

MAINE STATE LEGISLATURE

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Bureau of Corporations, Elections, and Commissions

covers
1992

*Department of
the Secretary of State*

Bill Diamond
Secretary of State

Janet E. Waldron
Assistant Secretary of State

Gary Cooper
Deputy Secretary of State

March 1, 1993

Governor John McKernan
State House Station 1
Augusta, Maine 04333

Dear Governor McKernan:

Pursuant to 5 M.R.S.A. Section 8056-A, I submit our report on rule-making under the Maine Administrative Procedure Act.

In 1992 there were 322 proposed rule notices and 493 adopted rules. Of the 493 adopted rules, 181 were adopted as emergencies. Marine Resources filed 142 of those emergency rules for the closing and opening of shores, flats and waters as a result of red tide, bacteria contamination and other potential threats to the public health. The other 39 emergency rules were filed by various other agencies.

At the end of 1992, there were a total of 1,820 active rules on file with the Secretary of State. This is an increase of 28 over 1991.

During calendar year 1992, the cost of publishing the rulemaking notices to state agencies was \$199,602.17.

Most agencies consistently meet all the requirements of the Maine Administrative Procedure Act. Those agencies which do not submit the required forms, etc. with proposed or adopted rules quickly comply once they are reminded of the requirements.

With regard to the progress of electronic conversion and codification of rules: of the 1,820 rules which we have on file, only 376 have been entered on the computer in a word processing system. Of these, 102 are complete, 137 need to be proofread, and 137 have been converted to our word processing system but must be edited. A staff cutback has disrupted this endeavor.

We have drafted a rule which would establish procedures and time lines for filing electronic copies of rules adopted by state agencies. We hope to have all current rules on our computer system within 5 years. This move will allow us to make the rules more accessible through searching and through publication in print and electronic formats.

A newspaper notice was placed recently in several papers requesting comments from the public on the Administrative Procedure Act and the draft rule on electronic filing. Excerpts from these comments follow:

Guardians Of Education for Maine:

Their letter suggested that the A.P.A. should be rescinded. They feel that the constitutional responsibility for law-making belongs in the legislative branch. They also suggested that all education rules should be suspended and local school district should be allowed to "handle their own expenses and refit programs to their individual districts."

Earle N. Ahlquist

He suggests that the "legislature review everything on the books and discard most of them and simplify others." He feels that there are too many laws and the cost of laws handicaps our whole population, especially people who need to be able to buy "an affordable lot." "The rules on the books should be the rules in effect on a piece of property from the day a person buys such property."

E.M. Ring

He suggests "stopping unnecessary writing of regulations." He goes on to say that "these attempts to micromanage the economy by office personnel must be stopped."

Linda Throckmorton

She asks why agencies don't use mailing lists rather than tiny-type newspaper ads so that people affected by these rules could comment more easily and effectively. (In fact, they must do so during the A.P.A. process as well as publish ads.) She mentioned clam management and the fee charged to out-of-state clam diggers should be higher. "This (clam) industry is overharvested in Cutler and probably won't survive the century." She also had a complaint about maintaining certain records for the Bureau of Taxation in selling to non-profit organizations.

Generally, public respondents are concerned with the frequency and content of rules rather than with procedural matters.

We contacted agency rule liaisons and other officials as required by law to solicit their opinions. The comments received from these sources concentrate on procedural questions such as form design and duplication, and are being addressed internally. Further comment will be solicited as the draft rule on electronic conversion enters the formal proposal stage; we plan to hold a public hearing to consider all agency and public procedural concerns.

Regulatory agenda requirements continue to attract adverse comment. Public Law 1991 c.540, which took effect on July 8, 1991 prohibits agencies from filing a rule unless it is listed on the agency's annual "regulatory agenda," a list of anticipated rules. The agenda must be filed between the first day of a regular legislative session and 100 days following adjournment. The impact of the law change is that there are periods of time every year in which an agency is prohibited from rule-making if it has failed to file an agenda or failed to list a possible rule on its current agenda.

Agencies have reacted to this problem by listing every conceivable rule, no matter how unlikely, that might arise after the agenda filing deadline. A compilation of the agendas from all agencies now reaches more than 700 pages. Also, an agency under public or legislative pressure to adopt a rule can evade it by failing to file a timely agenda.

When the situation was described to rule-making officials from other states during this past summer's meeting of the National Association of Secretaries of State in Portland, some indicated a possible constitutional problem, in that the proper execution of law by executive agencies through rule-making can in Maine be delayed through a paperwork technicality involving legislative notification. I report this without offering an opinion as to the argument's validity.

Agencies do argue that new situations can arise which demand rule-making whether or not the proposed rule is on an agenda.

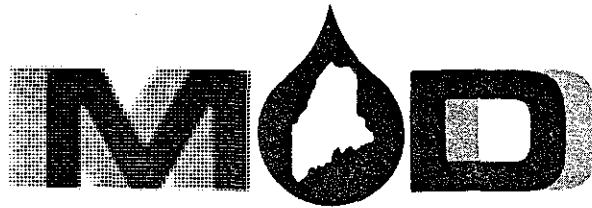
I have appended a lucid letter from the Maine Oil Dealers Association which describes some problems with the regulatory agenda requirement.

In my Department's legislative package this year is a bill that, among other corrections to A.P.A., seeks to retain the goal of advance legislative notice for rule-making while allowing agencies to act when appropriate.

Respectfully submitted,

Bill Diamond
Secretary of State

GWD/dw



Maine Oil Dealers Assn.

Representing Maine's Petroleum Marketers

The Honorable William Diamond
Secretary of State
State House Station #101
Augusta, ME 04333

January 26, 1993

Attn: Lucille L. Weeks

Dear Secretary Diamond,

I am writing in response to your request for comments on the Administrative Procedures Act (92 -P321). We are beginning to encounter a situation where efforts to stem too much agency rulemaking without proper legislative oversight is being used by various agencies to thwart legitimate requests for rule changes.

The problem lies in the prohibition against any rulemaking that is not on an agency's Regulatory Agenda. To escape any restraint this law may have on an agency, the practice is to list an anticipated "update" rulemaking for any given rule. This gives an Agency the opportunity to respond to a need they may identify. The public, however, does not have the same opportunity.

When we request a rulemaking, we are told it cannot be done because it is not on the Regulatory Agenda. This recently happened to us for a minor change that both the industry and the Agency agreed to. Notwithstanding our agreement with the agency, we were told the change could only be done in the future when either an omnibus update rulemaking was done or when a new Agenda was submitted.

This raises two additional problems. First, a series of minor changes becomes a major review which an overburdened staff must defer to a future point when more time is available. Second, agencies are reluctant to do minor rulemaking because of the administrative charges to the agency.

We strongly support the legislature's desire to increase the accountability of the various Departments and we strongly support the Governor's Executive Order requiring the submission and justification of all agency rulemakings. We find, however, that in practice the agencies have found a way around these restrictions and turned them against public involvement. The only option left to the public is the cumbersome petition process.

I appreciate the opportunity to comment, and would be happy to further discuss these issues with you.

Sincerely,

Eugene A. Guilford, Jr.
President