DEPARTMENT OF ATTORNEY GENERAL
CONTINUING LEGAL EDUCATION COMMITTEE

THE ADMINISTRATIVE PROCEDURE ACT:

AGENCY RULEMAKING

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Rulemaking CLE Outline **1/26/01**

I. DEVELOPMENT OF DRAFT RULE BY THE AGENCY

A. "Rule" v. "Policy" or "Guideline" §§ 8002(9), 8057(1)

general applicability
intended to be judicially enforceable (same legal force as a statute), and
implements or interprets a law or describes the agency's procedures or practices

An agency is not required to use the formal rulemaking procedures every time it makes a decision interpreting an existing rule. Fryeburg Health Care Center v. DHS, 734 A.2d 1141, 1144 (Me. 1999); Mitchell v. Maine Harness Racing Comm'n, 662 A.2d 924, 927 (Me. 1995).

Courts have found agency policies or methodologies to be invalid because they constituted rules that were not adopted pursuant to the MAPA. Fulkerson v. Comm'r, Dept. of Human Services, 628 A.2d 661 (Me. 1993) (DHS copayment provisions constitute "rules" subject to MAPA); New England Whitewater Center, Inc. v. Department of Inland Fisheries and Wildlife, 550 A.2d 56 (Me. 1988) (changes in process for allocating minimum daily number of passengers to whitewater rafting outfitters constituted rulemaking, thus allocations were invalid for failure of IFW to comply with MAPA).

B. Consensus-based Rule Development Process §§ 8002(3-C), 8051-B, 8060(1)(A)

This is a collaborative process where the draft rule is developed by the agency and a representative group of participants with an interest in the subject of the rulemaking. § 8002(3-C) Under this process, a draft rule is developed jointly by the agency and a group of interested persons. The agency retains sole discretion:

- over whether to submit the rule as a proposed rule, and
- as to the final language of the proposed rule. § 8051-B

The procedures for establishing the representative group of participants and keeping records of their meetings and decisions are found at §§ 8051-B(2) & (3).

An agency action to engage in or terminate a consensus-based rule development process is not subject to judicial review. § 8051-B(4)

C. Factors to Consider During Rule Development

1. Statutory Authority

Statutory Authority to Adopt Rule: Identify the state law that gives the agency specific rulemaking authority. § 8057-A(1)

> The MAPA provisions do not relieve any agency of the responsibility to comply with any statute requiring that its rules be filed with or approved by any designated persons before they become effective. § 8057(3)

Consistency With Underlying State or Federal Law or Regulations § 8052(8)

> If there is an inconsistency between a rule and the enabling law under which it was adopted, the law controls. Theriault v. Brennan, 488 F. Supp. 286 (D.Me. 1980)
>
> Most rules function to implement and interpret the statute administered by the agency. If a dispute were to arise in court over the agency's interpretation of the statute it administers or its regulations, the agency's interpretation will be given great deference. National Industrial Constructors, Inc. v. Superintendent of Insurance, 655A.2d 342, 345 (Me. 1995); Abbott v. Comm'r in Inland Fisheries and Wildlife, 623 A.2d 1273, 1275 (Me. 1993). However, the plain meaning of the statute always controls over an inconsistent administrative interpretation. National Industrial Constructors, Inc. at 345.

Delegation Doctrine Me. Const. Art. III, § 2 & Art. I § 6-A

> A Legislative delegation of rulemaking authority must be accompanied by adequate standards and safeguards to assure that the delegation is not abused.
>
> Adequate standards exist where "the legislation clearly reveals the purpose to be served by the regulations, explicitly defines what can be regulated for that purpose, and suggests the appropriate degree of regulation." Lewis v. State Department of Human Services, 433 A.2d 743, 748 (Me. 1981)

2. Agency Regulatory Agenda §§ 8053-A(2) & (3), 8060, 8064

Except for emergency rules, an agency may not adopt any rule unless the agency has listed the rule on its regulatory agenda. §§ 8060(6), 8064

When an agency proposed a rule not in its current regulatory agenda, the agency must file an amendment to its agenda with the Legislature and Secretary of State under section 8053-A at the time of rule proposal. § 8064

Contents: rules agency expects to propose prior to the next regulatory agenda due date (including amended, repealed, suspended rules - 8002(9)), whether the agency anticipates engaging in any consensus-based rule development process, and list of all emergency rules adopted since the previous regulatory agenda due date. § 8060(1)

3. Specific MAPA Rulemaking Requirements Regarding Fiscal Impact, Etc.

Goals and Objectives of the Rule §§ 8057-A(1)

All Relevant Information Regarding Economic, Environmental, Fiscal and Social Impact of the Rule §§ 8052(4), 8057-A

Economic Burden on Small Businesses §§ 8052(5-A), 8057-A(1)(D)

The agency must seek to reduce any economic burdens through flexible or simplified reporting requirements.

Fiscal Impact on Municipalities and Counties § 8063

The agency must estimate the cost to municipalities and counties for implementing or complying with the proposed rule, if any. A fiscal note describing this fiscal impact must be attached to the proposed rule before formal rulemaking is initiated.

Fiscal note requirement not applicable to emergency rules. Unfunded mandate?

Plain English § 8061

Performance Standards § 8062

4. Incorporation of Other Standards by Reference § 8056(1)(B)

The reference in the rules must fully identify the incorporated rules by exact title, edition or version and the date of publication. § 8056(B)(2)

Cannot incorporate standards as they may be updated by the outside agency or organization in the future. An agency may only adopt the outside material as it exists at the time of adoption. If the agency wants to be able to enforce the incorporated standard when IT is updated, then it must initiate rulemaking at that time to amend its own rule to refer to updated standard.

If an agency refers to or requires compliance with another of its own rules in the proposed rule, the agency need not incorporate that other agency rule by reference

A rule may incorporate by reference a fact or event that has independent significance, such as: (these 2 cases deal with statutory provisions)

> Commission of Pharmacy's requirement that pharmacists have a degree from a pharmacy school accredited by the American Council on Pharmaceutical Education even though list of accredited schools subject to change. Lucas v. Maine Commission of Pharmacy, 472 A.2d 904, 909 (Me. 1984)
>
> Use by State Tax Assessor of the national Consumer Price Index published by the U.S. Department of Labor in assessing state tax even through CPI to be determined in the future. Opinion of the Justices, 460 A.2d 1341, 1348 (Me. 1982)

5. Effective Date §§ 8002(3-A), 8052(6), 8072(8)

Routine technical rules: Unless the agency otherwise specifies, the effective date is 5 days after the adopted rule is filed with the Secretary of State. Emergency rules are effective on the date the rule is filed with the Secretary of State. §§ 8002(3-A), 8052(6)

Major substantive rules are effective 30 days after the agency has finally adopted the rule, after the Legislative has reviewed the rule and given its approval for the agency to proceed with final adoption. § 8072(8)

"Sunset" Date: Usually rules go into effect and stay in effect until they are repealed in a separate rulemaking process. However, a rule can be adopted with a "sunset" provision, i.e. the rule will be automatically repealed on a specific date.

Both effective and "sunset" dates can be dependent upon the occurrence or nonoccurrence of an event. In the latter case, notice must be provided to the Secretary of State that the triggering event has occurred.

6. Unfunded State Mandates Me. Const. Art.19, §21, 30-A M.R.S.A. § 5658

   Article 19, Section 21 of the Maine Constitution prevents the State from imposing any new mandate on municipalities, counties and other local units of government unless the Legislature provides 90% of the funds required on an annual basis or unless the Legislature approves such action by 2/3 vote. The legislation implementing the constitutional amendment is found at 30-A M.R.S.A. § 5658.

   That statute defines "mandate" as "any law, rule or executive order of this State enacted, adopted or issued after November 23, 1992 that requires a local unit of government to expand or modify that unit's activity so as to necessitate additional expenditures from that units local revenues." 30-A M.R.S.A. § 5658(1)(C)

7. Takings Me. Const. Art. I, § 21, § 8056(6)

   The MAPA specifically states that "[t]he Attorney General may not approve a rule if it is reasonably expected to result in an taking of private property under the Constitution of Maine unless such a result is directly by law or sufficient procedures exist in law or in the proposed rule to allow for a variance designed to avoid such a taking." § 8056(6)

   A regulatory taking occurs when property is regulated to such an extent that it deprives the landowner of all economic use of the property, taking into account the reasonable expectations of the property owner and preexisting principles of nuisance and real estate law prior to the onset of the regulations.

   Lucas v. South Carolina Coastal Council, 113 S.Ct. 2264 (1993); Hall v. Board of Environmental Protection, 528 A.2d 453 (Me. 1987).

8. Enforceability/Unconstitutionally Vague Provisions

   The rule must be written clearly enough that it gives regulated entities and individuals specific advance notice of the criteria they must meet and gives agencies sufficient guidance to assure that essential determinations are not left to personal whim or arbitrary discretion.

   For a good discussion of caselaw, see Kosalka v. Town of Georgetown, 752 A.2d 183 (Me. 2000) (shoreland zoning ordinance requirement that all development must "conserve natural beauty" is unconstitutionally vague).

9. Nonregulatory Material in the Rule

Summary statements, "notes" added to rule text, and the basis statement/response to comments not part of the rule and need not be formally adopted. Nor are they enforceable.

10. Proper Format § 8056(1)(B)

The MAPA provides that all adopted rules must be filed with the Secretary of State in a specific format prescribed by the Secretary of State. See the Guide to Rulemaking.

D. Agency Recordkeeping During Rule Development §§ 8052(5)(B), 8057-A

Maintain a file of all information relevant to the rule that is being considered by the agency in developing the rule. § 8052(5)(B)

If consensus-based rule development process was used, keep records of all meetings and information shared in accordance with § 8051-B.

Gather information required to prepare the Fact Sheet to be provided to the Legislature at the time formal rulemaking is initiated (or, for emergency rules, within 10 days following adoption). §§ 8053-A, 8057-A

II. FORMAL RULEMAKING – PROPOSED AGENCY RULE

A. Definition of "Proposed Rule" §§ 8002(8-A), 8053(5), 8056

Means a rule that an agency has formally proposed for adoption by filing it with the Secretary of State. 8002(8-A) Once a draft rule has been filed with the SOS as a proposed rule, it becomes a "proposed agency rule" subject to all of the procedural requirements of the MAPA concerning public input.

B. Strict Adherence to Formal Rulemaking Process § 8052(1)

1. "Ex Parte" Contacts

Agency decisionmakers: While the ex parte provisions of MAPA § 9055 do not strictly apply to rulemaking proceedings, the MAPA process for receiving public input during rulemaking may not be ignored. All comments must be presented to the agency in the manner outlined in the MAPA.

Agency staff: Because agency staff are not decisionmakers, there is no bar on outside discussion of the proposed rule between staff and interested persons. But if the comments relayed to staff are to be considered by the agency decisionmaker(s) with authority to adopt the rule, they must be timely submitted in writing to be included in the rulemaking record.

2. "Meeting" v. "Hearing" § 8052(1)

"A public meeting or other public forum held by an agency for any purpose that includes receiving public comments on a proposed agency rule is a public hearing and is subject to all the provisions of this subchapter regarding public hearings." § 8052(1)

C. Notice of Proposed Rulemaking to Secretary of State, Public and Legislature §§ 8053, 8053-A(1) & (3)

See Secretary of State's Guide to Rulemaking

The Secretary of State's weekly consolidated rulemaking ad published in newspapers around the state each Wednesday § 8053(3)

Providing notice of a proposed rule is the one of three times the MAPA requires the agency to submit a notice for publication in the Secretary of State's consolidated rulemaking ad:

Notice of proposed rule
Notice of an extension of the written comment period for a proposed rule
Notice of an adopted rule

Date of publication is important because the written comment period and the date of any hearing held on the proposed rule is based on this date.

At the time of rule proposal, the agency must file with the Legislature a fact sheet and, if the rule is not in the agency's current regulatory agenda, an amendment to the agency's regulatory agenda. §§ 8053-A(1) & (3), 8064

D. Public Proceedings – How Comments Received

1. Rulemaking With Hearing §§ 8052(1) & (2)

The MAPA itself does not require a hearing. A hearing will be held on a proposed rule whenever the agency chooses to schedule a hearing, a statute requires a hearing, or 5 or more people request a hearing after a proposed rule has been filed with a written comment period only. The MAPA requirements for hearings in adjudicatory proceedings do not apply to rulemaking hearings. § 8052(2)

The MAPA does require that, where a board or commission has rulemaking authority, at least 1/3 of the board or commission members be present at the rulemaking hearing. The MAPA also specifies who may conduct the hearing. § 8052(2)

The Guide to Rulemaking also contains specific suggestions for the conduct of rulemaking hearings.

Notice and Written Comment Period §§ 8053(1), (2) & (5)

Continuing or postponing a hearing – more notice required

The MAPA requires that the written comment period following a hearing be a minimum of 10 days. § 8052(3) It may be advisable to make this a longer period, perhaps as much as 30 days, if the agency thinks it may want to reopen the record for further written comments.

2. Rulemaking Without Hearing § 8053(1)

Notice and Written Comment Period §§ 8053(1), 8053(5)(A)

E. Reviewing Public Testimony and Comments

1. Agency Recordkeeping

The MAPA imposes strict recordkeeping requirements on the agency at this juncture -- the rulemaking file must contain all testimony and comments, the names of persons who commented and the organizations they represent. § 8052(5)(B)

2. Response to Comments

The agency must evaluate each comment and decide whether to make changes to the proposed rule based on the specific concerns expressed. § 8052(5) In its Response to Comments, the agency must address the specific comments and concerns expressed about any proposed rule and state its rationale for:

adopting any changes from the proposed rule,
failing to adopt the suggested changes, or
drawing findings and recommendations that differ from those expressed about the proposed rule.

The MAPA § 8052(5)(B) provides that a rule may not be 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.

Deliberations By Multi-member Agencies: Be careful this does not turn into a public hearing.

F. Reopening Record for Further Written Comments if Rule to be Adopted "Substantially Different" from Proposed Rule §§ 8052(5)(B) & (7)

The MAPA requires that the agency reopen the rulemaking record and allow further written comment concerning the changes from the proposed rule if the agency determines that the rule to be adopted is "substantially different" from the proposed rule. § 8052(5)(B)

"Substantially different": Would the affected public understand the change to be one within the broad scope of the original rulemaking proposal, or would it feel that it had not had an opportunity to comment on a significant change to its detriment?

Notice that written comment period extended (or reopened) for a period of 30 days § 8052(5)(B)

> The notice must be published within 14 days after the most recently published written comment deadline. § 8052(7) Given the 8 day lead time required by the Secretary of State for the consolidated rulemaking ad, which occurs only on Wednesdays, this does not give the agency much time to review all the testimony and comments, conclude that substantial changes are needed, and reopen the record. Therefore, in a matter where the agency wants to reserve as much flexibility as possible, it is advisable to have a written comment period lasting more than the 10 day statutory minimum following a hearing. With a longer comment period following a hearing, say 30 days, the agency has more time to review the comments as they come in and to make a determination regarding the changes to the proposed rule that may be needed.

G. Preparation of Basis Statement and Response to Comments

1. Basis Statement § 8052(5)

   Explain the factual and policy basis for the rule. § 8052(5)

   Identify the underlying federal or state law or regulation which serves as the basis of the rule. § 8052(8)

   Describe the information developed by the agency during the comment period concerning the purpose and operation of the rule, its fiscal impact, etc. §§ 8057-A(3) & (4)

2. Response to Comments § 8052(5)

   List names of persons whose comments where received, including through testimony at hearings, the organizations they represent and summaries of their comments.

   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 to be addressed by the agency, listing the names of the persons who commented and the organizations they represent.

   The agency shall address the specific comments and concerns expressed about any proposed rule and state its rationale for adopting any changes from the proposed rule, failing to adopt the suggested changes or drawing findings and recommendations that differ from those expressed about the proposed rule.

III. ADOPTION AND AG APPROVAL OF ROUTINE TECHNICAL RULE

A. Deadlines for Adoption and AG approval §§ 8052(7)(A) & (B)

Adoption within 120 days of the last written comment deadline
AG approval within 150 days of the last written comment deadline

The 120 and 150 day deadlines start again when the agency reopens the rulemaking record for further written comments.

For a major substantive rule, the 120 day and 150 day deadlines apply to the provisional adoption of the rule, not final adoption. § 8072

B. Adoption by Agency Decisionmakers §§ 8002(1-A) & (3-B)

Final adoption of a routine technical rule occurs when the rule is signed by an agency head or voted on by a board or commission at a public meeting. 8002(1-A) & (3-B)

Record of vote: The agency must keep and make available for inspection a record of the vote of each member of the agency taken in the rulemaking proceedings. 8056(5)

C. Approval by AAG as to Form and Legality 8052(7)(B), 8056(1)(A), 8056(6)

AG review and approval of an adopted rule may not be performed by any person involved in the formulation or drafting of the proposed rule. 8056(6) Ask a colleague to review the rule.

D. Notice of Adopted Rule to Secretary of State, Public and Legislature

The agency submits to the Secretary of State a package consisting of the adopted rule, basis statement, response to comments, checklist, a copy of the fact sheet and a copy of any matter incorporated by reference 8053(5), 8053-A(4), 8056(1)(B), 8056-A, 8057-A(4)

This is the package that is sent to the AAG for review as to form and legality. If this is the first time the AAG has seen the rule, it is important for the AAG to consider each of the factors discussed earlier and all of the procedural requirements of the MAPA.

Minor errors may be corrected at this point if the 120 day deadline for adoption has not yet passed. The agency can re-adopt the rule as corrected and the AG can approve.

E. Post-adoption

Secretary of State correction of minor errors (nonsubstantive typographical, errors in numbering) 8056(10)

Electronic filing with Secretary of State 8056(7) & (8); 29 CMR 800

Publication of rules: Adopted rules must be published and made available to the public by the agency and the Secretary of State. 8056(1)(C), (2), (3), (7) & (9)

Note: agency must also publish forms, instructions and guidelines 8056(4)

IV. EMERGENCY RULEMAKING FOR ROUTINE TECHNICAL RULES §§ 8002(3-A), 8053-A, 8054, 8060(1)(F) & (6), 8064

This is a fast track procedure for rulemaking that is limited to situations where the agency determines that adherence to the time-consuming notice and comment requirements might result in dangerous delay, preventing rules from having the necessary effect. § 8054

Agency may vary from the normal rulemaking procedures to the minimum extent necessary. § 8054

Effective date: date the adopted emergency rule is filed with the Secretary of State. § 8002(3-A)

Fact Sheet to be provided to the Legislature within 10 days following adoption of emergency rules. § 8053-A

Need not list in regulatory agenda §§ 8060(6), 8064; but regulatory agenda must list all emergency rules adopted since the previous regulatory agenda due date. § 8060(1)(F)

Limited period of effectiveness: An emergency rule is in effect only for 90 days, after which the rule must be adopted through the regular rulemaking process. § 8054(3)

Existence of an emergency: The emergency rule shall include, with specificity, agency findings with respect to:

the existence of an emergency (immediate threat to public health, safety or general welfare)

no emergency when the primary cause of the emergency is delay caused by the agency involved

the extent to which the MAPA provisions governing notice and the acceptance of public comment must be modified in order to mitigate or alleviate the threat found

The agency's findings are subject to judicial review. § 8054(2)

V. RULEMAKING INITIATED BY CITIZEN PETITION § 8055

Any person may petition an agency for the adoption or modification of any rule, on a form designated by the agency for this purpose. §§ 8055(1) & (2)

The Secretary of State has a form agencies can use.

Within 60 days of receiving a citizen rulemaking petition, the agency must either deny the petition in writing, stating the reasons for the denial, or initiate rulemaking proceedings. § 8056(3)

The agency is required to initiate rulemaking proceedings within 60 days if:

> Petition is submitted by 150 or more registered voters of the state; petition must be verified and certified by the Secretary of State prior to its presentation to the agency. § 8056(3)

A citizen rulemaking petition is defective unless it is accompanied by an actual rule text. The Secretary of State's form for citizen rulemaking petitions requires that the rule text be attached. This requirement is necessary in order to prevent citizens from asking agencies to initiate rulemaking on some broad subject which would then require the agency to begin the sometimes lengthy process of drafting a rule.

VI. REQUIREMENT THAT AGENCIES ADOPT RULES OF PRACTICE § 8051

The MAPA requires each agency to adopt rules of practice governing:

> Conduct of adjudicatory proceedings
> Licensing proceedings
> Rendering of advisory rulings – see § 9001 for required elements of rules regarding advisory rulings

. . . unless these types of rules are already provided by law. § 8051

If a rule of practice imposes a time limit or deadline for the filing of any papers on the agency or a party, the MAPA sets out standard provisions governing when the filing is complete. § 8051(1) & (2)

ADR: The first time after October 1, 1995 that an agency proposes to adopt or amend existing rules of practice, it shall also propose any rules reasonably necessary to promote the use of alternative dispute resolution techniques. § 8051

> If the agency determines that it is unnecessary or inappropriate to propose ADR techniques into its rules of practice, it must state so in the notice of proposed rulemaking provided to the public and the Secretary of State, and again in the basis statement filed with the adopted rule. § 8051

VII. JUDICIAL REVIEW OF RULES

A. Collateral Attack in 80C appeals § 11007

Most court challenges to rules occur in the context of an 80C appeal of final agency action, in which an aggrieved party argues that the agency rule applied to him/her in an adjudicatory action is void or inapplicable.

"Rules" are generally open to collateral attack in an 80C appeal of final agency action. Gross v. Secretary of State, 562 A.2d 667 (Me. 1989); Fisher v. Dame, 433A.2d 366, 372 & n.8 (Me. 1981)

B. Direct Challenge to Rule § 8058

Under section 8058 a plaintiff may bring a declaratory judgment action to seek review of an agency rule per se, absent a specific adjudicatory action. This is a direct challenge to the validity of the rule.

Under section 8058(1), an adopted rule may be declared invalid when:

1. The rule exceeds rulemaking authority of agency.

2. Agency has failed to comply with certain procedural requirements involving public participation (notice, hearing, comment requirements) § 8057(1) or (2)

Failure to adhere to the provisions of sections 8052(1),(2),(3),(4) & (7), 8053 and 8054 renders the rule void, except that insubstantial deviations from the requirements of section 8053 (involving notice) shall not invalidate the rule. § 8057(1)

Rules not approved by the AG and filed with the Secretary of State as required by sections 8056(1)(A) & (B) are void. § 8057(2)

3. Agency has failed to comply with any other procedural error if the error rises to the level that, if the error had not occurred, the rule would have likely been significantly different.

4. The rule is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

Remember the court's deference to agency interpretation of both law it administers and own rules.

Under section 8058, a person may also bring a declaratory judgment action to seek review of the agency's refusal or failure to adopt a rule where the adoption of a rule is required by law. If the court finds that an agency has failed to adopt a rule as required by law, the court may issue such orders as are necessary and appropriate to remedy such failure. § 8058(1)

No exhaustion of administrative remedies required: Need not bring an action under 8058 in order to bring an 80C appeal of final agency action under section 11007. The failure to seek judicial review under section 8058 does not preclude judicial review of rules in any other civil or criminal proceedings. § 8058(2)

VIII. MAJOR SUBSTANTIVE RULEMAKING §§ 8052(5)(C), 8071-8074

Tab 1	-	Rulemaking Statutes
Tab 2	-	DEP's Rulemaking Checklist
Tab 3	-	Various Memos & AG Opinions

Tab 1

Selected Provisions from the Maine Administrative Procedure Act

5 M.R.S.A. §§ 8001, et seq.

8002	Definitions
8003	Inconsistent provisions
8051	Adoption of rules of practice
8051-A	Appointment of liaison
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8071	Legislative review of certain agency rules
8072	Legislative review of major substantive rules
8073	Emergency major substantive rules
8074	Federally mandated rules

5 M.R.S.A. § 8002. Definitions (CONTAINS TEXT WITH VARYING EFFECTIVE DATES)

As used in this Act, unless the context otherwise indicates, the following words and phrases shall have the following meanings. [1977, c. 694, §29-B (amd).]

1. Adjudicatory proceeding. "Adjudicatory proceeding" means any proceeding before an agency in which the legal rights, duties or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for hearing.
[1977, c. 551, §3 (new).]

1-A. Adopt. "Adopt" means action certified by the dated signature of an authorized representative that a rule is accepted as official by an agency.
[1993, c. 362, §1 (new).]

2. Agency. "Agency" means any body of State Government authorized by law to adopt rules, to issue licenses or to take final action in adjudicatory proceedings, including, but not limited to, every authority, board, bureau, commission, department or officer of the State Government so authorized; but the term does not include the Legislature, Governor, courts, University of Maine System, Maine Maritime Academy, technical colleges, the Commissioner of Education for schools of the unorganized territory, school administrative units, community action agencies as defined in Title 22, section 5321, special purpose districts or municipalities, counties or other political subdivisions of the State.
[1995, c. 246, §1 (amd).]

3. Agency member. "Agency member" means an individual appointed or elected to the agency who is charged by statute with that agency's decision-making functions. It does not include counsel to the agency or agency staff.
[1977, c. 551, §3 (new).]

3-A. Effective date. "Effective date" means the date a rule goes into effect. If a date is not assigned by the agency, the effective date is assigned by the Secretary of State in accordance with section 8052, subsection 6. Unless otherwise stated in law, emergency rules filed in accordance with section 8054 are effective at the time they are filed with the Secretary of State.
[1993, c. 362, §1 (new).]

3-B. Authorized representative. "Authorized representative" means the chair of a board or commission, an individual in a major policy-influencing position as defined by chapter 71, or the chief executive officer of an agency, within the agency adopting a rule.
[1995, c. 373, §2 (new).]

3-C. Consensus-based rule development process. "Consensus-based rule development process" means a collaborative process when a draft rule is developed by an agency and a representative group of participants with an interest in the subject of the rulemaking.
[1999, c. 307, §1 (new).]

4. Final agency action. "Final agency action" means a decision by an agency which affects the legal rights, duties or privileges of specific persons, which is dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the agency.
[1977, c. 551, §3 (new).]

5. License. "License" includes the whole or any part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law which represents an exercise of the state's regulatory or police powers.
[1977, c. 551, §3 (new).]

6. Licensing. "Licensing" means the administrative process resulting in the grant, denial, renewal, revocation, suspension or modification of a license.
[1977, c. 551, §3 (new).]

7. Party. "Party" means:

A. The specific person whose legal rights, duties or privileges are being determined in the proceeding; [1977, c. 551, §3 (new).]

B. Any person participating in the adjudicatory proceeding pursuant to section 9054, subsection 1 or 2; and [1977, c. 696, §47 (amd).]

C. (TEXT EFFECTIVE UNTIL 3/15/01) Any agency bringing a complaint to Administrative Court under section 10051. [1977, c. 551, §3 (new).]

C. (TEXT EFFECTIVE 3/15/01) Any agency bringing a complaint to District Court under section 10051. [1999, c. 547, Pt. B, §16 (amd); §80 (aff).]
[1999, c. 547, Pt. B, §16 (amd); §80 (aff).]

8. Person. "Person" means any individual, partnership, corporation, governmental entity, association or public or private organization of any character, other than the agency conducting the proceeding.
[1977, c. 551, §3 (new).]

8-A. Proposed rule. "Proposed rule" or "proposed agency rule" means a rule that an agency has formally proposed for adoption through submission of the rule to the Secretary of State for publication pursuant to section 8053, subsection 5.
[1997, c. 110, §1 (new).]

9. Rule.

A. "Rule" means the whole or any part of every regulation, standard, code, statement of policy, or other agency statement of general applicability, including the amendment, suspension or repeal of any prior rule, that is or is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency, or describes the procedures or practices of the agency. [1989, c. 574, §1 (amd).]

B. The term does not include:

(1) Policies or memoranda concerning only the internal management of an agency or the State Government and not judicially enforceable;

(2) Advisory rulings issued under subchapter III;

(3) Decisions issued in adjudicatory proceedings; or

(4) Any form, instruction or explanatory statement of policy which in itself is not judicially enforceable, and which is intended solely as advice to assist persons in determining, exercising or complying with their legal rights, duties or privileges. [1977, c. 694, §§31,32 (amd).]

[1989, c. 574, §1 (amd).]

§ 8003. Inconsistent provisions

Except where expressly authorized by statute, any statutory provision now existing or hereafter adopted which is inconsistent with the express provisions of the Maine Administrative Procedure Act shall yield and the applicable provisions of this Act shall govern in its stead. [1977, c. 694, § 33 (new).]

5 M.R.S.A. § 8051. Adoption of rules of practice

In addition to other rule-making requirements imposed by law, each agency shall adopt rules of practice governing the conduct of adjudicatory proceedings, licensing proceedings and the rendering of advisory rulings, except to the extent that such rules are provided by law. The first time after October 1, 1995 that an agency proposes to adopt or modify the rules of practice governing the conduct of adjudicatory proceedings or licensing proceedings, the agency shall also propose any rules reasonably necessary to promote, when appropriate, the efficient and cost-effective use of alternative dispute resolution techniques, including the use of neutral facilitators, mediators or arbitrators. If the agency determines that it is unnecessary or inappropriate to propose these rules, it shall so state in the notice of rulemaking required under section 8053. A written explanation of the reasons for the agency's determination must be included in the basis statement of rule. Any agency rule of practice that imposes a time period or deadline for the filing of any submission or for the service of any paper must provide that filing or service is complete: [1995, c. 249, §1 (amd).]

1. Upon an agency. Upon an agency, when the agency receives the submission or the paper by mail, in-hand delivery or any other means specified by the agency; or [1989, c. 297, §1 (new).]

2. Upon a party. Upon a party, when the paper is mailed to the party or the party's attorney, by in-hand delivery to the recipient or by delivery to the recipient's office. [1995, c. 249, §1 (amd).]

§ 8051-A. Appointment of liaison

The commissioner or director of each state agency shall designate a person to serve as a liaison between the agency and the general public, the Legislature, the Secretary of State and the office of the Attorney General with respect to rulemaking. The liaison shall serve as a representative of the agency with respect to providing information about agency rules. The liaison shall be responsible for implementing the procedural provisions of this subchapter. [1989, c. 574, §2 (new).]

§ 8051-B. Consensus-based rule development process

1. Agency authority. An agency may voluntarily engage in a consensus-based rule development process. An agency that develops a draft rule through a consensus-based rule development process retains the sole discretion over whether to submit the rule as a proposed rule and as to the final language of the proposed rule.
[1999, c. 307, §2 (new).]

2. Initial considerations. As part of a consensus-based rule development process, an agency shall:

A. Establish a representative group of participants with an interest in the subject of the rulemaking; [1999, c. 307, §2 (new).]

B. Develop ground rules for the operation of the consensus-based rule development process that are mutually acceptable to the agency and the participants; [1999, c. 307, §2 (new).]

C. Disclose the funding and time constraints on the agency; [1999, c. 307, §2 (new).]

D. Give prior notice of all meetings to the representative group of participants and establish a mechanism for other interested parties to receive notice and information regarding all meetings; [1999, c. 307, §2 (new).]

E. Select an agency employee or another individual contracted by the agency to chair or facilitate the meetings; and [1999, c. 307, §2 (new).]

F. Distribute a summary and submitted materials from all meetings to the representative group of participants and other interested parties. [1999, c. 307, §2 (new).]

[1999, c. 307, §2 (new).]

3. Record. An agency that engages in a consensus-based rule development process that results in a proposed rule shall maintain:

A. A list of all meetings held, the participants at each meeting and the interests or organizations they represented; [1999, c. 307, §2 (new).]

B. A summary of each of the meetings; and [1999, c. 307, §2 (new).]

C. A description by the agency of the consensus-based rule development process and an analysis of the decisions that came out of that process, including the extent to which consensus was reached on the decisions. [1999, c. 307, §2 (new).]

[1999, c. 307, §2 (new).]

4. Judicial review. An agency action to engage in or terminate a consensus-based rule development process is not subject to judicial review. This section does not bar judicial review of a rule finally adopted by an agency following a consensus-based rule development process if such a review is otherwise available by law as long as the basis for review is other than procedural error in the consensus-based rule development process.

[1999, c. 307, §2 (new).]

5 M.R.S.A. § 8052. Rulemaking

1. Notice; public hearing. Prior to the adoption of any rule, the agency shall give notice as provided in section 8053 and may hold a public hearing, provided that a public hearing is held if otherwise required by statute or requested by any 5 interested persons.

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

[1997, c. 110, §2 (amd).]

2. Requirements. Any public hearing shall comply with any requirements imposed by statute, but shall not be subject to subchapter IV. Any public hearing shall be held and conducted as follows.

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. [1981, c. 524, §2 (new).]

B. In the case of a rule authorized to be adopted by a single agency member, either the agency member, a person in a major policy-influencing position, as listed in chapter 71, or a designee who has responsibility over the subject matter to be discussed at the hearing shall hold and conduct the hearing. [1993, c. 362, §2 (amd).]

[1993, c. 362, §2 (amd).]

3. Statements and arguments filed. When a public hearing is 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.

[1977, c. 551, §3 (new).]

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 adopting any rule. [1991, c. 632, §1 (amd).]

5. Written statement adopted. At the time of 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 adopting any changes from the proposed rule, failing to 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. [1993, c. 446, Pt. A, §19 (amd).]

B. A rule may not be 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 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 adoption of a rule. If an agency determines that a rule that the agency intends to 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 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. [1993, c. 446, Pt. A, §19 (amd).]

C. If the adoption under this subsection is final adoption of a major substantive rule under subchapter II-A, the agency must include in its written statement citation of the legislative act authorizing final adoption of that rule; or, if authorization is the result of failure of the Legislature to act under section 8072, subsection 7, the agency must indicate that fact and identify the date the agency filed the rule for review under section 8072. [1997, c. 196, §1 (new).]

[1997, c. 196, §1 (amd).]

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.

[1989, c. 574, §4 (new).]

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.

[1993, c. 362, §3 (amd).]

7. Adoption of rule. A rule may not take effect unless:

A. The agency 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 [1985, c. 39, §1 (new).]

B. This 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. [1985, c. 39, §1 (new).]

The final date for comments may be extended if notice of doing so is published within 14 days after the most recently published comment deadline, in the consolidated notice referred to in section 8053.

[1995, c. 373, §3 (amd).]

8. Appropriate reference to underlying federal and state laws and regulations. At the time of adoption of any rule, the agency shall refer with particularity to any underlying federal or state law or regulation which serves as the basis of the rule.
[1985, c. 77, §1 (new).]

5 M.R.S.A. § 8053. Notice

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

A. Any person specified by the statute authorizing the rulemaking; [1981, c. 470, Pt. A, §9 (new).]

B. Any person who has filed within the past year a written request with the agency for notice of rulemaking; and [1985, c. 39, §2 (amd).]

C. Any trade, industry, professional, interest group or regional publication that the agency considers effective in reaching the persons affected. [1995, c. 373, §4 (amd).]

D. [1985, c. 39, §2 (rp).]

Notification to subscribers under paragraph B 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 must also be given to the Secretary of State, by the deadline established by the Secretary of State, for publication in accordance with subsection 5.
[1995, c. 373, §4 (amd).]

2. Notice of rulemaking hearing. When an agency holds a public hearing prior to adoption of a rule, notice of the hearing shall be given in the manner described in subsections 1 and 5, using the date of the hearing to calculate the time periods involved;
[1979, c. 425, §5 (rpr).]

3. Contents of notice. The notice shall:

A. Refer to the statutory authority under which the adoption of the rule is proposed; [1979, c. 425, §5 (new).]

B. State the time and place of any scheduled public hearing or state the manner in which a hearing may be requested; [1979, c. 425, §5 (new).]

C. State the manner and time within which data, views or arguments may be submitted to the agency for consideration, whether or not a hearing is held; [1985, c. 77, §2 (amd).]

D. If possible, contain the express terms of the proposed rule or otherwise describe the substance of the proposed rule, stating the subjects and issues involved and indicate where a copy of the proposed rule may be obtained; and [1985, c. 77, §2 (amd).]

E. Refer to the substantive state or federal law to be implemented by the rules. [1985, c. 77, §2 (new).]

[1985, c. 77, §2 (amd).]

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 comment deadline of any rule without a hearing, the agency shall make copies of the proposed rule available to persons upon request.

[1995, c. 373, §5 (amd).]

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.

[1981, c. 524, §9 (amd).]

5. Publication. The Secretary of State shall:

A. Arrange for the weekly publication of a consolidated notice of rule making of all state agencies, which shall also include a brief explanation to assist the public in participating in the rule-making process. Notice of each rule-making proceeding shall be published once 17 to 24 days prior to the public hearing on the proposed rule or at least 30 days prior to the last date on which views and arguments may be submitted to the agency for consideration if no public hearing is scheduled; [1981, c. 698, §12 (rpr).]

B. Designate certain newspapers, which together have general circulation throughout the State, as papers of record for the purpose of publishing notice under paragraph A. Notice of proposed rules affecting only a particular locality or region need only be published in the designated newspapers having general circulation in the area affected. [1979, c. 425, §5 (new).]

C. Designate one day as rules day for publication of notices on rulemaking as set forth in this subsection; and [1991, c. 837, Pt. A, §11 (amd).]

D. Be reimbursed for the cost of publication of rule-making notice by the agencies proposing the rulemaking. The total costs of each consolidated publication will be prorated by the Secretary of State among all agencies submitting notice for a particular week. [1979, c. 425, §5 (new).]

[1991, c. 837, Pt. A, §11 (amd).]

§ 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. [1989, c. 574, §5 (rpr).]

B. [1989, c. 574, §5 (rp).]

C. [1989, c. 574, §5 (rp).]

D. [1989, c. 574, §5 (rp).]

[1989, c. 574, §5 (rpr).]

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. [1989, c. 574, §5 (rpr).]

3. Submission of materials to the Legislature. When an agency, pursuant to subsection 1 or 2, provides materials to the Legislature, it shall provide them to the Executive Director of the Legislative Council, who shall refer the materials to the appropriate committee or committees of the Legislature for review. The agency shall provide sufficient copies of the materials for each member of the appropriate committee or committees. [1989, c. 574, §5 (new).]

4. Adopted rules. When an agency adopts rules, it shall provide a copy of the adopted rules, the statement required by section 8052, subsection 5, and the checklist required by section 8056-A to the Secretary of State who shall compile the adopted rules by agency. [1989, c. 574, §5 (new).]

5 M.R.S.A. § 8054. Emergency rulemaking

1. Emergency. If the agency finds that immediate adoption of a rule by procedures other than those set forth in sections 8052 and 8053 is necessary to avoid an immediate threat to public health, safety or general welfare, it may modify those procedures to the minimum extent required to enable adoption of rules designed to mitigate or alleviate the threat found. Emergency rules shall be subject to the requirements of section 8056. [1977, c. 551, § 3 (new).]

2. Agency findings. Any emergency rule shall include, with specificity, the agency's findings with respect to the existence of an emergency, and such findings shall be subject to judicial review under section 8058. No emergency shall be found to exist when the primary cause of the emergency is delay caused by the agency involved. [1979, c. 425, § 6 (amd).]

3. Emergency period. Any emergency rule shall be effective only for 90 days, or any lesser period of time specified in an enabling statute or in the emergency rule. After the expiration of the emergency period, such rule shall not thereafter be adopted except in the manner provided by section 8052. [1977, c. 551, § 3 (new).]

5 M.R.S.A. § 8055. Petition for adoption or modification of rules

1. Petition. Any person may petition an agency for the adoption or modification of any rule. [1977, c. 551, § 3 (new).]

2. Form designated. Each agency shall designate the form for such petitions and the procedure for their submission, consideration and disposition. [1977, c. 551, § 3 (new).]

3. Receipt of petition. Within 60 days after receipt of a petition, the agency shall either notify the petitioner in writing of its denial, stating the reasons therefor, or initiate appropriate rule-making proceedings. Whenever a petition to adopt or modify a rule is submitted by 150 or more registered voters of the State, the agency shall initiate appropriate rulemaking proceedings within 60 days after receipt of the petition. The petition must be verified and certified in the same manner provided in Title 21-A, section 354, subsection 7, prior to its presentation to the agency. [1985, c. 506, Pt. A, § 4 (amd).]

5 M.R.S.A. § 8056. Filing and publication

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

A. Submit the rule to the Attorney General for approval as to form and legality; [1977, c. 551, §3 (new).]

B. File the original rule as signed by the Attorney General or an assistant attorney general and the authorized representative of the agency, 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 is susceptible to frequent and easy revision.

(1) Through rulemaking, an agency may incorporate by reference all or any part of a code, standard, rule or regulation that has been adopted by an agency of the United States or of this State or by a nationally recognized organization or association.

(2) The reference in the agency rules must fully identify the incorporated matter by exact title, edition or version and date of publication.

(3) The rules must state where copies of the incorporated matter are available at cost from the agency issuing the rule or where copies are available from the agency of the United States, this State or an organization or association originally issuing that matter.

(4) An agency incorporating a matter by reference shall submit a copy of the incorporated matter to the Secretary of State; [1999, c. 261, §1 (amd).]

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 [1981, c. 524, §11 (amd).]

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. [1981, c. 524, §12 (new).]

[1999, c. 261, §1 (amd).]

2. Form. With respect to every rule 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, and for distribution free or at actual cost, complete sets of such rules currently in effect.

[1977, c. 551, §3 (new).]

3. Secretary of State. The Secretary of State shall:

A. Maintain and make available at the Secretary of State's office, for inspection at no charge and for copying or purchase, current copies of complete rules for all agencies filed in accordance with subsection 1, paragraph B; [1995, c. 373, §7 (amd).]

A-1. Compile, edit, index and arrange for publication and distribution all current rules of state agencies as available resources permit. Compilations must be supplemented or revised at least annually; [1993, c. 362, §4 (amd).]

A-2. Publish an annual list of current rules of state agencies; [1993, c. 362, §5 (new).]

B. Supply, at actual cost, annually updated copies of complete sets of rules of an agency to any person who has filed with the Secretary of State within the past year a written request for such sets of rules; and [1991, c. 541, §1 (amd).]

C. Codify all current state agency rules in an electronic text file data base, in consultation with affected state agencies and in accordance with subsections 7 and 8, as available resources permit. [1991, c. 541, §1 (new).]

[1995, c. 373, §7 (amd).]

4. Additional requirements. The requirements of subsection 2 shall additionally be applicable to the agency's forms, instructions, explanatory statements and other items defined in section 8002, subsection 9, paragraph B, subparagraph (4).

[1977, c. 551, §3 (new).]

5. Record of vote. In addition to the foregoing, each agency shall keep, at its principal office, and make available for inspection to any person a record of the vote of each member of the agency taken in rule-making proceedings.
[1977, c. 551, §3 (new).]

6. Attorney General review and approval. The review required in subsection 1 may not be performed by any person involved in the formulation or drafting of the proposed rule. The Attorney General may not approve a rule if it is reasonably expected to result in a taking of private property under the Constitution of Maine unless such a result is directed by law or sufficient procedures exist in law or in the proposed rule to allow for a variance designed to avoid such a taking.
[1995, c. 537, §6 (amd).]

7. Codification of rules. The Secretary of State, in consultation with affected state agencies, shall develop a plan to codify all current rules of state agencies within its available resources. The codified rules must be maintained on an electronic text file data base. To develop the electronic text file data base, agencies may refile an existing rule or parts of an existing rule. If an agency refiles a rule or portion of a rule:

A. The agency may not make at the time of refiling any substantive changes in that rule or portion of that rule; and [1991, c. 554, §2 (new).]

B. The refiled rule or portion of the rule must be adopted in accordance with the Maine Administrative Procedure Act except that public comment on the refiling under section 8057-A, subsection 3 is limited to documenting where the refiled rule or portion of the rule is substantively different from the existing rule. [1991, c. 554, §2 (new).]

[1991, c. 554, §2 (new).]

8. Electronic text file procedures. Under subsection 1, the Secretary of State may establish by rule in accordance with the Maine Administrative Procedure Act procedures and criteria for the filing of rules in electronic text file format.
[1991, c. 554, §2 (new).]

9. Certification of published rules. The Secretary of State may certify that a publication of the codified rules and any supplements or replacement volumes to that publication are a correct transcript of the text of the original rules.

A. Certified publications must contain a printed certificate of the Secretary of State stating that the publication is the official copy. A facsimile of the signature of the Secretary of State imprinted by or at the direction of the Secretary of State has the same validity as a written signature of the Secretary of State. [1991, c. 554, §2 (new).]

B. A publication of the rules certified by the Secretary of State constitutes prima facie evidence of the rules. [1991, c. 554, §2 (new).]

C. Any publication of a rule or rules that is not certified by the Secretary of State:

(1) May neither state nor imply that the publication is an official copy of the rules; and

(2) Must state in a conspicuous location where the Secretary of State's certified copy is located. [1991, c. 554, §2 (new).]

[1991, c. 554, §2 (new).]

10. Minor errors. The Secretary of State may correct minor, nonsubstantive errors in spelling and format in proposed or adopted rules if the agency is notified.

[1993, c. 362, §6 (new).]

§ 8056-A. Technical assistance; annual report

1. Checklist. The Secretary of State shall establish and implement a checklist that must be completed by agencies and attached to adopted rules filed with the Secretary of State after December 31, 1989. The checklist must include the timing of filing and notices as well as other procedural requirements of this subchapter.

[1991, c. 554, §3 (amd).]

2. Technical assistance. The Secretary of State shall develop uniform drafting instructions for use by all agencies that propose rules under this subchapter and shall compile those instructions in a drafting manual. In addition, the Secretary of State shall provide assistance to any agency regarding the form for drafting of rules and supporting materials and the other requirements of this subchapter.

[1991, c. 554, §3 (amd).]

3. Report. The Secretary of State shall report to the Governor and the joint standing committee of the Legislature having jurisdiction over state and local government prior to February 1st of each year with respect to rule-making activities for the prior year. The report must include statistical information on agency rule-making activities, agency experience with procedural requirements of this subchapter, an evaluation of the codification process, the impact of the electronic text file data base on state agencies and users of the rules and recommendations for improvements to the rule-making process. In preparing the report, the Secretary of State shall solicit comments on this subchapter from agencies and their legal counsels, the Executive Director of the Legislative Council and the public.

[1991, c. 554, §3 (amd).]

5 M.R.S.A. § 8057. Compliance

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 8053 and 8054 shall be void and of no legal effect, provided that insubstantial deviations from the requirements of section 8053 shall 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. [1985, c. 680, § 5 (amd).]

2. Rules not approved. Rules not approved and filed in the manner prescribed by section 8056, subsection 1, paragraphs A and B, shall be void and of no legal effect. Rules in effect prior to July 1, 1978, become void and of no legal effect on December 31, 1979, unless filed with the Secretary of State in accordance with section 8056, subsection 1, paragraph B. [1979, c. 425, § 10 (amd).]

3. Agency, responsibility. The requirements of this subchapter do not relieve any agency of the responsibility of compliance with any statute requiring that its rules be filed with or approved by any designated person before they become effective. [1977, c. 551, § 3.]

§ 8057-A. Preparation and adoption of rules

In preparing and adopting rules, each agency shall strive to the greatest possible extent to follow the procedure defined in this section. [1989, c. 574, §7 (new).]

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 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 shall establish a fact sheet that provides the citation of the statutory authority of the rule. In addition, the agency, to the best of its ability, shall also include in the fact sheet the following:

A. The principal reasons for the rule; [1989, c. 574, §7 (new).]

B. A comprehensive but concise description of the rule that accurately reflects the purpose and operation of the rule; [1989, c. 574, §7 (new).]

C. An estimate of the fiscal impact of the rule; and [1989, c. 574, §7 (new).]

D. An analysis of the rule, including a description of how the agency considers whether the rule would impose an economic burden on small business as described in section 8052, subsection 5-A. [1989, c. 574, §7 (new).]

[1989, c. 574, §7 (new).]

2. Additional information for existing rules. For existing rules having an estimated fiscal impact greater than $1,000,000, the fact sheet shall also include the following:

A. A description of the economic impact of the rule including effects that cannot be quantified in monetary terms; [1989, c. 574, §7 (new).]

B. A description and examples of individuals, major interest groups and types of businesses that will be affected by the rule and how they will be affected; and [1989, c. 574, §7 (new).]

C. A description of the benefits of the rule including those that cannot be quantified. [1989, c. 574, §7 (new).]

[1989, c. 574, §7 (new).]

3. Public comment period. During the public comment period and prior to adoption of any rule, the agency shall strive to obtain and evaluate relevant information from the public and other information reasonably available to the agency with respect to relevant provisions in subsection 1. [1989, c. 574, §7 (new).]

4. Adoption of rules. At the time of adoption of any rule, the agency shall file with the Secretary of State the information developed by the agency pursuant to subsections 1 and 2. [1989, c. 574, §7 (new).]

5 M.R.S.A. § 8058. Judicial review of rules

1. Judicial review. Judicial review of an agency rule, or of an agency's refusal or failure to adopt a rule where the adoption of a rule is required by law, may be had by any person who is aggrieved in an action for declaratory judgment in the Superior Court conducted pursuant to Title 14, section 5951, et seq., which provisions shall apply to such actions wherever not inconsistent with this section. Insofar as the court finds that a rule exceeds the rule-making authority of the agency, or is void under section 8057, subsection 1 or 2, it shall declare the rule invalid. In reviewing any other procedural error alleged, the court may invalidate the rule only if it finds the error to be substantial and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if the error had not occurred. If the court finds that the rule is not procedurally invalid and not in excess of the agency's rule-making authority, its substantive review of that rule shall be to determine whether the rule is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. The phrase "otherwise not in accordance with law" shall apply only to the review authorized in the preceding sentence and shall not be construed so as to limit or replace in any way section 8003. In the event that the court finds that an agency has failed to adopt a rule as required by law, the court may issue such orders as are necessary and appropriate to remedy such failure. [1985, c. 680, § 6 (amd).]

2. Failure to seek judicial review. The failure to seek judicial review of an agency rule in the manner provided by subsection 1 shall not preclude judicial review thereof in any civil or criminal proceeding. [1977, c. 551, § 3 (new).]

5 M.R.S.A. § 8059. Inconsistent rules

When 2 rules are inconsistent or in conflict with one another, so that compliance with both is impossible, then compliance with either rule shall be deemed to be compliance with the other. [1985, c. 680, § 7 (rpr).]

5 M.R.S.A. § 8060. Regulatory agenda

Each agency with the authority to adopt rules shall issue to the appropriate joint standing committee or committees of the Legislature and to the Secretary of State an agency regulatory agenda as provided in this section. [1989, c. 547, §8 (new).]

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

A. A list of rules that the agency expects to propose prior to the next regulatory agenda due date and whether the agency anticipates engaging in any consensus-based rule development process; [1999, c. 307, §3 (amd).]

B. The statutory or other basis for adoption of the rule; [1989, c. 547, §8 (new).]

C. The purpose of the rule; [1989, c. 547, §8 (new).]

D. The contemplated schedule for adoption of the rule; [1989, c. 547, §8 (new).]

E. An identification and listing of potentially benefited and regulated parties; and [1989, c. 547, §8 (new).]

F. A list of all emergency rules adopted since the previous regulatory agenda due date. [1989, c. 547, §8 (new).]

[1999, c. 307, §3 (amd).]

2. Due date. A regulatory agenda must be issued between the beginning of a regular legislative session and 100 days after adjournment.

[1993, c. 362, §7 (amd).]

3. Legislative copies. The agency shall provide copies of the agency regulatory agenda to the Legislature as provided in section 8053-A.

[1989, c. 547, §8 (new).]

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

[1989, c. 547, §8 (new).]

5. Legislative review of agency regulatory agendas. Each regulatory agenda shall 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.

[1989, c. 547, §8 (new).]

6. Application. Nothing in this section or section 8053-A may be construed to prohibit agencies from adopting emergency rules that have not been listed or included in the regulatory agenda pursuant to this section.

[1991, c. 540, §1 (amd).]

5 M.R.S.A. § 8061. Style

All rules and any other materials required by this subchapter to be provided to the public or to the Legislature shall, to the maximum extent feasible, use plain and clear English, which can readily be understood by the general public. The use of technical language shall be avoided to the greatest possible extent. [1989, c. 574, §8 (new).]

5 M.R.S.A. § 8062. Performance standards

When legislation authorizing any regulated activity requires that certain criteria be met in order that any license, permit, authorization or certification to undertake the regulated activity be granted and when an agency determines that performance standards will assist regulated parties in complying with the criteria, the standards shall be developed during the rule-making process and incorporated into adopted rules when performance standards are equally effective in meeting applicable statutory criteria. [1989, c. 574, §8 (new).]

5 M.R.S.A. § 8063. Fiscal impact

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

This section does not apply to emergency rules. [1991, c. 233 (new).]

5 M.R.S.A. § 8064. Limitation

Except for emergency rules as provided in section 8060, subsection 6, an agency may not adopt any rule unless the agency has complied with the provisions in sections 8053-A and 8060, which include legislative review of the rule. When an agency proposes a rule not in its current regulatory agenda, the agency must file an amendment to its agenda with the Legislature and Secretary of State under section 8053-A at the time of rule proposal. [1993, c. 362, §8 (amd).]

§ 8071. Legislative review of certain agency rules

Except as otherwise provided in this subchapter, rules adopted pursuant to rule-making authorization delegated to an agency after January 1, 1996 are subject to the procedures of this subchapter and subchapter II. [1995, c. 463, §2 (new).]

1. Legislative action. All new rules authorized to be adopted by delegation of legislative authority that is enacted after January 1, 1996, including new rules authorized by amendment of provisions of laws in effect on that date, must be assigned by the Legislature to one of 2 categories and subject to the appropriate level of rule-making procedures as provided in this subchapter. The Legislature shall assign the category and level of review to all rules at the time it enacts the authorizing legislation. The Legislature may assign different categories and levels of review to different types of rules authorized by the same legislation.

[1995, c. 574, §1 (amd).]

2. Categories of rules. There are 2 categories of rules authorized for adoption after January 1, 1996.

A. Routine technical rules are procedural rules that establish standards of practice or procedure for the conduct of business with or before an agency and any other rules that are not major substantive rules as defined in paragraph B. Routine technical rules include, but are not limited to, forms prescribed by an agency; they do not include fees established by an agency except fees established or amended by agency rule that are below a cap or within a range established by statute. [1995, c. 463, §2 (new).]

B. Major substantive rules are rules that, in the judgment of the Legislature:

(1) Require the exercise of significant agency discretion or interpretation in drafting; or

(2) Because of their subject matter or anticipated impact, are reasonably expected to result in a significant increase in the cost of doing business, a significant reduction in property values, the loss or significant reduction of government benefits or services, the imposition of state mandates on units of local government as defined in the Constitution of Maine, Article IX, Section 21, or other serious burdens on the public or units of local government. [1995, c. 463, §2 (new).]

[1995, c. 463, §2 (new).]

3. Levels of rule-making process. In order to provide for maximum agency flexibility in the adoption of rules while retaining appropriate legislative oversight over certain rules that are expected to be controversial or to have a major impact on the regulated community, each agency rule authorized and adopted after January 1, 1996 is subject to one of 2 levels of rule-making requirements.

A. Routine technical rules are subject to the rule-making requirements of subchapter II only. [1995, c. 463, §2 (new).]

B. Major substantive rules are subject to the requirements of section 8072. After January 1, 1996, any grant of general or specific rule-making authority to adopt major substantive rules is considered to be permission only to provisionally adopt those rules subject to legislative review. Final adoption may occur only after legislative review of provisionally adopted rules as provided in section 8072.

The establishment or amendment of an agency fee by rulemaking is a major substantive rule, except for the establishment or amendment of a fee that falls under a cap or within a range set in statute, which is a routine technical rule. [1995, c. 463, §2 (new).]

[1995, c. 463, §2 (new).]

§ 8072. Legislative review of major substantive rules

As provided in section 8071, major substantive rules are subject to an increased level of rule-making requirements. The rule-making requirements of subchapter II for routine technical rules apply to the adoption of major substantive rules, except that the 120-day period for adoption and the 150-day period for approval as to form and legality under section 8052, subsection 7, paragraphs A and B apply to provisional adoption of major substantive rules, not final adoption. In addition to the other rule-making requirements, every major substantive rule is also subject to legislative review as provided in this section. [1995, c. 463, §2 (new).]

1. Preliminary adoption of major substantive rules. An agency proposing a major substantive rule other than an emergency rule, after filing the notice of proposed rulemaking required by section 8052, shall proceed with rule-making procedures to the point of, but not including, final adoption. At that point, known in this section as "provisional adoption," the agency shall file the provisionally adopted rule and related materials with the Secretary of State as provided in section 8056, subsection 1, paragraph B and submit the rule to the Legislature for review and authorization for final adoption as provided in this section. The rule has legal effect only after review by the Legislature followed by final adoption by the agency.

[1997, c. 196, §2 (amd).]

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

A. The full text of the rule provisionally adopted by the agency with new language underlined and with language to be deleted from any existing rule stricken through but clearly legible; [1995, c. 463, §2 (new).]

B. A concise summary of the content of the rule and a description and a copy of any existing rule the agency proposes to amend or repeal; [1995, c. 463, §2 (new).]

C. A statement of the circumstances that require the rule; [1995, c. 463, §2 (new).]

D. A statement of the economic impact of the rule on the State and its residents; and [1995, c. 463, §2 (new).]

E. Any other information required by law. [1995, c. 463, §2 (new).]

[1995, c. 463, §2 (new).]

3. Assignment to committee of jurisdiction. Upon receipt of the required copies of the provisionally adopted rule and related information, the Executive Director of the Legislative Council shall immediately forward the materials to the Secretary of the Senate and the Clerk of the House for placement on the Advance Journal and Calendar and distribution to a committee as provided in this subsection. The secretary and clerk shall jointly suggest reference to a joint standing committee of the Legislature that has jurisdiction over the subject matter of the proposed rule and shall provide for publication of that suggestion in the Advance Journal and Calendar first in the Senate and then in the House of Representatives no later than the next legislative day following receipt. After floor action on referral of the rule to committee is completed, the Secretary of the Senate and the Clerk of the House of Representatives shall send copies of the rule and related information to each member of that committee. Each rule submitted for legislative review must be reviewed by the appropriate joint standing committee at a meeting called for that purpose in accordance with legislative rules. A committee may review more than one rule and the rules of more than one agency at a meeting. The committee shall notify the affected agency of the meeting on its proposed rules.

[1995, c. 574, §2 (amd).]

4. Committee review. The committee shall review each provisionally adopted rule and, in its discretion, may hold public hearings on that rule. A public hearing under this subsection must be advertised in the same manner as required by legislative rules then in effect for advertisement of public hearings on proposed legislation. The committee's review must include, but is not limited to, a determination of:

A. Whether the agency has exceeded the scope of its statutory authority in approving the provisionally adopted rule; [1995, c. 463, §2 (new).]

B. Whether the provisionally adopted rule is in conformity with the legislative intent of the statute the rule is intended to implement, extend, apply, interpret or make specific; [1995, c. 463, §2 (new).]

C. Whether the provisionally adopted rule conflicts with any other provision of law or with any other rule adopted by the same or a different agency; [1995, c. 463, §2 (new).]

D. Whether the provisionally adopted rule is necessary to fully accomplish the objectives of the statute under which the rule was proposed; [1995, c. 463, §2 (new).]

E. Whether the provisionally adopted rule is reasonable, especially as it affects the convenience of the general public or of persons particularly affected by it; [1995, c. 463, §2 (new).]

F. Whether the provisionally adopted rule could be made less complex or more readily understandable for the general public; [1995, c. 537, §7 (amd).]

G. Whether the provisionally adopted rule was proposed in compliance with the requirements of this chapter and with requirements imposed by any other provision of law; and [1995, c. 537, §7 (amd).]

H. For a rule that is reasonably expected to result in a significant reduction in property values, whether sufficient variance provisions exist in law or in the rule to avoid an unconstitutional taking, and whether, as a matter of policy, the expected reduction is necessary or appropriate for the protection of the public health, safety and welfare advanced by the rule. [1995, c. 537, §8 (new).]

[1995, c. 537, §§7, 8 (amd).]

5. Committee recommendation. After reviewing the rule, the committee shall recommend:

A. That the Legislature authorize the final adoption of the rule; [1995, c. 463, §2 (new).]

B. That the Legislature authorize the final adoption of a specified part of the rule; [1995, c. 463, §2 (new).]

C. That the Legislature authorize the final adoption of the rule with certain specified amendments; or [1995, c. 463, §2 (new).]

D. That the final adoption of the rule be disapproved by the Legislature. [1995, c. 463, §2 (new).]

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

[1995, c. 463, §2 (new).]

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

[1995, c. 463, §2 (new).]

7. Consideration by the Legislature. No later than 30 days before statutory adjournment of the Legislature as provided in Title 3, section 2 each joint standing committee of the Legislature shall submit to the Secretary of the Senate and the Clerk of the House of Representatives the committee's report on agency rules the committee has reviewed as provided in this section. The report must include a copy of the rule or rules reviewed, the committee's recommendation concerning final adoption of the rule or rules, a statement of the reasons for a 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 an adjournment date earlier than required by statute is anticipated, the Legislative Council may establish an earlier deadline for agencies to submit provisionally adopted rules for review, except that any earlier date established by the council may not be more than 75 days before statutory adjournment. If, before adjournment of the session at which a rule is reviewed, the Legislature fails to act on all or part of any rule submitted to it

for review in accordance with this section, an agency may proceed with final adoption and implementation of the rule or part of the rule that was not acted on.

[1997, c. 196, §2 (amd).]

8. Final adoption; effective date. Unless otherwise provided by law, final adoption of a rule by an agency must occur within 60 days of the effective date of the legislation approving that rule or of the adjournment of the session at which that rule is reviewed if no legislation is enacted. Finally adopted rules must be filed with the Secretary of State as provided in section 8056, subsection 1, paragraph B 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.

[1995, c. 463, §2 (new).]

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

[1995, c. 463, §2 (new).]

§ 8073. Emergency major substantive rules

Major substantive rules are subject to the emergency rule-making procedures required under subchapter II, except that a major substantive rule adopted on an emergency basis after the deadline for submission to the Legislature for review under section 8072 may be effective for up to 12 months or until the Legislature has completed review as provided in that section. After the expiration of the emergency period, an emergency rule may not be adopted except in the manner provided by section 8072. [1995, c. 463, §2 (new).]

§ 8074. Federally mandated rules

Major substantive rules that must be adopted to comply with federal law or regulations or to qualify for federal funds and over the adoption of which the agency exercises no option or discretion are not subject to the legislative review requirement of this subchapter unless they impose requirements or conditions that exceed the federal requirements. An agency must file notice of the adoption of major substantive rules that are required by federal law and that do not exceed federal requirements with the Legislature in the same manner as it files notice of proposed rules under section 8053-A. [1995, c. 463, §2 (new).]

Tab 2

REVISED: 12/29/00

Department of Environmental Protection
CHECKLIST of STEPS in the RULEMAKING PROCESS

NOTE: This document may be used as a guide for rulemaking. Its use is not required. If you have questions or comments, call Hetty Richardson (ext. 7799), Jeff Crawford (7647), Jim Dusch (8662), or John James (7866).

	ACTION	**DATE COMPLETED**
1.	Ok need for rule with supervisor and bureau director.	_____
2.	Prepare initial draft in standard rule format.	_____

NOTE 1: *All department rules must follow the format described in Jim Dusch's memo of 2/7/96. A template has been prepared for this purpose. Contact Laura Gay (BRWM), Shari Goodwin (BLWQ) or Lori Stone (BLWQ) for word-processing assistance. Word-processing will be simplified if the required format is used from the inception of the rule development process.*

NOTE 2: *See 5 MRSA §8052(5-A) requiring consideration of small business impacts; 5 MRSA § 8056(1)(B) regarding incorporation of material into a rule by reference; 5 MRSA §8062 requiring use of performance standards; and 38 MRSA §341-D(1-B) requiring identification of provisions more stringent than corresponding federal requirements.*

NOTE 3: *5 MRSA §8052(5)(B) requires you to keep a file that includes information considered in connection with formulation, proposal and adoption of a rule. See also 5 MRSA §8051-B(3) regarding record keeping for consensus-based rule development.*

3.	Circulate draft rule for internal review and comment to appropriate program staff, supervisor, bureau director, OOC (I&A director and Brooke), P&P units for each bureau, regional office directors, AAG.	_____

NOTE: *I&A is required to ensure that rules are consistent with P2 goals and initiatives. See 38 MRSA § 342(4)(B)(3).*

4.	Revise draft based on internal review comment.	_____
5.	Present revised draft to supervisor and bureau director for review. Refine as directed.	_____

	ACTION	DATE COMPLETED
6.	In consultation with bureau director, decide whether to seek preliminary input from outside parties (Step 8) or to begin formal proceedings (Step 9); brief commissioner as appropriate.	_____
7.	Coordinate with I&A (Ron Dyer) for notice to small business as appropriate.	_____
	NOTE: *The I&A office facilitates small business participation in rulemaking proceedings. See "Governor's Initiatives for Small Business, DEP 5 Point Plan for Environmental Excellence" (Dec. 95).*	
8.	[OPTIONAL] Solicit input on rule development from outside parties via workshops, task force or written comment. Revise draft as appropriate in response to outside comment.	_____
	NOTE 1: *This step has become standard practice. It is recommended for new rules and major amendments, but can be time consuming. Allow enough time for meaningful input and revision, but do not let the process drag out unnecessarily. The aim is to gather information and ideas; consensus on all areas of concern is unlikely and not expected at this early step.*	
	NOTE 2*: Although consensus-based rule development processes are optional, the MAPA imposes certain procedural requirements if an agency decides to undertake such a process. See 5 MRSA §8051-B.*	
9.	Present revised draft to AAG for legal fine-tuning; revise as needed. Allow at least two weeks for AAG review.	_____
10.	Complete rulemaking summary (per Executive Order 6, FY 94/95; EO 12, FY 91/92; and EO 3, FY 99/00). See template "6&12form.dot" at H:\common\rulemak\guidance\blankfrm\. Address the cover memo to Wayne Douglas and send an electronic copy with the completed summary to OOC (Brooke Barnes). Brooke will forward it to Mr. Douglas for authorization to proceed.	_____
11.	Upon ok to proceed from OOC and governor's office, see BEP secretary Terry Hanson to schedule the rule for presentation to the BEP and to select a tentative date for a public hearing (if a hearing will be held).	_____
	NOTE: *To allow time to meet MAPA notice requirements, hearings should be scheduled at least 30 days after the date the draft rule is presented to the BEP.*	
12.	Prepare memo to BEP requesting permission to begin formal rulemaking proceedings under the MAPA. The memo should: explain the purpose of the rule; describe the rule development process; outline key issues; recommend a public hearing date (or explain why a hearing is not recommended); and propose a deadline for receipt of comments. See P&P for sample memo; see	

also DEP Operational Guidelines, "Procedure for Preparation of Board Packet Material," 4/13/91. _____

NOTE: *When setting the deadline for comments, remember that the MAPA requires the comment period to extend at least 10 days after the hearing date or 30 days from the date notice of rulemaking is published if no hearing is held. A minimum 30-day, post-hearing comment period is recommended by the Attorney General's Office.*

13. Give the memo, draft rule and any other appropriate explanatory material to the board packet coordinator for your bureau (Laura Gay in BRWM; Cindi Oakes in BLWQ). In BRWM, board packet material is due to Laura on the Tuesday sixteen days in advance of the board meeting at which the rule will be presented. Board meetings usually are held on the 1st and 3rd Thursday of each month. See Laura or Cindi for the specific packet deadlines. _____

NOTE: *The MAPA (see 5 MRSA §8063) requires a fiscal impact note "at the end of the rule." To satisfy this requirement, the Secretary of State has included a fiscal impact note in the MAPA-3 notice form. There is no need to also append the note at the end of the rule text.*

14. **BLWQ only.** Give the Bureau Director a copy of the packet material with a cover memo including the name of the person who will be speaking at the board meeting, the action to be requested of the board, the issues and the anticipated outcome. _____

15. Present draft rule to BEP for approval to proceed. _____

16. If a hearing is to be held, check with BEP secretary Terry Hanson to confirm the location, room set-up and transcription arrangements, and to discuss any special requirements you may have. _____

NOTE re: transcription: *At a minimum, the hearing should be taped. We recommend that you arrange for a written transcript because of the need to prepare written responses to comments (see Step 25 below).*

17. Complete the rulemaking notice form (MAPA 3) and prepare a "fact sheet" as required under 5 MRSA §8057-A(1). Templates for the forms are at H:\common\rulemak\guidance\blankfrm. Be sure to have the appropriate person complete and sign the bottom of the notice form to authorize payment for publication of the notice ad. In BLWQ, this usually is Paul Dutram; in BRWM, see David Maxwell or your division director. _____

NOTE: *It is department practice to accept comments by e-mail and fax. Be sure the MAPA-3 notice form includes the following language:*

ACTION **DATE COMPLETED**

Comments may be submitted by mail at the address below, by fax at (207) 287- [insert appropriate FAX extension] *or by e-mail at* [insert e-mail address]. *To ensure consideration, comments must include your name and the organization you represent, if any.*

***NOTE** (BLWQ only): If the draft rule will be posted on the web, consider stating that and giving the web address in the notice (see Hetty Richardson).*

18. Check with bureau P&P staff to see if the rule is on the regulatory agenda. If not, the filings under steps 19 and step 20 below must include an amendment to the agenda. See 5 MRSA § 8064. See P&P unit for agenda format. _____

19. Give the notice form, fact sheet and draft rule to BEP Secretary Terry Hanson for delivery to the Secretary of State by 5:00 P.M. on Tuesday of the week preceding the week you want the notice published. _____

***NOTE:** In determining the publication date, keep in mind that the MAPA requires notice to be published once 17 to 24 days before the hearing (or 30 days before the end of the comment period if no hearing is held), and that rulemaking notices are published on Wednesday of each week*

***WARNING:** After this point in the rulemaking process, further stakeholder meetings or other public meetings to receive comment on the rule are considered public hearings and should be avoided. See 5 MRSA §8052(1). It does not violate the MAPA if staff is exposed to comment and discussion on the proposed rule, but the scheduling of meetings for this purpose should be avoided. Interested parties who approach staff should be encouraged to present their concerns in writing or testimony to the board.*

20. On or before the publication date of the rulemaking notice, send 20 copies of the notice form and fact sheet only to the Executive Director of the Legislative Council, SHS 115. _____

21. Send notice of the rulemaking to everyone on the rulemaking subscription list maintained by BEP Secretary Terry Hanson. Terry will supply address labels. If a hearing is to be held, this notice must be mailed at least 20 days before the hearing. If no hearing, send the notice at least 20 days before the comment deadline. _____

***NOTE:** Notice also should be sent to others who have expressed interest or likely to be interested in the subject matter of the rule (e.g., stakeholders, trade associations, licensees). 5 MRSA §8053(1) requires notice to any trade, professional, interest group or regional publication considered effective in reaching persons affected.*

	ACTION	DATE COMPLETED
22.	Consider posting the draft rule, rulemaking notice and, as appropriate, explanatory documents on the bureau home page. OOC encourages this step; BLWQ requires it. See your bureau webmaster for assistance (or Karl Wilkins in OOC if your bureau has no webmaster).	_____
23.	If a hearing is to be held, prepare opening statement for presiding officer. See P&P for sample.	_____
24.	Hold public hearing.	_____
25.	End of comment period. Send a copy of all written comments (and the hearing transcript if a hearing was held) to each BEP member.	_____
26.	Revise proposed rule as appropriate in response to comments and prepare draft basis statement. ***NOTE:*** *The basis statement must: list the names of persons who submitted comments (including through hearing testimony); identify the organizations they represent; summarize the comments; explain the reasons for adopting or failing to adopt suggested changes; and explain the basis for provisions more stringent than corresponding federal requirements. See 5 MRSA §8052(5) and 38 MRSA §341-D(1-B). For sample statements, see the Secretary of State rulemaking guide and P&P.*	_____
27.	Ok revised draft and basis statement with bureau dir., OOC and AAG.	_____
28.	If the revised rule is "substantially different" from the proposed rule, you must request public comment on the changes by publishing notice of the revised rule and new comment deadline in the same manner as Step 19 above. Send a copy of the notice to each person who commented on the proposed rule and send 20 copies of the notice and revised fact sheet to the Executive Director, Legislative Council. See 5 MRSA §§8052(5)(B and 8053-A(1)(A). If comments are received, revise the basis statement and draft rule as appropriate and return to step 27.	_____
29.	Schedule the rule for presentation to BEP. Check with Terry Hanson for schedule and packet deadlines. Packet material should include the draft rule, basis statement and a cover memo requesting adoption. In the memo, explain how key issues have been addressed and identify provisions more stringent than corresponding federal law (see 38 MRSA §341-D(1-B)). The cover memo also must include a Rule Implementation Plan listing the steps to be taken to notify the regulated community.	_____

ACTION	DATE COMPLETED

30. [BLWQ only] Give the Bureau Director a copy of the packet material with a cover memo including the name of the person who will be speaking at the board meeting, the action to be requested of the board, the issues and the anticipated outcome. _____

31. [OPTIONAL] Provide each person who commented on the proposed rule with a copy of the BEP packet material on final adoption and inform them of the date, time and location of the meeting at which the rule will be presented for final adoption. _____

32. Present rule to BEP for adoption. _____

NOTE 1: *Under the MAPA, no rule may become effective unless adopted within 120 days of deadline for receipt of written comments. See 5 MRSA §8052(7) and §8072.*

NOTE 2: *Adoption is "provisional" if the authority for the rule was adopted after January 1, 1996, and the rule is "major substantive." See 5 MRSA §8072.*

33. Complete the rulemaking cover sheet (MAPA 1), notice of adopted rule (MAPA 4) and MAPA checklist. For templates, go to H:\common\rulemak\guidance\blankfrm. _____

NOTE: *This step and step 34 below should be completed as soon as possible following adoption to allow the AG time to review the rule within the allotted timeframe under the MAPA. The MAPA provides that no rule may become effective unless approved by the AG as to form and legality within 150 days of deadline for receipt of comments.. See 5 MRSA §8052(7).*

34. Give BEP secretary Terry Hanson:

- three paper copies and a diskette with one electronic copy of the adopted rule;
- three paper copies of the basis statement;
- three paper copies of the rulemaking cover sheet (MAPA 1);
- one copy of all material (e.g. professional codes; federal regulations) incorporated in the rule by reference;
- one paper copy of the MAPA checklist, the fact sheet from step 18, and the notice of adoption (MAPA 4); and
- if the adopted rule amends an existing rule, one paper copy and one electronic copy showing additions to the text in brackets (or underlined) and deletions to the text struck through (~~like this~~). _____

NOTE 1. *For electronic copies, be sure to include the rule number and title on the diskette label.*

ACTION	DATE COMPLETED

NOTE 2. *Terry will obtain the commissioner and AG signatures on MAPA 1, and file the information required by the Secretary of State for the rule to become effective. Rules usually become effective 5 days after the filing date unless a later date is specified in the rule. Terry will provide a copy of rule stamped with the filing date when she receives it from the Secretary of State.*

35. If the rule is adopted under subchapter II-B (underground oil storage), send 20 copies to the Joint Standing Committee on Natural Resources for review as required under 38 MRSA §570-E. _____

36. If the rule is adopted under the authority of 38 MRSA §1304 [solid waste] or 1319-O(1) [hazardous waste], and will impose requirements more stringent than any corresponding requirement under EPA regulations, submit 20 copies to the Joint Standing Committee on Natural Resources for review as required under 38 MRSA §1304(10). _____

37. If the rule is a major substantive rule subject to legislative review under 5 MRSA §8072, send 20 copies and the supplemental information required under §8072(2) to the Executive Director, Legislative Council. _____

NOTE: *Most of the required supplemental information is available from the EO6/12 analysis prepared under step 11.*

38. Send an electronic copy of the final rule, basis statement and, if appropriate, other explanatory documents regarding the final rule to Hetty Richardson (BLWQ) or Ginger McMullen (BRWM) for posting on bureau web site. _____

39. Arrange for printing of multiple copies of the rule for distribution. Before printing, make sure the effective date appears on the last page of the main text of the rule. _____

40. Send 18 copies of the adopted rule to the State Librarian, 64 SHS, per 1 MRSA §501-A(4). Distribute copies to bureau staff and to any interested outside party who requested a copy. Mail notice of adoption to other interested parties (e.g. persons who commented on the proposed rule; licensees or others subject to the rule requirements). _____

41. Organize and store the rulemaking file. In BLWQ, rulemaking files are kept in first floor file room of the Ray building. In BRWM, see John James in the P&P unit. _____

IMPORTANT REMINDER

This checklist lists the key steps in the rulemaking process. It is not meant to be a legal reference. All those involved in rulemaking should keep the following references at hand:

- An Agency Guide to Rule-Making, published by the Secretary of State (1993); and
- The Maine Administrative Procedures Act, 5 MRSA §§8001 through 8062.

Tab 3

Me. Op. Atty. Gen. No. 95-6

Office of the Attorney General
State of Maine

Opinion No. 95-6

May 1, 1995

The Honorable John J. Cleveland
State Senator
State House Station Three
Augusta, Maine 04333

Dear Senator Cleveland:

This is in response to your letter of April 26 requesting an opinion on several questions relating to L.D. 1412, Part D. By letter of April 27, I advised you of my tentative views with respect to the constitutionality of Sections D-4 and D-5 of L.D. 1412 and advised you that a more detailed opinion would be forthcoming.

At the outset, it is helpful to outline the general structure of Part D of L.D. 1412 in its original from. [FN1] Although L.D. 1412 is a Supplemental Budget bill for fiscal year 1995, Part D of L.D. 1412 is entered to create a mechanism that will allow savings to be achieved during the biennial budget for fiscal years 1996 and 1997. As recited in Section D-1 of L.D. 1412, Part D is designed to implement a productivity initiative that will allow $45,346,780 in General Fund savings in the 1996-97 biennium.

Specifically, Sections D-2 and D-3 create a Productivity Realization Task Force that will consider how to achieve increased productivity and efficiency throughout state government through various measures including attrition, elimination of redundant functions, changes in management, technology, changes in agency and program missions, program restructuring, and privatization. This task force shall make recommendations to the Governor with respect to measures designed to achieve savings in the amount of the deappropriations to be specified in the 1996-97 biennial budget.

The actual method of achieving the specified savings in addressed by Sections D-4 and D-5. Section D-5 authorizes the Governor, notwithstanding any other provision by law, (1) to transfer positions between General Fund accounts and department and (2) to transfer the balances of General Fund appropriations between line categories, accounts, and departments "in order to achieve the deappropriations" that will be specified in the

biennial budget for the fiscal year 1995-96 and fiscal year 1996-97. Section D-4 provides that, if the task force recommendations would require any change in existing statutes beyond the transfers of positions and balances authorized by Section D-5, the Governor shall notify the Legislature of the nature and proposed impact of those recommendations and, if the Legislature is not already in session, call the Legislature into Special Session to consider legislation necessary to implement the recommendations. Once commenced, the Legislature would have three calendar days to enact alternative legislation achieving the same amount of projected savings without increasing revenue. If the Legislature fails to enact such alternative legislation, Section D-4 provides that the Governor may proceed to "implement" the recommendations in question to achieve the projected savings or deappropriations. Part D also contains a specific sunset clause, effective June 30, 1997.

Because of the way in which the questions you have posed are interrelated, I believe it makes most sense to consider the constitutionality of Section D-5 first and then proceed to consider the constitutionality of Section D-4 and your other questions.

1. Constitutionality of Section D-5.

The question of whether Section D-5, authorizing the Governor to transfer) positions and account balances between appropriations, is an invalid delegation of legislative authority depends on whether the delegation is accompanied by adequate standards sufficient to guide the action of the executive. See Lewis v. Department of Human Services, 433 A.2d 743, 747 (Me. 1981). The existence of standards is necessary to assure that the authority delegated will be exercised "in accordance with basic policy determination made by those who represent the electorate" and to assure that some safeguard exists to prevent arbitrariness in the exercise of power. Id. As the Lewis case demonstrates, the standards necessary to uphold a delegation may be "implicit" and may be derived from the context of the legislative scheme as a whole, even if not set forth in the statutory delegation of authority itself. 433 A.2d at 746.48.

In this instance, the necessary standards can be found in Section D-1, which provides that the intent of the productivity initiative is to realize cost savings "from increased productivity of state employees, more efficient delivery of services, and the elimination of waste, duplication, and unnecessary programs." This language, in the context of the overall legislative scheme contained in Part D, supplies standards to guide the exercise of the Governor's authority in Section D-5 and would appear to resolve any constitutional problem. Specifically, the Governor would be given broad managerial discretion to achieve savings by increasing productivity an efficiency and eliminating waste, duplication, and redundancy. However, Section D-5 would not authorize the Governor to transfer positions or balances because he disagreed with the Legislature's policy decision to create or continue a specific program. He would not be authorized to eliminate or cripple an existing governmental program based on his views as to the social utility or wisdom of the program in question. Section D-5 also would not authorize the Governor to transfer balances and positions for arbitrary reasons unrelated to efficiency and productivity.

Thus, Section D-5 gives the Governor authority to decide how to deliver the governmental services and fulfill the governmental obligations set forth in existing legislation. It contemplates that, by transferring positions and balances, the Governor may consolidate certain governmental functions and perform other governmental functions with fewer resources and personnel. The Governor is not, however, authorized to override the policy decisions of the Legislature as to whether or not to provide a specific governmental service. His actions must be designed to meet the goals of delivering existing governmental services with fewer resources through increased productivity and efficiency and the elimination of waste and duplication. The exercise of his authority is thus guided and limited by the standards of productivity and efficiency.

The standards contained in Section D-1, therefore, embody the "basic [legislative] policy determinations" necessary to guide the exercise of the authority conferred in Section D-5 and provide sufficient safeguards against arbitrary action so that we believe Section D-5 would pass constitutional muster. Moreover, the delegation of authority here would be limited to the extent necessary to achieve approximately $45 million in savings - an amount that we understand is only 1.3 percent of the total amount of general Fund monies in the 1996-97 biennial budget. Nevertheless, Section D-5 constitutes a broad delegation of power to the Governor, and we express no opinion as to whether the Legislature should, as a matter of policy, agree to such a delegation. This opinion, is directed solely to the question of whether, in our view, Section D-5 of L.D. 1412 would be found to be unconstitutional by the Supreme Judicial Court. In this connection, it bears emphasis that our opinion on this issue is by necessity limited to an evaluation of the validity of Section D-5 on its face, while the Court's eventual view on this issue may depend in part on how the authority contained in Section D-5 is exercised.

In expressing the view that the supreme Judicial Court would not find Section D5 to be unconstitutional, we are also guided by the fact that during the last two decades the Law Court has consistently sustained state statutes against charges of improper delegation. Lewis, 433 A.2d at 746-48; Board of Dental Examiners v. Brown, 448 A.2d 881, 884 (Me. 1982); Maine School Administrative District 15 v. Raynolds, 413 A.2d 523, 529 (Me. 1980); State v. Dube, 409 A.2d 1102, 1104-05 (Me. 1979). This is true even when, as in the Lewis case, the statutory provisions involved have provided minimal guidance. [FN2]

You have also expressed concern as to whether, aside from the adequacy of standards, Section D-5 would violate the separation of powers because it would allow the Governor to exercise power that can only be exercised by the Legislature. The power to appropriate and deappropriate funds is a core legislative function, and we do not believe that the Legislature could validly delegate its appropriation power to the Governor. However, although the language contained in the current version of Section D-5 is somewhat unclear, it is our understanding that Section D-5 contemplates that the actual deappropriation will still be made by the Legislature via a lump sum deappropriation in the biennial budget. Under these circumstances, Section D-5 would not delegate the Legislature's appropriation power since that power will still be exercised by the Legislature. Instead, Section D-5 would be intended to give the Governor the

administrative tools to transfer positions and balances as necessary to achieve the savings required by the Legislature's lump sum deappropriation.

Although the Legislature has traditionally exercised its appropriation power by breaking down its appropriations into specific categories, we are not aware of any reason why the Legislature could not, if it chose to do so, exercise its appropriation power by appropriating a single lump sum to the executive branch - thus leaving it up to the Governor to determine how to allocate that money in order to meet the various statutory responsibilities of the State and its agencies. That being so, we believe that the Legislature may also deappropriate by lump sum and simultaneously give the Governor the authority to transfer funds and positions as required to operate the government in light of the reduced money available.

In our view, this is exactly what Section D-5 is intended to accomplish. As a result, it does not involve a situation where the Governor would be authorized to exercise a power exclusively belonging to another branch of government in violation of Article III, Sections 1 and 2 of the Maine Constitution. Those provisions expressly provide that the powers of the State government shall be divided into three distinct departments (legislative, executive, and judicial) and that no person belonging to one of these branches shall exercise the powers properly belonging to another branch. See State v. Hunter, 447 A.2d 797, 799-800 (Me. 1982). In this instance, it appears that the gubernatorial action contemplated by Section D-5 involves the kind of managerial actions that are quintessentially executive in nature - increasing productivity and efficiency, eliminating waste and duplication, allocating funds and employees as operationally required to provide those governmental services mandated by the Legislature and meet those governmental obligations established by the Legislature. See Me.Const., Art. I, Part I, § 1 (supreme) executive power shall be vested in the Governor). This would not improperly invade the Legislature's exclusive authority. In this connection, it is our understanding that the major savings to be achieved under Section D-5 will be derived - from the Governor's existing authority to leave vacancies unfilled and, in some instances, to lay-off employees. Thus, Section D-5 can be seen as giving the Governor the additional managerial tools required to operate state government in light of the Legislature's exercise of its appropriation power through a lump sum deappropriation. Under these circumstances, it would appear that Section D-5 of L.D. 1412 is not inconsistent with the separation of powers set forth in the Maine Constitution. It contemplates that the Legislature will continue to exercise the ultimate deappropriation power but authorizes the executive branch to respond to that deappropriation by taking the necessary managerial steps in order to continue to provide government services with reduced resources by implementing measures to increase productivity and efficiency.

2. Constitutionality of Section D-4.

You have separately asked whether Section D-4 of L.D. 1412 constitutes a violation of the separation of powers or violates the enactment and presentment provisions of Article IV, Part 3, Section 2. Under L.D. 1412, Section D-4 comes into play if the Governor's Productivity Realization Task Force recommends action that would involve changes in an

existing statute. The Governor's authority under Section D-5 of L.D. 1412 to achieve savings by transferring balances and positions, as discussed above, does not require invocation of the procedure set forth in Section D-4.

Section D-4 in its current form contemplates that the Governor could propose changes to existing statutes that he could implement -- until June 30, 1997 -- if the Legislature failed to act within three days at a special session. In effect, therefore, this would give the Governor the power to amend existing law until June 30, 1997 without further legislative action. In our view, as we have previously advised you, this would be a violation of the separation of powers required by the Maine Constitution and would be inconsistent with the enactment and presentment provisions of Article W, Part 3, Section 2.

In State v. Hunter, 447 A.2d at 799-800, the Law Court noted that because of the express separation of powers clause contained in Article Ill, Section 2, the separation of powers mandated by the Maine Constitution is more vigorous than that required of the federal government by the United States Constitution. Hunter sets forth the relevant, inquiry under the Maine Constitution as follows:

> Has the power in issue been explicitly granted to one branch of state government and to no other branch? If so, Article III, Section 2 forbids another branch to exercise that power.

447 A.2d at 800. As discussed above, Article III, Section 2 of the Maine Constitution does not forbid the Legislature from delegating specified authority to the executive branch so long as that delegation is accompanied by appropriate standards. However, Section D-4 of L.D. 1412 by permitting the Governor to "implement" proposed amendments to state statutes even if the Legislature fails to enact those amendments -- can only be seen as a delegation of the actual power to make laws. That power is reserved to the Legislature. See Article IV, Part 3, Section 1.

Moreover, under Article IV, Part 3, Section 2, proposed legislative changes can only be implemented if they are passed by both branches of the Legislature, presented to the Governor for his approval, and approved by the Governor (or if vetoed by the Governor, passed by two-thirds majorities in both houses). See Opinion of the Justices, 96 A.2d 749, 751 (Me. 1953). The infirmity of Section D-4 is that it provides that amendments proposed to the Legislature may be given the force of law until June 30, 1997 even though they have not been passed by a majority of both houses of the Legislature if the Legislature simply fails to act within a three day period.

3. Binding Effect of L.D. 1412 if Enacted.

You have also asked whether the Legislature would be free, at the Second Regular Session or at a Special Session, to repeal or amend the provisions of L.D. 1412. We think there is no doubt that L.D. 1412, if enacted, would be subject to repeal or amendment at any time. This means that the Legislature could repeal or amend all or any

part of L.D. 1412 by majority vote if the Governor approved such action or by a two-thirds vote of each house in the event of a gubernatorial veto.

4. Effective Date of Legislation.

Finally, you have asked about the effective dates of the Governor's proposed changes and of any legislation that might be passed by the Legislature at a Special Session or at the Second Regular Session, as contemplated by Section D- 4. Since we do not believe that the separation of powers would permit any proposed amendments to take effect without legislative action, for the reasons discussed above, we need only consider the effective dates of any legislative action that might occur at a Special Session or at the Second Regular Session. If the Legislature were to enact legislation of the kind contemplated by Section D-4 at a Special Session or at the Second Regular Session, we believe such legislation would be subject to the provisions of Article IV, Part 3, Section 16, and would not take effect for 90 days after the session, unless enacted as an emergency by a two-thirds vote as provided in Article IV, Part 3, Section 16.

I hope this responds to your inquiries. Please feel free to seek further clarification if necessary.

Sincerely,

Andrew Ketterer
Attorney General

[FN1]. We are aware of certain amendments to Part D that have been proposed since your letter of April 26. This opinion relates to L.D. 1412 in its unamended form.

[FN2]. In general, courts have not shown any recent enthusiasm for the delegation doctrine. At the federal level, the doctrine has for some time been regarded as a dead letter. Davis, Administrative Law Treatise, § 3.1 (2d ed. 1979). At the municipal level, the Law Court has invalidated two ordinances on delegation grounds in recent years. Wakelin v. Town of Yarmouth, 523 A.2d 573 (Me. 1987); Cope v. Town of Brunswick, 464 A.2d 223 (Me. 1983). Those cases, however, evidence the fact that the delegation doctrine has been applied more strictly to municipalities than to the State. More fundamentally, the two cases in question are also best understood as involving a failure to provide adequate standards to guide quasi-judicial activity by executive officers. The Law Court has not appeared to have been troubled if the executive officers themselves provided the requisite standards (through rulemaking) so long as the standards existed when it came time to determine the rights of individuals and entities in quasi-judicial proceedings. See Secure Environments, Inc. v. Town of Norridgewock, 544 A.2d 319, 323 (Me. 1988).

Me. Op. Atty. Gen. No. 95-6, 1995 WL 279968 (Me.A.G.)
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Excerpt from: 1995 WL 279968 (Me.A.G.) to 1995 WL 279968, *6 (Me.A.G.)

January 22, 1999

Michael F. Kelley
Commissioner of Public Safety
42 State House Station
Augusta, ME 04333-0042

RE: Constitutionality of Proposed Rules for Certification of Law Enforcement Officers

Dear Commissioner Kelley:

I am writing in response to your inquiry of December 7, 1998 concerning whether rules governing the certification of law enforcement officers provisionally adopted by the Board of Directors of the Maine Criminal Justice Academy pursuant to its statutory authority under 25 M.R.S.A. §2803-A would, if approved by the Legislature in its current form as a major substantive rule, constitute a "state mandate" within the meaning of Article IX, Section 21 of the Maine Constitution. For the reasons which follow, it is my opinion that the provisionally adopted rule, if approved by the Legislature in its current form as a major substantive rule, would not constitute such a mandate.

Article IX, Section 21 of the Maine Constitution, which became effective on November 23, 1992 provides:

> State mandates. For the purpose of more fairly apportioning the cost of government and providing local property tax relief, the State may not require a local unit of government to expend or modify that unit's activities so as to necessitate additional expenditures from local revenues unless the State provides annually 90% of the funding for these expenditures from State funds not previously appropriated to that local unit of government. Legislation implementing this section or requiring a specific expenditure as an exception to this requirement may be enacted upon the vote of 2/3 of all members elected to each House. This section must be liberally construed.

The purpose of the amendment is apparent: to make it more difficult for the Legislature to enact legislation which would result in an increase in local property taxes. The amendment does not, however, purport to restrict or limit the authority of the Legislature to enact legislation or adopt rules which might conceivably result in increased expenditures by local units of government. Rather the amendment provides the State may not *require* a local unit of government to expend or modify that unit's activities so as to *necessitate* additional expenditures from local revenues (emphasis added). In order to qualify as a "state mandate" within the purview of Article IX, Section 21 of the Maine Constitution, an action of the Legislature must both have the effect of requiring a local unit of government to modify its activities and necessitate that additional expenditures of local revenues will occur as a result of the modification. Op. Atty.Gen. No. 95-9, May 15, 1995; Op. Atty. Gen.93-2, March 11, 1993.

In 1997 the Legislature required the Board of Directors of the Maine Criminal Justice Academy ("the Board") to enact rules identifying the permissible duties of part-time law enforcement officers who have completed the preservice law enforcement training requirements established by the Mandatory Training Act, 25 M.R.S.A.§2804-B (hereinafter referred to as "the 100 hour course"). 25 M.R.S.A.§2803-A(1). The enabling legislation required the rules adopted by the Board to be major substantive rules within the meaning of the Maine Administrative Procedures Act, and further required the rules be implemented no later than December 31,2001. A major substantive rule must be submitted to the Legislature for approval after it has been provisionally adopted by an agency of Maine government. 5 M.R.S.A.§8072. The rule must then be referred to the appropriate committee of jurisdiction, reported out of committee to each house of the Legislature with recommended disposition, and then finally authorized by the Legislature. Since the adoption of the provisionally adopted rule is contingent upon authorization by the full Legislature, the rule must be scrutinized to determine whether it implicates the unfunded state mandate provisions of Article IX, Section 21 of the Maine Constitution.

The provisionally adopted rule would, if finally authorized by the Legislature, replace the present delineation of "full-time" and "part-time" law enforcement officers based upon the annual earnings of the officer with a four tier system under which a law enforcement officer's authority to perform law enforcement functions would progress contingent upon that officer's level of Board approved training. The rules would not affect the present certification standards for full-time law enforcement officers. Rather the rules, to be effective January 1, 2002, would link the law enforcement officer's authority to discharge law enforcement functions to the level of Board approved training he or she secured. Since the rules would effectively change the status of part-time law enforcement officers as inferentially established under 25 M.R.SA § 2801-A (4),(5), companion legislation would be necessary to conform the definition of law enforcement officers, and designation of their respective duties, with the different levels of law enforcement officer classifications contemplated by the Board proposal.

The financial impact of the provisionally adopted rule is somewhat problematic. Since most large law enforcement agencies in Maine require all their officers to attend the basic law enforcement training course sponsored by the Academy, little, if any additional expenditure by local units of governments in which those departments are situated is contemplated. However, several smaller law enforcement departments in Maine frequently use "part-time" law

enforcement officers for financial reasons. Those law enforcement agencies, and the local units of government in which they are situated, may incur additional expenditures of local revenues in order to comply with the enhanced training requirements contemplated by the provisionally adopted rule.

Bills or rules which set new standards for discretionary programs, such as bills or rules which require local units of government to perform certain activities, in the event those local units opt to participate in such an activity, are not considered state mandates because they neither *compel* nor *require* local units of government to perform enhanced or modified activities which trigger the expenditure of local revenues. Therefore this Department determined that a proposed transfer of the regulation of driver education in Maine from the Board of Commercial Driver Education to the Secretary of State would not constitute a mandate, although the bill required public and private schools which offered driver education courses to assure their driver education teachers secure driver education licenses from the Secretary of State because local units of government were not required to offer such driver education courses; the bill merely provided that in the event a school did elect to offer a driver education course, it's instructors be duly licensed by the State. See Correspondence of Cabanne Howard to Senator Albert Stevens and Representative William O'Gara, June 19, 1995. Conversely this Department concluded legislation which would have included salaries, pensions and insurance for binding arbitration under the Municipal Public Employee Labor Relations laws would constitute an unfunded state mandate within the scope of Article IX, Section 21 because the bill allowed municipal employees, for the first time, to compel binding arbitration with regard to disputes with municipalities over salaries, pensions, and insurance benefits. Op.Atty.Gen 95-5, April 27, 1995. The critical issue is whether the proposed state action would both *require* a local unit of government to perform a certain activity and *necessitate* expenditures of local revenues on account of the required activity. Whereas local units could exercise discretion in whether to offer driver education courses in their schools, and hence avoid additional local expenditures required by new state licensing requirements, local units had no such discretionary authority with respect to funding additional costs of public employees who prevailed in disputes pertaining to salaries, pensions or insurance benefits in binding arbitration.

With respect to the issue of law enforcement training, local units of government are not compelled to provide law enforcement in their communities. Local units have the option of contracting with other levels of government to provide law enforcement, or relying upon policing services offered by the Maine State Police or the local sheriff's department. Although many would argue the provision of local law enforcement services is highly desirable, the provision of such services by local units of government is not mandatory. Accordingly, the State may alter, amend or modify the training requirements for law enforcement officers in the State without implicating the unfunded state mandate provision of Article IX, Section 21 of the Maine Constitution. Although it is highly likely that some local units of government would be required to provide additional expenditures of local revenues to comply with the enhanced training requirements proposed by the provisionally adopted rule, authorization of the rule by the Legislature would not *necessitate* the expenditure of additional funds by local governmental units because the provision of law enforcement services, although highly desirable, is not mandatory.

Furthermore, the provisionally adopted rule does not impose a direct obligation upon local units of government to fund additional training for officers presently considered "part-time". The rule relates to the required level of training necessary to secure certification at specified levels of law enforcement. Although the cost of training law enforcement officers is frequently borne by the employing law enforcement agency, the cost of training is technically the responsibility of the law enforcement officer. Since the inception of the Maine Criminal Justice Academy, tuition costs have often been assumed by employing law enforcement units. Likely local law enforcement agencies assumed those costs to maintain a competitive position in the marketplace for future law enforcement officers. However, the 118th Maine Legislature approved $10,000,000 to expand the Maine Criminal Justice Academy to accommodate more students and centralize training operations at a single facility. With the expansion of the Academy, serious consideration is being given to the prospect of prospective law enforcement officers attending the Academy at their own expense prior to assuming a law enforcement position. Indeed in 1994 the 116th Maine Legislature ordered the Board to establish a plan to transition the Academy's student body from a body consisting of persons employed by law enforcement agencies at the time of enrollment to a body wherein students attended the Academy prior to securing law enforcement positions. The planned expansion of the Academy has given rise to further consideration of an Academy student body whose participants pay their own tuition prior to securing employment in law enforcement. To the extent the provisionally adopted rule imposes additional training requirements upon law enforcement personnel, the transition of an Academy student body whose tuition is paid for by local law enforcement agencies which have referred students to the Academy to a student body consisting of individuals who have paid for their own tuition costs prior to securing law enforcement positions would neither require local units of government to assume additional activities or necessitate the expenditure of local revenues to secure the training contemplated in the proposed rule.

Hopefully, this correspondence is responsive to your inquiry in this regard. Please contact me should further clarification be desired.

Very sincerely yours,

N. Paul Gauvreau
Deputy Attorney General

State of Maine

DEPARTMENT OF ATTORNEY GENERAL

M E M O R A N D U M

To: All Lawyers

From: Cabanne Howard, Deputy AG

Date: December 18, 1992

Subject: Constitutional Amendment Concerning State Mandates

As most of you know, the Legislature enacted, and the voters approved on November 3, an amendment to the Maine Constitution concerning State imposed mandates on local units of government, Const. Res. 1991, Ch. 2, passed in 1992, enacting Article IX, Section 21 of the Maine Constitution. A copy of the text of the amendment, as well as the explanation of it prepared by our office (known as the "Intent and Content") is attached. The following is a list of issues regarding the interpretation of this amendment, as well as a brief description of the current position of the office on each issue, as agreed to by the Deputy Attorneys General. The purpose of this memorandum is to alert everyone to the issues and positions, so as to insure the office is speaking with one voice. This is not to say that the office's position is cast in stone; if anyone thinks a different position should be taken on some issue, he or she should talk it over with his or her deputy, or with me.

1. Effective Date. The effective date of the amendment, according to its terms, is the date on which the Governor officially proclaimed the results of the referendum. This occurred on November 23, 1992.

2. Application to Rules. The text of the amendment provides that "the State may not require a local unit of government to expand or modify that unit's activities so as to necessitate additional expenditures from local revenues unless . . . " (emphasis added). The amendment, therefore, makes no distinction between the various ways in which the "State" might "require" local revenues to be expended. Thus, the amendment should be read to apply to not only statutes, but rules (delegated legislative authority). This interpretation is consistent with the legislative history of the amendment, of which I have a complete set.

3. Application to Mandates Enacted Before Effective Date of Amendment but Requiring Municipal Action After that Date. The issue here is whether the amendment applies to a mandate which was already in place (either by statute or by regulation) before the effective date of the amendment, but which requires the expenditure of local revenues after that date, either at one time (such as expenditure attendant upon the closure of a landfill) or annually (such as mandates requiring certain educational expenditures). The office's position is that the amendment does not apply to these situations, since the mandates in question were already on the books before the amendment took effect. Note the statement in the attached Attorney General's "Intent and Content" (which the Law Court has held to be part of the legally cognizable legislative history of a constitutional amendment) which states that the amendment applies only to "new" requirements.

4. Application to Rules Authorized Before the Effective Date of the Amendment but Adopted After. Here, the issue is slightly different. What happens if a statute exists authorizing a Department to adopt rules on a particular subject but the Department does not adopt such rules until after the effective date of the amendment? The office's position on this issue depends on whether the statute merely authorizes the adoption of rules, or whether it directs the agency to do so. In the former case, the office's position is that the amendment applies, and that the agency may not, in furtherance of general rulemaking authority, adopt new rules containing new mandates after the effective date of the amendment. (In such a case, the agency wishing to have such a mandate imposed would have to go back to the Legislature to gain the necessary authority by a two-thirds vote, as contemplated by the amendment.) In the latter case, however, the office's position is that if the Legislature has mandated the adoption of a rule in a statute passed prior to the effective date of the amendment, the agency may adopt such a rule, even if it imposes a new mandate on a local unit of government, after the effective date.

5. Application to Amendments of Existing Mandates. As to the question of whether the amendment applies to amendments of existing mandates (whether contained in statutes or rules), the position of the office is that amendments to existing mandates requiring expenditure of additional local funds are covered by the amendment, which requires a case-by-case determination as to whether any particular amended mandate falls within this category.

6. Application to Federal Mandates on Municipalities. It is clear that the amendment does not, and could not constitutionally, affect any mandates imposed directly upon municipalities by the federal government in the future.

However, the federal government usually seeks to affect State action not by direct order (which is constitutionally questionable, particularly after the decision of the Supreme Court this year in New York v. United States), but by inducing the states in the form of an offer of federal funds on condition that the states adopt certain laws, which might include mandates on local units of government. The question thus arises whether, in this circumstance, if the federal government in the future changes the conditions on which continued receipt of federal funds is required, the state government could claim that it was relieved from compliance with the constitutional amendment. For the present, the office's position on this question is that State action in response to changes in federal law is not covered by the amendment, although lawyers are encouraged to discuss such situations as they arise with their deputies, since it is possible that a case-by-case approach might be more practical.

7. Meaning of "Local Unit of Government." The amendment, in terms, prohibits the imposition of a mandate which requires "a local unit of government to expand or modify that unit's activities so as to necessitate additional expenditures from local revenues . . . ." The amendment thus clearly applies to mandates imposed on municipalities, but leaves open the question of its application to counties and special purpose districts. The office's position on this issue is that the amendment applies to all of those entities. The reason for this position is that an earlier draft of the amendment defined "local unit of government" expressly to include counties and special districts, and, while that definition (along with all other definitions of the terms of the amendment) was later deleted, there is no indication that the Legislature's intention with regard to the amendment's scope on this issue had changed.

CABANNE HOWARD
Deputy Attorney General

CH:sw

other than revenues set aside for special purposes, must be appropriated to the Department of Inland Fisheries and Wildlife?"

The legal voters of each city, town and plantation shall vote by ballot on this question and designate their choice by a cross or check mark place within a corresponding square below the word "Yes" or "No." The ballots must be received, sorted, counted and declared in open ward, town and plantation meetings and returns made to the Secretary of State in the same manner as votes for members of the Legislature. The Governor shall review the returns and, if it appears that a majority of the legal votes are cast in favor of the amendment, the Governor shall proclaim that fact without delay and the amendment becomes part of the Constitution on the date of the proclamation; and be it further

Secretary of State shall prepare ballots. Resolved: That the Secretary of State shall prepare and furnish to each city, town and plantation all ballots, returns and copies of this resolution necessary to carry out the purposes of this referendum.

Resolution according to Article X, Section 4 of the Constitution of the State of Maine.

INTENT AND CONTENT

This proposed constitutional amendment would provide that the Department of Inland Fisheries and Wildlife, or its successor, retain for its use all funds received by it in the course of its operations. These funds include the proceeds of the sales of Department licenses and permits; the proceeds of the sale, lease or rental of Department-owned property; and fines and penalties imposed for the violation of Department statutes. The amendment also specifies that the Legislature may control how the Department uses these revenues, as well as any federal funds which the Department may receive, by establishing special funds for specific Departmental purposes.

A "YES" vote approves the amending of the State Constitution as proposed.

A "NO" vote disapproves the proposed amendment.

STATE OF MAINE

CHAPTER 2

CONSTITUTIONAL RESOLUTION OF 1991

RESOLUTION, Proposing an Amendment to the Constitution of Maine to Provide State Funding of any Mandate Imposed on Municipalities

Constitutional amendment. RESOLVED: Two thirds of each branch of the Legislature concurring, that the following amendment to the Constitution of Maine be proposed:

Constitution, Art. IX, §21 is enacted to read:

Section 21. State mandates. For the purpose of more fairly apportioning the cost of government and providing local property tax relief, the State may not require a local unit of government to expand or modify that unit's activities so as to necessitate additional expenditures from local revenues unless the State provides annually 90% of the funding for these expenditures from State funds not previously appropriated to that local unit of government. Legislation implementing this section or requiring a specific expenditure as an exception to this requirement may be enacted upon the votes of ⅔ of all members elected to each House. This section must be liberally construed.

; and be it further

Constitutional referendum procedure; form of question, effective date. Resolved: That the city aldermen, town selectmen and plantation assessors of this State shall notify the inhabitants of their respective cities, town and plantations to meet, in the manner prescribed by law for holding a general election, at the next general election in the month of November following passage of this resolution, to vote upon the ratification of the amendment proposed in this resolution by voting upon the following question:

"Shall the Constitution of Maine be amended to require the State to fund any state mandates imposed upon a municipality by statute, by executive order or by rule?"

The legal voters of each city, town and plantation shall vote by ballot on this question, and shall designate their choice by a cross or check mark placed within the corresponding square below the word "Yes" or "No." The ballots shall be received, sorted, counted and declared in open ward, town and plantation meetings and returns made to the Secretary of State in the same manner as votes for members of the Legislature. The Governor shall review the returns and, if it appears that a majority of the legal votes are in favor of the amendment, the Governor shall proclaim that fact without delay and the amendment shall become part of the Constitution on the date of the proclamation; and be it further

Secretary of State shall prepare ballots. Resolved: That the Secretary of State shall prepare and furnish to each city, town and plantation all ballots, returns and copies of this resolution necessary to carry out the purposes of this referendum.

Resolution according to Article X, Section 4 of the Constitution of the State of Maine.

INTENT AND CONTENT

This proposed constitutional amendment would prevent the Legislature from imposing any new requirement on a local unit of government to expand or modify its activities if such action will involve the expenditure of local revenues, unless the Legislature provides 90 percent of the funds required on an annual basis or unless the Legislature approves such action by a vote of two-thirds of its members.

A "YES" vote approves the amending of the State Constitution as proposed.

A "NO" vote disapproves the proposed amendment.

Email
To: Augusta AAGs
From: Pidot, Jeff
Subject: major substantive rules, part II
Date: 7-28-99

Subject: major substantive rules

As a follow-up on my email to you on this subject of yesterday, this is to let you know how the 2 issues described in my email are likely to be handled. Thank you for your many responses and helpful suggestions.

On the issue of how to handle recently enacted rulemaking authority in which the Legislature has failed to specify whether rules are to be major substantive (requiring delayed effectiveness and legislative review) or routine technical (requiring only normal APA rulemaking procedures), the better answer seems to be that such rules should be considered as *not* requiring legislative review. In Title 5 section 8071, the Legislature called upon *itself* to make the designation of major substantive (requiring legislative review) or routine technical (requiring only regular APA procedures) for any rulemaking authority granted or amended in 1996 or later. If it failed to do so, then I believe normal rulemaking should apply. This makes the most sense, since the alternative would lead to an AG-mandated overlay of legislative review and delayed effectiveness of a rule when the Legislature itself had not made the designation as major substantive. This accords with Linda Pistner's advice recently given on this topic.

On the other issue, there is nothing in the APA that directly calls for a second AG approval of major substantive rules following legislative ratification (AG approval is always required at the stage of the agency's first adoption of the rule). Nevertheless, there is an indirect statutory reference that might lead to the conclusion that the AG must sign at both ends. After discussing this with Phyllis (and hearing from a number of you), I am inclined to sign the rules involved, following legislative ratification, but to change the "approved as to form and legality" boilerplate on the signature page, as it makes no sense for us to be passing upon the legality and form of that which the Legislature itself has directed and ratified. Accordingly, I am planning to sign this rule only as having "conformed with section 8072 of the APA," the provision that calls for legislative review of major substantive rules. By this, I am certifying simply that the rule was finally

adopted after legislative review and ratification, as called for by this law when the rule was designated as major substantive. I have discussed this plan with the Secretary of State's office (which must accept the rule for filing after signature) and they are content with it.

If you would like to discuss these issues further, please let me know. Thanks.