STATE OF MAINE
124th LEGISLATURE
SECOND REGULAR SESSION

Final Report of the State and Local Government Committee Study of the Rule-making Process under the Maine Administrative Procedure Act

November 2010

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Executive Summary

The Joint Standing Committee on State and Local Government Committee (herein referred to as "the Committee"), pursuant to Resolve 2009, chapter 207, met three times over the interim after the Second Regular Session of the 124th Legislature to study the rulemaking process under the Maine Administrative Procedure Act ("APA"). Although the genesis of the study resolve originated in major substantive special education rules dealt with by the Education and Cultural Affairs Committee, the charge to the State and Local Government Committee to examine the APA was fairly broad. The duties under the resolve included an examination of the circumstances surrounding the adoption of emergency rules, the Legislature's role in reviewing major substantive rules, and the relationship between the intent of the Legislature and the rule as actually drafted.

In conducting this study, the Committee held three meetings. During those meetings, the Committee reviewed a summary and legislative history on the special education rules dealt with by the Education and Cultural Affairs Committee; heard from the sponsor of the bill, Representative Connor, representatives of the Department of Education, and a member of the public who is a stakeholder in the special education programs; and received briefings from the Office of the Attorney General and the Office of the Secretary of State.

The Committee makes the following recommendations:

1. **The Legislature enacts legislation to clarify the meaning of the deadline for agencies to submit major substantive rules for legislative review.** Currently, the statutory language is ambiguous and allows for the possibility of an agency to adopt a major substantive rule without any review if the Legislature fails to act on rules submitted after the current deadline. We recommend that rules submitted after the statutory deadline may not be finally adopted by the agency in the event the Legislature fails to act on those rules prior to adjournment.

2. **The agency's findings with respect to the existence of an emergency be included in the emergency rule at the time of adoption or at the time of the public hearing in a section clearly labeled "Findings".** Currently, the law requires an emergency rule to include, with specificity, the agency's findings with respect to the existence of an emergency. Including the findings with the rule ensures the transparency of the process itself by informing the public of the reasons why the rule is being adopted on an emergency basis.

3. **Each separate item in an emergency rule has an estimate of the fiscal impact.** Understanding the fiscal impact of an emergency rule adopted to satisfy the requirements of a temporary curtailment order by the Governor is essential to the public and the Legislature in evaluating the programmatic impacts of the emergency rule.

4. **Orientation seminars for incoming legislative members every two years include a discussion on the issues a legislative committee should consider when deliberating on legislation that will grant rulemaking authority to an agency.** The more detail the Legislature includes in a statute with respect to specifying policy criteria or standards, the less discretion an agency will have on those issues when drafting its rule.

5. **Orientation seminars for incoming legislative members every two years include discussions on all aspects of the Administrative Procedure Act, especially the role of the Legislature and its committees in reviewing provisionally adopted major substantive rules.** Legislators would benefit from a regular program of education and training on the Administrative Procedure Act and the Legislature's role in reviewing provisionally adopted major substantive rules.

6. **The Legislature and the Secretary of State implement a coordinated process that fully automates the submission, distribution and posting to the internet of documents filed by agencies under the Administrative Procedure Act.** Automating the filing and posting of annual regulatory agenda, rulemaking fact sheets prior to the adoption of any rule and the filing of the adopted rule itself would reduce printing costs and expedite the access to those documents by the public and members of the Legislature.

I. INTRODUCTION

The Joint Standing Committee on State and Local Government, pursuant to Resolve 2009, chapter 207, was authorized to meet up to three times during the interim following the Second Regular Session of the 124th Legislature to study issues relating to the Maine Administrative Procedure Act. (See Appendix A for Resolve 2009, chapter 207.) The Committee's duties included:

1. The circumstances surrounding the adoption of emergency rules, in particular major substantive rules, to ensure that the process of adopting an emergency rule is applied only when there is truly an emergency;

2. The Legislature's role in reviewing major substantive rules, including whether sufficient information is being provided by agencies, oversight functions are adequate and appropriate notice is being provided to the public, and the implications for state agencies of the statutory deadline for submitting major substantive rules to the Legislature; and

3. The relationship between the intention of the Legislature in adopting specific content in a major substantive rule and the rule as drafted by the department.

The committee met three times, holding two work sessions and one meeting to review a draft of the report. This report fulfills the Committee's requirement to submit a report on its study of issues related to the Administrative Procedure Act, including suggested legislation. Following receipt and review of the Committee's report, the Joint Standing Committee on State and Local Government is authorized to submit a bill in the First Regular Session of the 125th Legislature.

II. BACKGROUND

Origins of the study

The bill that led to Resolve 2009, chapter 207 was initially introduced as LD 1784, a concept draft to examine the rulemaking authority of the Commissioner of the Department of Education as it relates to rules submitted to the Legislature by the Commissioner, considered by the Legislature and rejected by the Legislature. The bill was referred to the Education and Cultural Affairs Committee.

LD 1784 was an attempt to address issues raised by the adoption in 2009 and 2010 of emergency major substantive rules by the Department of Education regarding services to children with eligible disabilities under the State's special education regulations, including the Child Development Services (CDS) program. The process of rulemaking and subsequent legislative review was not smooth and raised a number of concerns among many Education and Cultural Affairs Committee members and stakeholder groups. The two primary concerns that were expressed were that:

- Some of the changes proposed to the special education and CDS programs in the Department's rules were inconsistent with the intent of the Legislature; and that

- Those changes were implemented through the emergency major substantive rulemaking process and were in effect before the Legislature had an opportunity to review those rules.

The policy disagreements between the Education and Cultural Affairs Committee and the Department on the special education rules were complicated by the fact that the changes were taking place at a time when the Department was being told to significantly cut its budget, and that the Department was attempting to address those budget cuts in part through changes in the special education and CDS programs. After several contentious work sessions, the Education and Cultural Affairs Committee unanimously voted to reverse some of the special education program changes adopted in the emergency rule, to sunset several other provisions and to direct the Department to adopt major substantive rules on the sunsetted items for consideration by the next Legislature. The specifics of the rules and resolves relating to CDS are contained in a memorandum drafted for the first committee meeting (Appendix B).

It was in that context that LD 1784 was introduced and heard by the Education and Cultural Affairs Committee. Although a number of committee members felt that the emergency major substantive rulemaking process suffered from a number of deficiencies and needed some sort of review, a majority (11-2) voted Ought Not To Pass on the bill, citing a lack of time remaining in the session to thoroughly work the bill and concerns among some that the problem was more general in nature and not limited only to the Department of Education. The minority report on the bill attempted to address those concerns by proposing to create a legislative study comprised of members from several committees, including the State and Local Government Committee which is charged with a broader study of the state's Administrative Procedure Act in general. The minority amendment was ultimately adopted in the House and the Senate (with several changes) and sent to the Special Study Table for consideration by the Legislative Council. For budget reasons and because of their belief that issues relating to the APA were most appropriately within the jurisdiction of the State and Local Government Committee, the Council amended the bill to require that this review be done by that committee during this legislative interim.

The Maine Administrative Procedure Act

Rulemaking has always existed at the federal level beginning with delegation to the President to issue rules that would govern those who trade with Indian tribes.[1] Rulemaking was limited at first but has become increasingly common as governing has become more complicated. Statutes in the 1880s creating the Interstate Commerce Commission and protecting wildlife required varying numbers of rules to be issued to implement important provisions. The New

[1] Cornelius M. Kerwin. *Rulemaking: How Government Agencies Write Law and Make Policy* (Washington D.C.: CQ Press, 1994)

Deal brought more extensive rulemaking and the 1970s, in particular, are frequently characterized as the "era of rulemaking".[2]

In 1946, the federal government enacted the Administrative Procedure Act to ensure predictability in agency rulemaking and to grant the public clear rights to participate in the process by requiring notice of proposed rulemaking and giving opportunities for comment.[3] Proponents of the APA argued that rulemaking "should be conducted in public, allowing for citizen participation in the formulation of policies that would affect them."[4] The National Conference on Uniform State Laws drafts model state APAs and it approved the first model act after the passage of the 1946 federal APA. Revisions to the model act were completed by 1961 and this version has formed the basis for half of state APA laws albeit with substantial individualizing by states. A new model was adopted in 1981 by the Conference but only a few states adopted that version.[5] Some states already had their own APAs by 1946; Maine enacted the APA in 1977.

In 1995, the Maine APA was substantially amended to establish two sets of rules. Prior to January 1st, 1996, all rules were adopted in the manner that routine technical rules are now adopted. However, since 1996, whenever the Legislature enacts a law granting a state agency rulemaking authority that law must categorize the rules as either routine technical or major substantive. Rules adopted prior to January 1st, 1996 continue to be subject to the pre-1996 adoption process and not subject to formal legislative review. Final adoption of a major substantive rule, and subsequent amendments to those rules, requires the agency to submit the provisional rule to the Legislature for formal review.

Agencies must submit provisional major substantive rules to the Legislature by 5:00 p.m. on the second Friday in January. The rule and a Resolve proposing to allow the agency to adopt the rule are referred to the committee with jurisdiction over the rule's subject matter. The committee usually holds a public hearing and work session on the Resolve as with any other bill. The committee makes a recommendation on whether the rule can go forward and whether the specifics of the rule should be amended. The Resolve is then reported to the full Legislature for approval in the same manner as any other bill. If the rule is filed after the deadline of the second Friday in January, the reviewing committee may decline to review the rule or may choose to review it. If a rule is submitted by the agency by the deadline and the Legislature takes no action, the rule may go forward. The intent of the Legislature was to ensure that rules submitted after the deadline may not be adopted unless approved by the Legislature. The lack of clarity in those provisions of law is addressed in this report by a recommendation to amend the law to clarify that original intent.

The Maine APA allows agencies to adopt emergency rules under certain conditions for a temporary period (provided, of course, that the agency has rulemaking authority granted to it for

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[2] Kerwin 1994, p. 14

[3] Kerwin 1994; Charles H. Koch. *Administrative Law and Practice, vol. 1.* 3rd edition. (Eagan, MN: West, 2010);

[4] Patty D. Renfrow and David J. Houston. "A Comparative Analysis of Rulemaking Provisions in State Administrative Procedure Acts" *Policy Studies Review* 6(4) 1987 pp 657-665

[5] Koch 2010.

the purpose). Under 5 MRSA §8054, an agency may adopt emergency rules to "avoid an immediate threat to public health, safety or general welfare" and may modify usual procedures to enable adoption of rules designed to mitigate or alleviate the threat found. The agency must report findings with respect to the existence of an emergency, including any modifications to procedures. Emergency routine technical rules are effective for up to 90 days. Occasionally, it is deemed necessary for emergency major substantive rules to be adopted and this is governed under §8073. Emergency major substantive rules may be effective for up to 12 months or until the Legislature has completed review (if earlier).

Committee process

The State and Local Government Committee held its first study meeting on the APA on September 9th, 2010. The Committee reviewed the duties in the resolve as well as a memorandum from the Office of Policy and Legal Analysis summarizing the content of the emergency substantive rules that prompted LD 1784 and the subsequent Resolve 2009, chapter 207. The Committee was briefed by the Secretary of State, Matt Dunlap, with an overview of how the APA is administered by that office. The Committee also heard from Representative Connor, the sponsor of LD 1784, and he expressed his concern that the 2010 emergency rule had undone what the Legislature had already decided upon in 2009. In addition, the Committee heard from representatives from the Department of Education, Greg Scott, Director of State/Local Relations, and Jaci Holmes, federal/state legislative liaison. Director Scott stated that the provisions of the emergency rule were controversial but that times and needs had changed since the passage of the 2009 rule and the Department had been asked by the Appropriations and Financial Affairs Committee to review and recommend changes where state rules on special education exceeded the federal requirements. He added that the contents of the emergency rule still had to be approved in a resolve to the Legislature for final approval and some provisions of the rule were approved and some were not.

The second study meeting took place on October 13th, 2010. At that meeting, Linda Pistner, Chief Deputy Attorney General, explained the role of the Office of the Attorney General in agency rulemaking. The APA requires agencies to submit rules to the Attorney General for approval as to form and legality. This involves reviewing compliance with all procedural steps required by the APA; whether the rule is consistent with the agency's statutory authority; identifying possible conflicts between the rule and Maine statutes, the Constitution and/or federal law; and suggesting changes to improve organization, readability and clarity. In addition, Governor Baldacci's Executive Order 17 FY 02/03 requires all agencies to submit rules to the Office of the Attorney General for a "legal pre-review" prior to a rule going out for public hearing and comment. Chief Deputy Pistner stated that the pre-review can identify any legal issues prior to the public comment process and therefore, can be more efficient; it can be more difficult to make changes after the public process. It was pointed out that the pre-review and the review are often done by different people in the Office. (See Appendix C for Linda Pistner's handout.)

The Office of the Attorney General also reviews emergency rules (both routine-technical and major-substantive) for compliance with the statutory emergency standards[6] in addition to its regular review of form and legality. Agencies must include specific findings with respect to the existence of an emergency and any modifications of procedures that were necessary. Under the law, delay is not considered a sufficient basis for an emergency rule and would be denied. Committee members asked whether a financial question such as a curtailment could be considered an emergency under the statute. A curtailment order is a response by the Governor to a situation in which there will not be enough money to make it through the year; waiting until the Legislature is in session to make necessary budget adjustments would result in the budget reductions being realized over a shorter period of time. According to Chief Deputy Pistner, there have been challenges in court to emergency rules when a shortfall in Medicaid funds was cited as constituting an emergency for rulemaking. In *Colorado Health Care Association v. Colorado Dept of Human Services,* 842 F.2d 1158 (10th Cir. 1988), the 10th Circuit Court of Appeals upheld that a shortfall in Medicaid funds was a sufficient basis for emergency adoption of the rule. In *Wheelchair Carriers Assoc. v. District of Columbia,* 2002 U.S. Dist LEXIS 4617 (D.D.C. 2002), the Federal District Court for the District of Columbia found that the agency's findings did not demonstrate that an emergency existed and voided the emergency rule (although the court did not say that an emergency could not be based on a financial shortfall). There have not been any cases in Maine challenging emergency major substantive rules.

Agencies are not supposed to add provisions into an emergency rule relating to curtailment that do not save money, although Chief Deputy Pistner acknowledged that this is a factual requirement of which the Office of the Attorney General is not the expert. The Committee determined that clearly defined dollar amounts for each part of the emergency rule would help the Office of the Attorney General to ensure that an emergency rule is not used by an agency to include items that do not fall under the emergency classification.

During the second meeting, representatives from the Office of the Secretary of State provided data on rules adoptions since 2007, including major substantive rules and emergency rules. In 2007, there were six emergency major substantive rules adopted. There were six in 2008, two in 2009 and seven in 2010 (as of October 13th, 2010). There are many routine technical emergency rules adopted with the vast majority being area closures promulgated by the Department of Marine Resources. (The table provided by the Office of the Secretary of State is in Appendix D.)

III. FINDINGS AND RECOMMENDATIONS

During its discussion of the APA, the Committee chose not to delve too deeply into the substance or specifics of the major substantive special education rules dealt with by the Education and Cultural Affairs Committee in 2009 and 2010. Although those issues prompted

[6] 5 MRSA §8054 determines that an emergency rule may be adopted if the agency finds it "is necessary to avoid an immediate threat to public health, safety or general welfare". The agency may modify regular procedures relating to public notice and comment to the "minimum extent necessary to enable adoption of rules designed to mitigate or alleviate the threat found".

the creation of this study, the charge to the State and Local Government Committee was to review the APA more broadly. The Committee looked for potential systemic issues in the rulemaking process that may have contributed to the problems that arose during the Education Committee's review of the special education rules. The Committee also examined administrative policies with a view to ensuring clarity, transparency, accountability and timeliness in the rulemaking process. The following proposals are the findings and recommendations of the State and Local Government Committee.

Finding #1. The statutory language establishing a deadline for the submission to the Legislature of major substantive rules for legislative review is an essential part of the APA, but it is ambiguous and ineffective as currently drafted. Because of the manner in which the law is currently structured, the Legislature risks allowing agencies to adopt major substantive rules without any review if the Legislature fails to act on rules submitted after the current "deadline".

> **Recommendation #1:** *We recommend that the statutory language pertaining to a deadline for agency submission of major substantive rules for legislative review be amended to clarify that rules submitted after the statutory deadline may not be finally adopted by the agency in the event the Legislature fails to act on those rules prior to adjournment.* (Language implementing this recommendation is included as Sections 1-4 in the proposed legislation attached as Appendix E.)

Finding #2. Current law (5 MRSA §8054, sub-§2) requires that any emergency rule include, with specificity, the agency's findings with respect to the existence of an emergency. Inclusion of such findings in any emergency rule is essential in informing the public as to the reasons why the rule is being adopted on an emergency basis and for ensuring the transparency of the emergency rulemaking process itself.

> **Recommendation #2.** *We recommend that 5 MRSA §8054, sub-§2 be amended to require that an agency's findings with respect to the existence of an emergency be included in the emergency rule, at the time of adoption or at the time of the public hearing, in a separate section of the rule clearly labeled as "Findings".* (Language implementing this recommendation is included as Section 5 in the proposed legislation attached as Appendix E.)

Finding #3. Understanding the fiscal impact of an emergency rule adopted to satisfy the requirements of a temporary curtailment order by the Governor under 5 MRSA §1668 is essential to the public and the Legislature in evaluating the programmatic impacts of the emergency rule. This is true for all emergency rule adoptions, but is particularly true in instances in which the emergency rule must be adopted as a major substantive rule. By their nature, major substantive rules are rules that the Legislature has determined to have potentially significant impacts on the public welfare and, as such, are subject to an increased level of legislative scrutiny under the APA.

> **Recommendation #3.** *We recommend that 5 MRSA §8054 be amended to include a requirement that any emergency rule adopted to satisfy the requirements of a*

temporary curtailment order by the Governor under 5 MRSA §1668 sub-§2 include within the adopted rule an estimate of the fiscal impact of each separate item in the rule. (Language implementing this recommendation is included as Section 6 in the proposed legislation attached as Appendix E.)

Finding #4. Questions about whether or not an agency rule satisfies the "intent" of the Legislature are legal questions that are difficult to resolve after the adoption of a rule without either judicial interpretation or subsequent action by the Legislature to clarify the underlying statute. Disagreements between the Legislative and Executive Branches about whether or not an agency satisfied Legislative "intent" in the rulemaking process can most effectively be avoided through careful attention by the Legislature, and its committees, to the statutory language used when granting an agency rulemaking authority. The more detail the Legislature includes in the statute with respect to specifying policy criteria or standards, the less discretion the agency will have on those issues when drafting its rule. The more general the authority granted to an agency by the Legislature to adopt rules, the more discretion the agency will have when drafting the rule. The Legislature, and its committees, must think carefully when deliberating on legislation that will authorize agency rulemaking about the policy standards and criteria they wish to include in the statute which are not generally subject to agency discretion, and those areas in which they choose to give an agency discretion to set specific criteria or standards during the rulemaking process.

Recommendation #4. *We recommend that the orientation seminars provided to incoming legislative members every two years include a discussion on the issues a legislative committee should consider when deliberating on legislation that will grant rulemaking authority to an agency. Those issues should include, but are not limited to, discussion on when policy criteria or standards should be specified in statute and when criteria and standards are more appropriately left to the discretion of the agency to adopt during the rulemaking process; when rulemaking authority be specified as major substantive; and in determining an appropriate timeframe for the adoption of the rule.*

Finding #5. Legislators would benefit from a regular program of education and training on the APA in general and on the role of the Legislature, and its committees, in reviewing provisionally adopted major substantive rules.

Recommendation #5. *We recommend that the orientation seminars provided to incoming legislative members every two years include discussions for all incoming members on all aspects of the Administrative Procedure Act, including discussions on the role of the Legislature and its committees in reviewing provisionally adopted major substantive rules.*

Finding #6. The APA imposes numerous filing requirements on the agencies, including filing an annual regulatory agenda listing the rules expected to be proposed in the coming year, filing rulemaking fact sheets prior to the adoption of any rule and the filing of the adopted rule itself. These filing requirements are essential in maintaining the transparency of the rulemaking

process, but they are largely paper-based and dependent on manual distribution to the public and the Legislature. For example, because of the manual nature of reviewing and posting such documents to the internet, the Office of the Secretary of State currently has a two year backlog in its web posting of regulatory agenda and a nine month backlog in web posting of adopted rules. In addition, the Legislature spends thousands of dollars each year photocopying and distributing regulatory agenda and rulemaking notices to members of the committee of jurisdiction. Automating the filing and posting of these documents to the internet would significantly expedite the filing of these documents, significantly reduce, or perhaps eliminate, the cost of printing and distributing many thousands of pages of material, and provide greater and more immediate access to those documents by the public and by members of the Legislature.

> **Recommendation #6.** *We recommend that the Legislature and the Secretary of State implement a coordinated process that fully automates the submission, distribution and posting to the internet of documents filed by agencies under the Administrative Procedure Act, including a mechanism by which the actual text of the proposed or adopted rule is available on the internet at the time it is filed and a process that automatically notifies members of the legislative oversight committee of that filing.*

APPENDIX A

Authorizing Legislation

APPROVED	CHAPTER
APR 0 8 '10	2 0 7
BY GOVERNOR	RESOLVES

STATE OF MAINE

IN THE YEAR OF OUR LORD

TWO THOUSAND AND TEN

H.P. 1272 - L.D. 1784

Resolve, Directing the Joint Standing Committee on State and Local Government To Study the Rule-making Process under the Maine Administrative Procedure Act

Sec. 1. Interim committee study. Resolved: That the Joint Standing Committee on State and Local Government is authorized to hold up to 3 interim meetings to study the rule-making process under the Maine Administrative Procedure Act. In conducting the study, the committee shall examine:

1. The circumstances surrounding the adoption of emergency rules, in particular major substantive rules, to ensure that the process of adopting an emergency rule is applied only when there is truly an emergency;

2. The Legislature's role in reviewing major substantive rules, including whether sufficient information is being provided by agencies, oversight functions are adequate and appropriate notice is being provided to the public, and the implications for state agencies of the statutory deadline for submitting major substantive rules to the Legislature; and

3. The relationship between the intention of the Legislature in adopting specific content in a major substantive rule and the rule as drafted by the department; and be it further

Sec. 2. Report. Resolved: That the Joint Standing Committee on State and Local Government shall, by November 3, 2010, submit a report that includes its findings and recommendations on matters relating to the issues identified in section 1, along with any suggested legislation, to the First Regular Session of the 125th Legislature for presentation to the joint standing committee of the Legislature having jurisdiction over state and local government matters.

APPENDIX B

LD 1784 Background Memorandum

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August 19, 2010

To: Members, Joint Standing Committee on State and Local Government

From: Patrick Norton, OPLA Director

Re: Background on LD 1784

This memo is intended to provide some background on the issues that gave rise to LD 1784 and subsequently to this study on the state's administrative rulemaking process by the Joint Standing Committee on State and Local Government.[1] This memo should not be interpreted as advocating any particular course of action or as suggesting that the Committee's work is limited by anything other than your interpretation of the language in the Resolve itself. Hopefully, this memo only provides you with some context as to the origins of LD 1784, the discussions on that bill by the Education Committee and the reasons why it was ultimately amended by the Legislative Council to direct the State and Local Government Committee to undertake this study.

LD 1784 was initially introduced as a concept draft in an attempt to address issues raised by the adoption in 2009 and 2010 of emergency major substantive rules by the Department of Education regarding services to children with eligible disabilities under the State's special education regulations, including the Child Development Services (CDS) program. The process of rulemaking and subsequent legislative review was not smooth and raised a number of concerns among many Education Committee members and stakeholder groups. The two primary concerns that were expressed were that:

- Some of the changes proposed to the special education and CDS programs in the department's rules were inconsistent with the intent of the Legislature; and that

- Those changes were implemented through the emergency major substantive rulemaking process and were in effect before the Legislature had an opportunity to review those rules.

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[1] LD 1784, as amended, became Resolve 2009, chapter 207. A copy of that Resolve is attached.

The policy disagreements between the Education committee and the department on the special education rules were complicated by the fact that the changes were taking place at a time when the department was being told to significantly cut its budget, and that the department was attempting to address those budget cuts in part through changes in the special education and CDS programs. After several contentious work sessions, the Education Committee unanimously voted to reverse many of the special education program changes adopted in the emergency rule, to sunset several other provisions and to direct the department to adopt major substantive rules on the sunsetted items for consideration by the next Legislature.

It was in that context that LD 1784 was introduced and heard by the Education Committee. Although a number of committee members felt that the emergency major substantive rulemaking process suffered from a number of deficiencies and needed some sort of review, a majority (11-2) voted ONTP on the bill, citing generally a lack of time remaining in the session to thoroughly work the bill and concerns among some that the problem was more general in nature and not limited only to the Department of Education. The minority report on the bill attempted to address those concerns by proposing to create a legislative study comprised of members from several committees, including the State and Local Government Committee, charged with a broader study of the state's Administrative Procedure Act (APA) in general. The minority amendment was ultimately adopted in the House and the Senate (with several changes) and sent to the Special Study Table for consideration by the Legislative Council.

For budget reasons and because of their belief that issues relating to the APA were most appropriately within the jurisdiction of the State and Local Government Committee, the Council amended the bill to require that this review be done by that committee during this legislative interim.

This memo first presents a summary of the legislation directing this study, followed by a description of the issues that lead to the introduction of LD 1784 and a brief legislative history of that bill. In the event that the Committee wishes to do a broader review of the Administrative Procedures Act, I would be happy to provide a summary of the agency rulemaking process and a list of the 252 statutory and unallocated sections of law directing agencies to adopt major substantive rules.

Summary of LD 1784 (Resolve 2009, chapter 207)

Resolve 2009, chapter 207 was introduced as LD 1784. A brief legislative history of LD 1784 is provided after this summary of the chaptered law.

Resolve 2009, chapter 207 authorizes the Joint Standing Committee on State and Local Government to meet up to 3 times during the 2010 legislative interim to study the rulemaking process under the Maine APA. In conducting the study, the committee is directed to examine the following issues:

1. The circumstances surrounding the adoption of emergency rules, in particular major substantive rules, to ensure that the process of adopting an emergency rule is applied only when there is truly an emergency;

2. The Legislature's role in reviewing major substantive rules, including whether sufficient information is being provided by agencies, oversight functions are adequate and appropriate notice is being provided to the public, and the implications for state agencies of the statutory deadline for submitting major substantive rules to the Legislature; and

3. The relationship between the intention of the Legislature in adopting specific content in a major substantive rule and the rule as drafted by the department.

The Resolve also directs the committee to issue a report by November 3, 2010 that includes its findings and recommendations and any suggested legislation to the First Regular Session of the 125th Legislature for presentation to the joint standing committee of the Legislature having jurisdiction over state and local government matters.

Joint Rule 353, section 8, provides that legislative committees receiving study reports may introduce a bill during the session to which the report is submitted to implement its recommendations on matters relating to that study. If the 125th Legislature adopts that Joint Rule without change, the joint standing committee having jurisdiction over state and local government matters in the 125th Legislature will have the authority to introduce a bill implementing its recommendations relating to that report to the First Regular Session of the 125th Legislature.

Issues in the Education Committee that gave rise to LD 1784

Given the relatively general nature of the study tasks in Resolve 2009, chapter 207, and the fact that the members of the State and Local Government Committee had no formal role in the public hearings and work sessions held on this bill by the Education Committee, I thought an overview of the issues that gave rise to LD 1784 might be useful as you begin your study process.

In preparing this overview, I consulted with Representative Connor, who sponsored LD 1784, Phillip McCarthy, Ed.D., the OPLA analyst assigned to staff the Education Committee and Anna Broome, Ph.D., the OPLA analyst who worked on this bill with the Education Committee. I also reviewed the testimony and other materials in the committee files for LD 1784 and the testimony and other materials in the files for LD 1741, the Resolve that provided for legislative review of major substantive rules relating to special education programs.

As mentioned earlier, the original draft of LD 1784 was a concept draft proposing to examine the major substantive rule-making authority of the Department of Education. The issues that gave rise to this bill can be traced back several years and involve a complex set of interactions between the enactment and adoption of a number of laws and major substantive rules that pertained to the continuity of care in the special education and CDS programs in the public schools. The special education and CDS programs in the public schools are a complex set of

programs and services administered at the state level by the department and locally by the public schools that seek to identify children with disabilities and provide those eligible children with early intervention services and free, appropriate public education. The most recent series of events involving the Education Committee and the department on special education rules took place during the 124th Legislature, and are described briefly below.

LD 489

During the First Regular Session of the 124th Legislature, the Education Committee directed the Department of Education (through LD 489) to adopt Emergency Major Substantive Rules by June 30, 2009, that would amend previously adopted rules to immediately resolve issues of eligibility and continuity of care in the special education and CDS programs in the public schools. LD 489 was signed into law on June 9, 2009 as Resolve 2009, chapter 113. The fact that this Resolve directed the department to amend rules adopted sometime prior to 2009 and that it included among its emergency preamble a statement that the immediate enactment of this Resolve is necessary to "*minimize any harm that might come to children as a result of the application of current practices*" suggests that, at best, a "back and forth" relationship between the Legislative and Executive branches on these issues had existed for some time.

In response to this Resolve, the Department adopted emergency major substantive rules in late June 2009 and later modified those emergency rules through a second adoption of emergency major substantive rules on January 19, 2010. The department also provisionally adopted those same rules as major substantive rules in January 2010 and submitted them to the Legislature for consideration. This bifurcated process is necessary, since the APA effectively "sunsets" emergency major substantive rules after 12 months unless they are reviewed and approved by the Legislature.[2]

LD 1741

LD 1741, the Resolve that would serve as the Committee's vehicle in reviewing this provisionally adopted major substantive rule, was introduced on January 14, 2010 and was heard by the Committee on February 8, 2010. At the public hearing, the Education Committee received testimony from 4 proponents, 35 opponents and 1 neither-for-nor-against. Over the next 2 weeks, the Committee held 6 work sessions on LD 1741.[3]

Much of testimony on the LD 1741 focused on changes to the special education and CDS programs that many opponents viewed as either bad public policy or inconsistent with law or legislative intent. Many saw these latest rules as a continuation of a process in which the department was frustrating the will of the Legislature by adopting policies that were not consistent with direction given by the Legislature. The department's testimony indicates that many of the changes proposed in the emergency rule adopted in January 2010 were intended to reduce program costs by addressing areas in which state law or rules exceeded minimum federal requirements and to ensure more uniform statewide application of special education

[2] This is not an uncommon practice; however it is not well understood by the agencies and often leads to confusion among the committees.
[3] 2/12, 2/17, 2/19, 2/23, 2/24 and 2/25.

rules and provision of services.[4] The fiscal note on the original bill supports the department's cost containment goals by showing that the provisionally adopted rules, if approved as presented to the Legislature, would achieve a total General Fund savings of $2.2 million over 2 years.

The policy changes made by the department in the January 2010 emergency rule and proposed in the provisionally adopted major substantive rule that were most often cited by opponents as being inconsistent with state law or legislative intent included:

- Reducing from 60 days to 45 days the allowable time for evaluating preschoolers with disabilities, a standard that was argued to be inconsistent with direction from the Legislature in LD 489;
- Adopting a stricter definition of "adverse effect" standard used to determine when the department must provide special education services;
- Reducing the statute of limitations on due process violations from 4 years to 2 years;
- Applying the "stay put" provisions only to due process (excluding it from complaint investigations and mediations); and
- Adopting language regarding determinations about extended school year services that was argued to be inconsistent with direction from the Legislature in LD 489.

The Education Committee voted unanimous OTP-AM on LD 1741 on February 25, 2010. The Committee's amendment, which became Resolve 2009, chapter 200, reflected the Committee's dissatisfaction with the proposed rules by making a number of substantive changes to the rule, including:

- Requiring that postsecondary transition planning begin no later than the beginning of grade 9 rather than by age 16;
- Deleting the proposed changes to the "stay put" provisions;
- Restoring the requirement that evaluation of children aged 3 to 5 years be conducted within 60 days rather than within 45 days;
- Deleting the provisions relating to "adverse effect";
- Provide that in addition to the right of a parent to request a due process hearing, that the parent must also be permitted to request mediation and to file a complaint if there is a dispute about a determination with respect to a child's transition from a CDS site to a public school;
- Placed a "sunset" of June 30, 2011 on several other provisions in the rule;
- Required the Commissioner of Education to convene a 13 member stakeholder group to examine the federal and state laws and rules that pertain to the provisions of Maine's unified special education rules (birth to age 20 years) subject to that sunset;
- Authorized the Commissioner to provisionally adopt major substantive rules to implement the recommendations of the stakeholder group for consideration by the First Regular Session of the 125th Legislature; and

[4] See December 4, 2009 letter from former Commissioner Gendron to members of the Appropriations Committee and the Education Committee.

- Directs the Department of Education to conduct a review of the Medicaid rate schedule for qualified licensed contractors and submit its report to the Education Committee by January 14, 2011.

LD 1784

Less than one week after its vote on LD 1741, the Education Committee held a public hearing on LD 1784, *An Act Regarding the Commissioner of Education's Rule-making Authority*, a concept draft sponsored by Representative Connor. LD 1784 was introduced to the Second Regular Session of the 124th Legislature on February 17, 2010 and referred to the Joint Standing Committee on Education and Cultural Affairs. The bill is a result of the issues surrounding the Education Committee's experiences with special education rulemaking process discussed earlier. As initially presented, LD 1784 proposed an examination of the rule-making authority of the Commissioner of Education as it relates to major substantive rules previously submitted to, and subsequently rejected by, the Legislature.

LD 1784 received a public hearing by the Education committee on March 1, 2010 and work sessions were held on March 2nd and March 11th. A committee vote on the bill was taken at the March 11th work session. The vote of the Education Committee was divided; 11 members voting in favor of an ONTP report, and 2 members voting in favor of an OTP-AM report. The minority OTP-AM report proposed to change the bill from an Act to an Emergency Resolve proposing to establish an 8 person legislative study commission to study the rule-making process under the Maine Administrative Procedures Act.

The Education Committee's minority report expanded the scope of the proposed legislation beyond just the Department of Education to include studying the circumstances surrounding the administrative adoption of emergency rules by any state agency, particularly major substantive rules, the Legislature's role in reviewing those rules and the relationship between the rule as drafted by the agency and the underlying legislative intent. These concerns arose out of the earlier committee discussions regarding LDs 489 and 1741, particularly the fact the Emergency Major Substantive Rules adopted in January 2010 that made substantive policy changes in the special education and CDS programs that many on the committee saw as inconsistent with legislative intent, took effect before the Committee had reviewed the provisionally adopted rule.

LD 1784 was subsequently reported out of the Education Committee to the House of Representatives on March 24, 2010. On March 25, 2010, after initially moving in the House to accept the Education Committee's majority ONTP report, Representative Sutherland later moved to table the bill. On March 31, 2010, Representative Sutherland withdrew her motion to accept the majority ONTP report and further moved to accept the minority OTP-AM report, which was accepted by the House. Representative Connor then moved to accept House Amendment "A" to Committee Amendment "A", which was then read and adopted. House Amendment "A" removed language in the committee amendment specifying the committees from which members of the study commission must be appointed and removed the authority of the study commission to submit a bill to the 125th Legislature. The bill was then passed to

be engrossed as amended by Committee Amendment "A" and House Amendment "A" and sent to the Senate for concurrence.

The Senate took up LD 1784 later in the day on March 31st, and on motions by Senator Alfond, read and accepted the bill as amended in the House by Committee Amendment "A" and House Amendment "A" and sent the bill back to the House in concurrence.

On that day, on the motion to accept the Minority OTP-AM report, Senators Alfond, Schneider and Mills spoke to this bill on the floor of the Senate.[5] Their comments are informative as to the reason why the Senate Chair was moving the minority committee amendment, why the bill was expanded to address major substantive rulemaking in general and why a change of venue from the Education Committee to the State and Local Government Committee was appropriate. Senator Alfond's comments also speak directly to the relationship between LD 1748 and the experience of the Education Committee with respect to the Committee's review of special education major substantive rules discussed earlier in this memo.

The text of their comments is presented below.

> Senator **ALFOND**: Thank you, Madame President. Ladies and gentlemen of the Senate, I rise just to describe a little bit about why I moved the Minority Report. In committee we got this bill very late. The bill, as it was brought to us, was a bill called 'An Act Regarding the Commissioner of Education's Rule Making Authority'. We heard this and, because we had a time limitation on the bill, we voted it out very quickly, but we also told the bill's sponsor that it did seem too limited in scope. The Minority Report that came out of the other Body is 'A Resolve to Establish the Commission to Study the Rule Making Process Under the Maine Administrative Procedure Act', also commonly referred to as the APA. In the Education Committee this issue couldn't have been more relevant. We, last session, passed a bill. The bill was adopted by both Bodies and signed by the Governor. This session, in the Education Committee, the Commissioner brought an emergency rule making bill. In fact, we just enacted it today. In that rule making process she overturned a law that we had passed, a law that we all supported. It was a unanimous decision out of the committee. Both Bodies supported it. The Governor signed it. Essentially, the bill sponsor said maybe there was a problem here and went and talked to a lot of different committees. It's not just happening in Education, it's happening in many committees. This bill, essentially, would take a broad look at the APA process and report back to the 125th Legislature. I think it's a real opportunity to analyze the APA process during this off-season that we have here. I really think it's an opportunity for the Legislative branch of government to look at this. We understand what we can do. I guess it's more what the Executive branch does and what they can do when they over rule things that we do. I think we take a lot of thought at what we do in our committees and when we pass laws. I certainly find it very troubling that in the next consecutive session a Commissioner can come back and over rule us. I hope that folks here in the Body will follow my light. I think it's a good bill and I hope that we can get this study done. Thank you.
>
> On motion by Senator **COURTNEY** of York, supported by a Division of one-fifth of the members present and voting, a Roll Call was ordered.
>
> **THE PRESIDENT**: The Chair recognizes the Senator from Somerset, Senator Mills.

[5] See page S-1711 of the Senate Legislative Record dated Wednesday, March 31, 2010.

Senator **MILLS**: Thank you, Madame President. Men and women of the Senate, I think the amendment has been accurately described by the good Senator from Cumberland as a bill. It's a whole new, free standing bill coming out of the committee that doesn't even have jurisdiction over the subject matter. It isn't that we all aren't concerned, broadly, about our duties as Senators, but this is an issue that is within the province of the State and Local Government Committee. It is a free standing bill under camouflage of an amendment. Who is to say this needs a study? It seems to me that it would be up to the committee that has jurisdiction to make that determination and this is an appropriate measure, perhaps, to bring forward as a bill next November and present it to the State and Local Government Committee to see if they think some changes ought to be made or whether a study should happen. To take a committee that is disappointed in the outcome of a specific issue of rulemaking and to convert that into a generic and broad based call for an overhaul of the whole procedural system, the Administrative Procedural Act, just seems to me that it smacks of a vendetta. We shouldn't be dealing with broad pieces of legislation like this that are free standing bills at the end of the session. That's what next sessions are for. It seems to me that we should defeat the pending motion and go on to the next appropriate motion. Thank you.

THE PRESIDENT: The Chair recognizes the Senator from Penobscot, Senator Schneider.

Senator **SCHNEIDER**: Thank you, Madame President. Men and women of the Senate, I hadn't expected to stand but I do support the Senator from Cumberland, Senator Alfond's motion. I'm standing because I was the former Chair of the State and Local Government Committee. Unfortunately, this theme of improper action on rulemaking keeps cropping up. In fact, we had one piece of legislation that came up that we passed that had to do with an issue that the Senator from Knox, Senator Rector, had brought before the State and Local Government Committee. This keeps coming up in all sorts of different committees. Health and Human Services mentioned that there was a problem with rulemaking issues. First of all, about the amendment. When we do amendments in committee changes like this always occur. This is not unusual. This is not some free standing bill. This is very much within the realm of the original bill. Sending it to a different committee also happens frequently. This is not something that is unusual. The only unusual part about it is that we're moving a two-person report. Frankly, that happened because of a very pushed timeframe that we were under. That's why that occurred. I truly believe that if we had had a little bit more time perhaps this would have been either re-referred to the State and Local Government Committee or we would have had a much larger group in favor of this piece of legislation. Clearly the other Body is in agreement and so I think we're here because there is a problem and we're talking about the balance of power here. In this case the Administration was able to undo something based on the fact that this was an emergency rule under the guise that they were using the emergency rule as a way to save money, money that was never booked in this budget. There was a hearing held the week of Christmas. This is a very interesting issue here and I think it is very much warranted to look at this more thoroughly and I would hope that you would support the pending motion, given that this is a problem that keeps cropping up. I think it is something that would help the next legislature to make some decisions on how this can be prevented in the future. Thank you very much.

On April 2, 2010, Representative Connor moved that the bill be further amended by House Amendment "B", which removed the Emergency Preamble and thereby removing the requirement for a 2/3rds vote for final passage. House Amendment "B" was adopted in the House and the bill was sent to the Senate, which accepted the bill as further amended by House Amendment "B". The bill in its amended form was finally passed in the House on April 5, 2010 and sent back to the Senate for concurrence. On a motion by Senator Bartlett later that day, LD 1784 was ordered placed on the special study table pending final passage in concurrence.

The Legislative Council met on April 6, 2010 to consider all bills assigned to the special study table. By unanimous vote, the Legislative Council voted to amend LD 1784 by assigning the rulemaking study tasks in the committee amendment to the Joint Standing Committee on State and Local Government rather than to a legislative study commission.

An amendment implementing the decision of the Legislative Council was adopted in the Senate on April 7, 2010 on a motion by Senator Bartlett. Later that same day, the House receded and concurred with the Senate action, finally passed the bill in its newly amended form and sent the bill to the Senate for concurrence. LD 1784 was finally passed by the Senate on April 7, 2010.

LD 1784 was signed by the Governor on April 8, 2010 as Resolve 2009, chapter 207. A copy of that Resolve is attached.

Other supporting materials

Although the primary issues that initially gave rise to LD 1784 were concerns that some emergency major substantive rules adopted by the Department of Education were perceived to be inconsistent with the intent of the Legislature and were implemented and in effect before there was any opportunity for Legislative review, there were also additional concerns that these problems were more general in nature and not limited to just the Department of Education.

Upon review, it appears that some of the issues are, in fact, particular to the special education and CDS programs and the Department of Education. Other issues, such as the fact that the Administrative Procedures Act does permit the adoption of emergency major substantive rules that can take effect before being reviewed by the Legislature, apply to all agencies having major substantive rulemaking authority.

If the committee wishes to undertake a review of the emergency rulemaking process as it applies to all agencies, I have attached two additional items that may be of use. The first is a summary of the administrative rulemaking process produced by OPLA. The second is a list of the 252 references in statute and unallocated law that authorize an agency to adopt major substantive rules. That document may serve as a starting point for your discussions should you choose to go in that direction.

I hope this has been useful. Please let me know if you have questions.

APPENDIX C

Role of the Attorney General in Agency Rulemaking

Role of the Attorney General in Agency Rulemaking

A. General Responsibilities

1. Advise agency during formation of the rule proposal.

2. Do a form and legality review before the rule is formally proposed, as provided under Executive Order 17 FY 02/03.

3. Provide advice to agency staff about changes to rule based on hearing and comments, preparation of the basis statement.

4. Review and approve the final rule for form and legality before it is filed with Secretary of State. This step cannot be performed by any person involved in the formulation or drafting of the proposed rule 5 MRSA § 8056(1)(A) and (6).

5. Defend any legal challenges brought against the rule.

B. Review for "Form and Legality"

1. Check compliance with all procedural steps required by APA

2. Check whether the rule is consistent with the agency's statutory authority.

3. Check for possible conflicts between the rule and other Maine statutes, the Maine Constitution, and federal law to the extent known.

4. Suggest changes to improve organization, readability and clarity.

C. Emergency Rules (additional steps)

1. Review for compliance with emergency standard.

2. Review agency's findings with respect to existence of emergency.

3. Can't find an emergency if primary cause is delay of agency.

D. Major Substantive Rules

1. AG responsibilities as above, except that review for form and legality happens twice: once upon provisional adoption, and again upon final adoption following legislative review.

2. An emergency major substantive rule may be effective for up to 12 months or until the Legislature has completed its review of the provisional rule. Provisionally adopted rules must reach the committee not later than 45 days before statutory adjournment; committee can still choose to review if the rule arrives after that date. 5 MRSA § 8072.

3. In reviewing emergency major substantive rules, the need for the Legislature to act on the permanent rule is relevant to the determination of the immediacy of the threat to public health, safety or welfare, *i.e.*, the difference between the time taken by routine rulemaking v. major substantive.

E. Cases on "Emergency" Rule Adoption

1. Colorado Health Care Ass'n v. Colorado Dept. of Human Services, 842 F.2d 1158 (10th Cir. 1988); Little v. Coler 557 So. 2d 157 (Fla.Ct.App. 1990): shortfall in Medicaid funds constituted an emergency for rulemaking.

2. Wheelchair Carriers Assoc. v. District of Columbia, 2002 US Dist LEXIS 4617 (D.D.C. 2002): agency failed to provide sufficient findings to demonstrate emergency.

5 §8054. EMERGENCY RULEMAKING

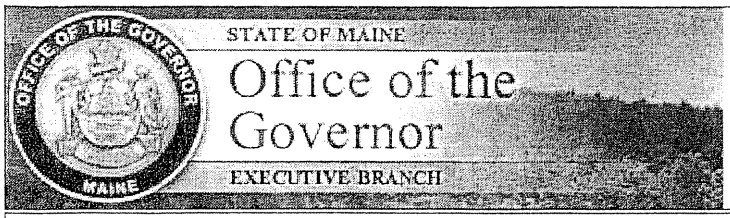
1. Emergency. If the agency finds that **immediate adoption of a rule by procedures other than those set forth in sections 8052 and 8053 is necessary to avoid an immediate threat to public health, safety or general welfare**, it may modify those procedures to the minimum extent required to enable adoption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

2. Agency findings. Any emergency rule **must include, with specificity, the agency's findings with respect to the existence of an emergency**, including any modifications of procedures, and such findings are subject to judicial review under section 8058. No emergency may be found to exist when the primary cause of the emergency is delay caused by the agency involved.

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

Prepared for the State & Local Government Committee

Linda Pistner, Chief Deputy AG, September 22, 2010



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Order Regarding Executive Review of Administrative Rulemaking 5/19/2003

May 19, 2003

17 FY 02/03

WHEREAS, Executive Order 10 FY 02/03 was intended to make the administrative rulemaking process effective and efficient; and

WHEREAS, further procedural clarifications and directives are necessary in order to reach that objective; and

WHEREAS, the purpose of this Executive Order is to clarify the role and responsibilities of state agencies promulgating rules pursuant to the Maine Administrative Procedure Act; and

WHEREAS, State agencies are responsible for the development of rules, which development is one of the most important policy-making functions entrusted to State agencies; and

WHEREAS, the Office of Attorney General is required by 5 M.R.S.A. §§ 8052(7)(B) and 8056(1)(A) to conduct a review to determine if a rule shall be approved as to form and legality:

NOW, THEREFORE, I, John E. Baldacci, Governor of the State of Maine, do hereby revoke Executive Order 10 FY 02/03 in its entirety and order the following:

Prior to issuing notice of rulemaking and submitting a proposed rule to the Secretary of State for publication pursuant to 5 M.R.S.A. § 8053, agencies must present to the respective Commissioners presiding over said agencies a written explanation detailing the following:

1. The legal requirement for adopting the rule;
2. Whether the proposed rule protects against a direct and immediate threat to the public health, safety, or welfare; and
3. An analysis of the costs of the regulatory initiative to the State, as well as the cost to and impact on the regulated community.

Prior to issuing notice of rulemaking and submitting a proposed rule to the Secretary of State for publication pursuant to 5 M.R.S.A. § 8053, the respective Commissioner presiding over agencies promulgating rules shall:

1. Review the above-described written explanation submitted to them and have an understanding of the substance and policy implications of the proposed rules; and
2. Once the Commissioners' review and understanding of the proposed rules are achieved, the Commissioners must indicate the Commissioners' preliminary approval of the proposed rules,

if such approval is deemed by the Commissioners to be warranted.

Further, prior to issuing notice of rulemaking and submitting a proposed rule to the Secretary of State for publication pursuant to 5 M.R.S.A. § 8053, all agencies shall seek a legal pre-review of proposed rules by the Office of the Attorney General. The legal pre-review is a preliminary informal review as to form and legality. Agencies submitting proposed rules to the Office of the Attorney General for legal pre-review shall ensure that: (1) the proposed rule has been drafted by a person responsible for and skilled in the development of rules; (2) the proposed rule represents the agency's best efforts at issue and policy development, organizational layout, and writing quality; and (3) the agency has provided the Office of the Attorney General with adequate time to perform its legal pre-review of the proposed rules. Moreover, upon request of the Attorney General, an agency shall enter into a Memorandum of Understanding between the Office of the Attorney General and the subject agency outlining the rule review process that will be followed.

The legal pre-review described in this Order is in addition to the review conducted by the Office of the Attorney General pursuant to 5 M.R.S.A. §§ 8052(7)(B) and 8056(1)(A) to determine if a rule shall be approved as to form and legality.

Effective Date

The effective date of this Executive Order is 19 May 2003.

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APPENDIX D

Rulemaking Statistics – 2007 to the Present

Appendix D

Rulemaking Statistics – 2007 to Present
Prepared by the Office of the Secretary of State, October 13, 2010

Proposed Rule Filings

Year	Proposals
2007	343
2008	382
2009	379
2010 (to date)	256

Routine Technical Rule Adoptions (Non-Emergency)

Year	Adoptions
2007	312
2008	319
2009	351
2010 (to date)	254

Routine Technical Rule Adoptions (Emergency)

Year	Total	Marine Res. Closed Areas	Maine Milk Comm. Minimum Prices	Various Other
2007	226	188	12	26
2008	293	244	12	37
2009	364	302	12	50
2010 (to date)	226	187	9	30

Major Substantive Rule Adoptions

Year	Provisional Adoptions	Final Adoptions (Non-Emergency)	Emergency Adoptions
2007	26	24	6
2008	18	14	6
2009	27	18	2
2010 (to date)	12	7	7

APPENDIX E

Recommended Legislation

APPENDIX E
Recommended Legislation

AN ACT to Implement the Recommendations of the Joint Standing Committee on State and Local Government to Make Necessary Changes to the Administrative Procedure Act.

Be it enacted by the People of Maine as follows:

Sec. 1. 5 MRSA, §8071-A is enacted to read:

§8071-A. Definitions.

As used in this subchapter, unless the context clearly indicates otherwise, the following terms have the following meanings:

1. Legislative rule acceptance period. "Legislative rule acceptance period" means the period:

A. Beginning on July 1 preceding the convening of a regular session of the Legislature; and

B. Ending at 5:00 p.m. on the 2nd Friday in January after the convening of that regular session of the Legislature.

2. Legislative review session. "Legislative review session" means the next regular session convening after the beginning of the legislative rule acceptance period.

Sec. 2. 5 MRSA, §8072 sub-§§ 3, 5, 6 and 7 are amended to read:

3. ~~Assignment to committee of jurisdiction~~ Legislative review period; legislative instrument prepared. If ~~Upon receipt of~~ the required copies of the provisionally adopted rule and related information are received by ~~,~~ the Executive Director of the Legislative Council during the legislative rule acceptance period, the Executive Director shall ~~immediately~~ notify ~~forward the materials to~~ the Revisor of Statutes, who shall draft an appropriate legislative instrument to allow for legislative review and action upon the provisionally adopted rule during the legislative review session. The Secretary of the Senate and the Clerk of the House shall ~~for placement on~~ place the legislative instrument on the Advance Journal and Calendar ~~and distribution to a committee as provided in this subsection~~. The secretary and clerk shall jointly suggest reference of the legislative instrument 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 of the legislative instrument. After floor action on referral of the legislative instrument ~~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 during the legislative rule acceptance period 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.

5. Committee recommendation. After reviewing a ~~the~~ rule referred to it by the Legislature, the committee shall recommend:

A. That the Legislature authorize the final adoption of the rule;

B. That the Legislature authorize the final adoption of a specified part of the rule;

C. That the Legislature authorize the final adoption of the rule with certain specified amendments; or

D. That the final adoption of the rule be disapproved by the Legislature.

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.

~~**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.~~

7. Report to the Legislature. ~~Consideration by the Legislature.~~ Unless otherwise provided by the Legislature, each joint standing committee of the Legislature that receives a rule submitted during the legislative rule acceptance period shall report to the Legislature its recommendations concerning final adoption of the rule no ~~No~~ later than 30 days before statutory adjournment of the legislative review session ~~Legislature~~ as provided in Title 3, section 2. ~~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 5:00 p.m. on the 2nd Friday in January of the year in which the rules are to be considered by the committee. 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.~~

Sec. 3. 5 MRSA, §8072 sub-§§ 7-A and 7-B are enacted to read:

7-A. Rules submitted outside legislative review period. The Legislature may act or decline to act upon any rules submitted outside the legislative rule acceptance period.

7-B. Prohibited final adoption. No provisionally adopted rule or part thereof may be finally adopted by an agency unless:

A. Legislation authorizing its adoption is enacted into law; or

B. The agency submits the rule or part thereof in accordance with this section during the legislative rule acceptance period and the Legislature fails to act on the rule or part thereof.

For purposes of this subsection, the Legislature fails to act on a rule or part thereof if it fails to enact legislation authorizing adoption or disapproving adoption of the rule or part thereof during the legislative review session or during any subsequent session to which a legislative instrument expressly providing for approval or disapproval of the rule or part thereof is carried over. Nothing in this section requires the Legislature to use the legislative instrument produced pursuant to subsection 3 to approve or disapprove of a rule or part thereof.

Sec. 4. 5 MRSA, §8072 sub-§8 is amended to read:

8. Final adoption; prohibition; effective date. Unless otherwise provided by law, final adoption of a rule or part thereof by an agency must occur within 60 days of the effective date of the legislation approving that rule or part thereof or of the adjournment of the session in which the Legislature failed to act on the rule or part thereof ~~at which that rule is reviewed if~~ as specified in subsection 7-B. ~~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~~ Expect as otherwise specified by law, the rules becomes effective 30 days after filing with the Secretary of State or at a later date specified by the agency.

Sec. 5. 5 MRSA, §8054 sub-§2 is amended to read:

2. Agency findings. Any emergency rule must include, with specificity, the agency's findings with respect to the existence of an emergency, including any modifications of procedures, and such findings are subject to judicial review under section 8058. Such findings must be included in any proposed or adopted emergency rule in a section labeled "Findings". No emergency may be found to exist when the primary cause of the emergency is delay caused by the agency involved.

Sec. 6. 5 MRSA, §8054 sub-§2-A is enacted to read:

2-A. Fiscal impact; curtailment orders. Any emergency rule proposed or adopted in whole or in part to satisfy the requirements of a temporary curtailment order

by the Governor under 5 MRSA, §1668, must specify in the rule the specific dollar amount of curtailed funds attributable to each change proposed or adopted in the rule.

SUMMARY

This proposed legislation implements the statutory recommendations of the Joint Standing Committee on State and Local Government resulting from its study during the summer of 2010 of the Administrative Procedure Act.

This proposed legislation clarifies that a provisionally adopted major substantive rule submitted for legislative review after the statutory deadline for submission may not be finally adopted unless legislation authorizing its adoption is enacted into law. This bill also specifies that an emergency rule must include the agency's findings with respect to the existence of an emergency in a section labeled "findings" and that emergency rules proposed or adopted in whole or in part to satisfy the requirements of a temporary curtailment order must specify in the rule the specific dollar amount of curtailed funds attributable to each change adopted in the rule.