 446, Pt. A,
52 §19, is further amended to read:

2 **§8052. Rulemaking**

4 **1. Notice; public hearing.** Prior to the provisional
6 adoption of any rule, the agency shall give notice as provided in
8 section 8053 and may hold a public hearing, ~~provided that a.~~ A
10 public hearing shall must be held if otherwise required by
12 statute or requested by any 5 interested persons.

14 A public meeting or other public forum held by an agency for any
16 purpose that includes receiving public comments on a proposed
18 agency rule is a public hearing and is subject to all the
20 provisions of this subchapter regarding public hearings.

22 **2. Requirements.** Any A public hearing shall must comply
24 with any requirements imposed by statute, but shall is not be
26 subject to subchapter IV. Any public hearing shall must be held
28 and conducted as follows.

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

36 B. In the case of a rule authorized to be provisionally
38 adopted by a single agency member, either the agency member,
40 a person in a major policy-influencing position, as listed
42 in chapter 71, or a designee who has responsibility over the
44 subject matter to be discussed at the hearing shall must
46 hold and conduct the hearing.

48 **3. Statements and arguments filed.** When a public hearing is
50 held, written statements and arguments concerning the proposed
rule may be filed with the agency within 10 days after the close
of the public hearing, or within such longer time as the agency
may direct.

4. Relevant information considered. The agency shall
consider all relevant information available to it, including, but
not limited to, economic, environmental, fiscal and social impact
analyses and statements and arguments filed, before provisionally
adopting any rule.

5. Written statement adopted. At the time of provisional
adoption of any rule, the agency shall adopt a written statement
explaining the factual and policy basis for the rule. The agency
shall list the names of persons whose comments were received,
including through testimony at hearings, the organizations the
persons represent and summaries of their comments. The agency
shall address the specific comments and concerns expressed about
any proposed rule and state its rationale for provisionally
adopting any changes from the proposed rule, failing to
provisionally adopt the suggested changes or drawing findings and

recommendations that differ from those expressed about the proposed rule.

A. If the same or similar comments or concerns about a specific issue were expressed by different persons or organizations, the agency may synthesize these comments and concerns into a single comment that accurately reflects the meaning and intent of these comments and concerns to be addressed by the agency, listing the names of the persons who commented and the organizations they represent.

B. A rule may not be provisionally adopted unless the adopted rule is consistent with the terms of the proposed rule, except to the extent that the agency determines that it is necessary to address concerns raised in comments about the proposed rule, or specific findings are made supporting changes to the proposed rule. The agency shall maintain a file for each rule provisionally adopted that must include, in addition to other documents required by this Act, testimony, comments, the names of persons who commented and the organizations they represent and information relevant to the rule and considered by the agency in connection with the formulation, proposal or provisional adoption of a rule. If an agency determines that a rule that the agency intends to provisionally adopt is substantially different from the proposed rule, the agency shall request comments from the public concerning the changes from the proposed rule. The agency may not provisionally adopt the rule for a period of 30 days from the date comments are requested pursuant to this paragraph. Notice of the request for comments must be published by the Secretary of State in the same manner as notice for proposed or adopted rules.

5-A. Impact on small business. In adopting rules, the agencies shall seek to reduce any economic burdens through flexible or simplified reporting requirements and may seek to reduce burdens through flexible or simplified timetables that take into account the resources available to the affected small businesses. The agency may consider clarification, consolidation, or simplification of compliance or reporting requirements. For the purposes of this subsection, "small business" means businesses that have 20 or fewer employees and gross annual sales not exceeding \$2,500,000.

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

When the effective date of a rule is contingent upon the occurrence or nonoccurrence of an event, notification of the

occurrence or nonoccurrence must be filed with the Secretary of State when known.

7. Adoption of rule. No rule may become effective unless:

A. The agency provisionally adopts it within 120 days of the final date by which data, views or arguments may be submitted to the agency for consideration in adopting the rule; and

B. This provisionally adopted rule is approved by the Attorney General as to form and legality, as required by section 8056, within 150 days of the final date by which those comments may be submitted.

The final date for comments may be extended if notice of doing so is published before that final date, in the consolidated notice referred to in section 8053.

7-A. Legislative approval prior to final adoption. Any rule provisionally adopted as provided in this subchapter must be approved by the Legislature as provided in section 8053-B before it may be finally adopted by an agency.

8. Appropriate reference to underlying federal and state laws and regulations. At the time of provisional adoption of any rule, the agency shall refer with particularity to any underlying federal or state law or regulation which that serves as the basis of the rule.

Sec. 5. 5 MRSA §8053, sub-§1, as amended by PL 1985, c. 39, §2, is further amended to read:

§8053. Notice

1. Notice of rulemaking without hearing. At least 20 days prior to the provisional adoption of any rule without hearing, the agency shall deliver or mail written notice to:

A. Any person specified by the statute authorizing the rulemaking;

B. Any person who has filed within the past year a written request with the agency for notice of rulemaking; and

C. Any trade, industry, professional, interest group or regional publication that the agency ~~deems~~ considers effective in reaching the persons affected.

Notification to subscribers under paragraph B shall must be by mail or otherwise in writing to the last address provided to the

agency by that person. 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.

Written notice shall ~~shall~~ must also be given to the Secretary of State, by the deadline established by him the Secretary of State, for publication in accordance with subsection 5.

Sec. 6. 5 MRSA §8053, sub-§2, as repealed and replaced by PL 1979, c. 425, §5, is amended to read:

2. Notice of rulemaking hearing. When an agency holds a public hearing prior to provisional adoption of a rule, notice of the hearing shall must be given in the manner described in subsections 1 and 5, using the date of the hearing to calculate the time periods involved.

Sec. 7. 5 MRSA §8053, sub-§3-A, as enacted by PL 1981, c. 524, §8, is amended 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 provisional adoption of any rule without a hearing, the agency shall make copies of the proposed rule available to persons upon request.

Sec. 8. 5 MRSA §8053-A, as repealed and replaced by PL 1989, c. 574, §5, is amended to read:

§8053-A. Notice to legislative committees

~~1.---Proposed rules.---At the time of giving notice of rulemaking under section 8053 or within 10 days following the adoption of an emergency rule, the agency shall provide to the Legislature, in accordance with subsection 3, a fact sheet providing the information as described in section 8057-A, subsection 1.~~

~~A.---If an agency determines that a rule which it intends to adopt will be substantially different from the proposed rule, it shall provide the Legislature with a revised fact sheet with the information defined in section 8057-A, subsection 1, as it relates to the substantially different rule.---The revised fact sheet shall be provided to the Legislature in accordance with subsection 3.~~

2. Regulatory agenda. The agency shall provide copies of its agency regulatory agenda, as provided in section 8060, to the Legislature at the time that the agenda is issued.

2 **3. Submission of materials to the Legislature.** When an
3 agency, pursuant to subsection 1-~~e~~ 2, provides materials to the
4 Legislature, it shall provide them to the Executive Director of
5 the Legislative Council, who shall refer the materials to the
6 appropriate committee or committees of the Legislature for
7 review. The agency shall provide sufficient copies of the
8 materials for each member of the appropriate committee or
9 committees.

10 **4. Adopted rules.** When an agency finally adopts rules
11 following legislative approval, it shall provide a copy of the
12 adopted rules, the statement required by section 8052, subsection
13 5, and the checklist required by section 8056-A to the Secretary
14 of State, who shall compile the finally adopted rules by agency.

15 **Sec. 9. 5 MRSA §8053-B** is enacted to read:

16 **§8053-B. Legislative review of agency rules**

17 An agency proposing a rule other than an emergency rule,
18 after filing the notice of proposed rulemaking required by
19 section 8052, shall proceed with rule-making procedures to the
20 point of, but not including, final adoption. At that point, the
21 agency shall submit the rule to the Legislature for approval of
22 final adoption as provided in this section. The rule has legal
23 effect only after final adoption is authorized by the Legislature
24 and carried out by the agency.

25 **1. Submission of materials.** At the time an agency
26 provisionally adopts a rule, the agency shall submit to the
27 Executive Director of the Legislative Council 20 copies of:

28 A. The full text of the rule provisionally adopted by the
29 agency, with new language underlined and with language to be
30 deleted from any existing rule stricken through but clearly
31 legible;

32 B. A brief summary of the content of the rule and a
33 description and a copy of any existing rule the agency
34 proposes to amend or repeal;

35 C. A statement of the circumstances that require the rule;

36 D. A statement of the economic impact of the rule on the
37 State or its residents; and

38 E. Any other information required by law.

39 **2. Assignment to committee of jurisdiction.** Upon receipt
40 of the required copies of information, the Executive Director of
41 the Legislative Council shall determine the appropriate joint
42 standing committee of the Legislature responsible for review of

2 the rule in question and send the information to each member of
3 that committee. Each rule submitted for legislative review must
4 be reviewed by the appropriate joint standing committee at a
5 meeting called for that purpose in accordance with legislative
6 rules. A committee may review more than one rule and the rules
7 of more than one agency at a meeting. The committee shall notify
8 the affected agency of the meeting on its proposed rules.

9
10 3. Committee review. The committee shall review each
11 provisionally adopted rule and, in its discretion, may hold
12 public hearings on that rule. Such a review must include,
13 without limitation, a determination of:

14 A. Whether the agency has exceeded the scope of its
15 statutory authority in approving the provisionally adopted
16 rule;

17 B. Whether the provisionally adopted rule is in conformity
18 with the legislative intent of the statute the rule is
19 intended to implement, extend, apply, interpret or make
20 specific;

21 C. Whether the provisionally adopted rule conflicts with
22 any other provision of law or with any other rule adopted by
23 the same or a different agency;

24 D. Whether the provisionally adopted rule is necessary to
25 fully accomplish the objectives of the statute under which
26 the rule was proposed;

27 E. Whether the provisionally adopted rule is reasonable,
28 especially as it affects the convenience of the general
29 public or of persons particularly affected by it;

30 F. Whether the provisionally adopted rule could be made
31 less complex or more readily understandable for the general
32 public; and

33 G. Whether the provisionally adopted rule was proposed in
34 compliance with the requirements of this article and with
35 requirements imposed by any other provision of law.

36
37 4. Committee recommendation. After reviewing the rule, the
38 committee shall recommend that the Legislature:

39 A. Authorize the adoption of the rule,

40 B. Authorize the adoption of part of the rule,

41 C. Authorize the adoption of the rule with certain
42 amendments, or

2 D. Recommend that the proposed rule be withdrawn.

4 The committee shall notify the agency proposing the rule of its
6 recommendation. When the committee makes a recommendation under
 paragraph B, C or D, the notice shall contain a statement of the
 reasons for that recommendation.

8 5. Draft legislation. When the committee recommends that a
10 rule be authorized, in whole or in part, by the Legislature, the
12 committee shall instruct nonpartisan staff to draft a bill
 authorizing the promulgation of all or part of the rule and
 incorporating any amendments the committee desires.

14 6. Consideration by the Legislature. No later than 30 days
16 before statutory adjournment of the Legislature as provided in
18 Title 3, section 2, each joint standing committee of the
20 Legislature shall submit to the Secretary of the Senate and the
22 Clerk of the House of Representatives the committee's report on
24 agency rules the committee has reviewed as provided in this
26 section. The report must include a copy of the rule or rules
28 reviewed, the committee's recommendation concerning final
30 adoption of the rule or rules, a statement of the reasons for a
32 recommendation to withdraw or modify the rule or rules and draft
 legislation for introduction in that session that is necessary to
 implement the committee's recommendation. A committee may
 decline to include in its report recommendations covering any
 rules submitted to it later than 45 days before statutory
 adjournment. If the Legislature fails to act on all or part of
 any report submitted to it by a joint standing committee as
 provided in this section, an agency may not finally adopt and
 implement the rule or part of the rule that was not approved.

34 7. Consideration at special session. If appropriate, the
36 committee recommendation regarding an agency rule or rules may be
 submitted to and considered by a special session of the
 Legislature.

38 8. Final adoption; effective date. An agency may finally
40 adopt only those rules that have been specifically approved by
42 act of the Legislature. Unless otherwise provided by law, final
44 adoption by an agency must occur within 60 days of the effective
46 date of legislation approving the rule. Finally adopted rules
48 must be filed with the Secretary of State as provided in section
 8053-A, subsection 7 and notice must be published as provided in
 section 8056, subsection 1, paragraph D. An agency rule
 authorized by the Legislature becomes effective 30 days after
 filing with the Secretary of State or at a later date specified
 by the agency.

50 Sec. 10. 5 MRSA §8056, sub-§1, as amended by PL 1985, c. 39,
 §3, is further amended to read:

1. **Requirements.** With respect to every rule finally
adopted, the agency shall:

A. Submit the rule to the Attorney General for approval as to form and legality;

B. File a certified copy of the rule and the statement required by section 8052, subsection 5, with the Secretary of State in a form prescribed by the Secretary of State, which form shall must be susceptible to frequent and easy revision;

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

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 finally adopted, its effective date, a brief description of the substance of the rule, and the address where a copy may be obtained.

Sec. 11. 5 MRSA §8056, sub-§2, as enacted by PL 1977, c. 551, §3, is amended to read:

2. **Form.** With respect to every rule finally adopted by the agency and in effect, the agency shall print and compile and make available to any person, at each of its offices, for inspection at no charge and for copying with or without cost, as the agency shall ~~determine~~ determines, and for distribution free or at actual cost, complete sets of such rules currently in effect.

Sec. 12. 5 MRSA §8057, sub-§1, as amended by PL 1985, c. 680, §5, is further amended to read:

1. **Rules; exception.** Rules adopted in a manner other than that prescribed by section 8052, subsections 1, 2, 3, 4 and 7 and by ~~section~~ sections 8053, ~~8053-B~~ and 8054 ~~shall-be~~ are void and of no legal effect, ~~---provided---that; however,~~ insubstantial deviations from the requirements of section 8053 shall do not invalidate the rule subsequently adopted. 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.

Sec. 13. 5 MRSA §8057-A, sub-§4, as enacted by PL 1989, c. 574, §7, is amended to read:

2 **4. Adoption of rules.** At the time of final adoption of any
3 rule, the agency shall file with the Secretary of State the
4 information developed by the agency pursuant to subsections 1 and
5 2.

6 **Sec. 14. 5 MRSA §8063,** as enacted by PL 1991, c. 233, is
7 amended to read:

8 **§8063. Fiscal impact**

9
10 Every rule proposed by an agency must contain a fiscal
11 impact note at the end of the rule. The note must be placed on
12 the rule prior to any public hearing and, in the case of rules
13 provisionally adopted without a hearing, prior to the sending of
14 notice under section 8053. The fiscal impact note must describe
15 the estimated cost to municipalities and counties for
16 implementing or complying with the proposed rule. If the
17 proposed rule will not impose any cost on municipalities or
18 counties, the fiscal impact note must state that fact.

19
20 This section does not apply to emergency rules.

21
22
23 **STATEMENT OF FACT**

24
25 This bill revises agency rule-making procedures to require
26 legislative review and approval of each agency rule before it is
27 finally adopted and implemented by the agency. Just prior to
28 final adoption, each agency rule must be submitted to the
29 appropriate legislative joint standing committee for review.
30 Following review, the committee submits a report to the full
31 Legislature, which must then enact authorizing legislation before
32 final adoption and implementation by the agency may occur.

33
34 The bill also defines any agency meeting held to receive
35 public comment on a proposed agency rule as a public hearing.
36 Any such meeting, whatever it is called by the agency, is subject
37 to the public hearing requirements of the Maine Administrative
38 Procedure Act.