STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
BOARD OF PESTICIDES CONTROL
28 STATE HOUSE STATION
AUGUSTA, MAINE 04333

JANET T. MILLS
GOVERNOR

AMANDA E. BEAL
COMMISSIONER

To: Board Members
From: Staff
Re: Legislative Directives
Date: June 28, 2021

Several new laws and resolves relevant to pesticides were signed by the Governor and should now be considered for response which may include policy development, rulemaking, study, committee review, and/or reporting back. Possible actionable items proposed by these laws and resolves are outlined below and all require Board discussion. All items are organized by the law, resolve or executive order in which they are referenced and are otherwise organized as follows:

The second column proposes possible Board actions.

The third column details the actionable item.

The fourth column identifies the deadline detailed in law for a specific action item.

The fifth column designates type of possible rulemaking (see Title 7 Section 610(6)):

RT Routine Technical

Complete list of possible rulemaking chapters: 10, 20, 40, 41

MEGAN PATTERNSON, DIRECTOR
90 BLOSSOM LANE, DEERING BUILDING

PHONE: (207) 287-2731
WWW.THINKFIRSTSPRAYLAST.ORG

LD 155—Resolve, Directing the Board of Pesticides Control To Prohibit the Use of Certain Neonicotinoids for Outdoor Residential Use				
1	Possible rulemaking (Chapter 10)	New section—Define "emerging invasive insect pests".	No deadline	RT
2	Possible rulemaking (Chapters 40 and 41)	New section—Prohibit the use of any product containing the active ingredient dinotefuran, clothianidin, imidacloprid, or thiamethoxam used for application in outdoor residential landscapes such as on lawn, turf or ornamental vegetation. Provide exemptions for products used for preserving wood, controlling, or treating indoor pests, controlling, or treating insects outside around structural foundations and other parts of structures and treating pets. Provide an exemption for licensed commercial applicators using any product containing the active ingredient dinotefuran, clothianidin, imidacloprid or thiamethoxam on ornamental vegetation to manage emerging invasive insect pests, including but not limited to the Asian long-horned beetle, emerald ash borer and hemlock wooly adelgid.	No deadline	RT
LD 264—Resolve, Directing the Board of Pesticides Control To Gather Information Relating to Perfluoroalkyl and Polyfluoroalkyl Substances in the State				
3	Possible rulemaking (Chapter 10)	New section—Define perfluoroalkyl or polyfluoroalkyl substances		RT
4	Possible rulemaking (Chapters 10 and 20)	New section—Develop a feasible definition of perfluoroalkyl or polyfluoroalkyl adulteration in a pesticide.		RT
5	Possible rulemaking (Chapter 20)	New section—Require manufacturers and distributors to provide affidavits stating whether the registered pesticide	No deadline	RT

		has ever been stored, distributed, or packaged in a fluorinated high-density polyethylene container		
6	Possible rulemaking (Chapter 20)	New section—Require manufacturers to provide an affidavit stating whether a perfluoroalkyl or polyfluoroalkyl substance is in the formulation of the registered pesticide.	No deadline	RT
7	Direct staff to study and report back for Board review and submission to the legislature	Conduct a study to determine if fluorinated adjuvants are being used or sold in the State. The board shall explore what is needed to regulate fluorinated adjuvants in the State and shall explore what is necessary to impose a prohibition on the distribution or application of pesticides or adjuvants containing perfluoroalkyl or polyfluoroalkyl substances.	Report submission deadline January 15, 2022	
LD 316—An Act To Prohibit the Use of Chlorpyrifos				
8	Short term adoption of policy and possible rulemaking (Chapters 40 and 41)	New section—Describe the process by which the Board will grant a temporary permit authorizing a licensed pesticide applicator to use or apply a pesticide containing chlorpyrifos as an active ingredient, as long as that licensed pesticide applicator possessed the pesticide in the State before January 1, 2022. Issued permits shall be posted on the Board's website. Issuance of permits is limited to the period between January 1, 2022 and December 31, 2022.	Deadline January 1, 2022	RT
9	Possible rulemaking (Chapters 40 and 41)	New section—After December 31, 2021, prohibit the purchase and use of pesticides containing	Deadline January 1, 2022	RT

		chlorpyrifos by anyone other than a Maine licensed pesticide applicator holding a Board issued permit.		
LD 519—An Act To Protect Children from Exposure to Toxic Chemicals				
10	Direct the MAC to study the issue and staff prepare and provide report back for Board review and submission to the legislative committee	Medical Advisory Committee evaluation of the potential impact of herbicides used on school grounds on human health.	Report submission deadline February 1, 2022	
Executive Order 41 FY2021—An Order Establishing the Governor's Review of the Aerial Application of Herbicides for Forest Management				
11	Direct staff to review or contract for a review, prepare and provide a report back for Board review and submission to the Governor	Review existing BMPs for aerial application of herbicides.	Deadline for final report submission January 2, 2022	
12	Direct staff to develop a monitoring effort, prepare and provide a report back for Board review and submission to the Governor	Develop a surface water quality monitoring effort to focus on aerial application of herbicides in forestry to be conducted in 2022.		
13	Direct staff to review existing regulations, prepare and provide a report back for Board review and submission to the Governor	Review the existing regulatory framework for aerial application of herbicides in forest operations.		
14		Conduct a series of public meetings to share and obtain public input on the results of the review before		

		finalizing.		
LD 524—Resolve, Directing the Board of Pesticides Control To Research Workable Methods To Collect Pesticide Sales and Use Records for the Purpose of Providing Information to the Public				
15	Direct staff to study and report back for Board review and submission to the legislature	Research workable methods to collect pesticide sales and use records for the purpose of providing information to the public. Explore the best methods for collecting pesticide use information from schools, private applicators, and commercial applicators. Explore the best methods for collecting information on pesticide sales in Maine.	Report submission deadline January 1, 2022	

DEPARTMENT OF ATTORNEY GENERAL
CONTINUING LEGAL EDUCATION COMMITTEE

THE ADMINISTRATIVE PROCEDURE ACT:

AGENCY RULEMAKING

January 26, 2001
University of Maine at Augusta
Augusta, Maine

Presenters:

Janet M. McClintock,
Assistant Attorney General
Natural Resources Division

Jeff Pidot,
Assistant Attorney General
Chief, Natural Resources Division

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

Maine Revised Statutes

Title 7: AGRICULTURE AND ANIMALS

Chapter 103: PRODUCTS CONTROLLED

§610. DETERMINATIONS; RULES; RESTRICTED USE PESTICIDES; UNIFORMITY

1. **Determinations.** The board may by rule:

A. Declare as a pest any form of plant or animal life, except viruses, bacteria or other microorganisms on or in living human beings or other living animals, that is injurious to health or the environment; [2005, c. 2, §8 (COR).]

B. Determine whether pesticides registered under the authority of FIFRA, Section 24(c) are highly toxic to human beings. [2005, c. 620, §10 (AMD).]

C. Determine whether pesticides or quantities of substances contained in pesticides are injurious to the environment. The board must be guided by EPA regulations in this determination; and [2005, c. 620, §10 (AMD).]

D. Require any pesticide to be colored or discolored if it determines that such a requirement is feasible and is necessary for the protection of health and the environment. [2005, c. 620, §10 (AMD).]

[2005, c. 2, §8 (COR) .]

2. **Rule-making powers.** The board may adopt other rules that it determines necessary to carry out the provisions of this subchapter. The board's rule-making authority includes, but is not limited to, rules:

A. Providing for the collection, examination and reporting of samples of pesticides or devices; [2005, c. 620, §10 (AMD).]

B. Providing for the safe handling, transportation, storage, display, distribution and disposal of pesticides and their containers; [2005, c. 620, §10 (AMD).]

C. Establishing requirements of all pesticides required to be registered under provisions of this subchapter, provided that such rules do not impose any requirements for federally registered labels in addition to or different from those required pursuant to FIFRA; [2005, c. 620, §10 (AMD).]

D. Specifying classes of devices that are subject to the provisions of section 605, subsection 1; [2005, c. 620, §10 (AMD).]

E. Governing pesticide application, including, but not limited to, rules:

(1) Designed to minimize pesticide drift to the maximum extent practicable under currently available technology;

(2) Prescribing procedures to be used for the application of pesticides, including the time, place, manner and method of that application;

(3) Restricting or prohibiting the use of pesticides in designated areas or during specified periods of time; and

(4) Prescribing tolerance levels for pesticide residues in off-target areas; [2005, c. 620, §10 (NEW).]

F. Prescribing the submission of information necessary for the board to undertake its responsibilities under this subchapter; [2005, c. 620, §10 (NEW).]

G. Prescribing requirements as necessary to carry out the provisions of section 607; [2005, c. 620, §10 (NEW).]

H. Governing the registration and the cancellation and suspension of registration of pesticides pursuant to section 609; and [2005, c. 620, §10 (NEW).]

I. For the purpose of achieving uniformity of requirements between the states and the Federal Government, provided the rules are in conformity with the primary pesticide standards, particularly as to labeling, registration requirements and criteria for classifying pesticides for restricted use, as established by EPA or other federal or state agencies. [2005, c. 620, §10 (NEW).]

[2005, c. 620, §10 (AMD) .]

3. **Uniformity of requirements; restricted uses.**

[2005, c. 620, §10 (RP) .]

4. **Designation of rules.** Rules adopted under this subchapter are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A unless otherwise specified or designated in accordance with subsection 5.

[2005, c. 620, §10 (NEW) .]

5. **Review of regulatory agenda; designation as major substantive rules.** Notwithstanding Title 5, section 8060, subsection 2, the due date for the submission of a regulatory agenda by the board under section 8060 is January 15th. The board shall annually submit a regulatory agenda complying with Title 5, section 8060, subsection 1 to the joint standing committee of the Legislature having jurisdiction over pesticides regulation. The legislative committee of jurisdiction shall complete its review of the board's regulatory agenda no later than February 15th of each year. The committee may report out legislation no later than February 20th to designate any rule on the board's regulatory agenda as a major substantive rule subject to legislative review under Title 5, chapter 375, subchapter 2-A.

[2005, c. 620, §10 (NEW) .]

6. **Major substantive rules.** Rules proposed for adoption by the board after July 1, 2007 that pertain to topics specified in paragraphs A to E are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A. Rules in effect on July 1, 2007 that pertain to topics specified in paragraphs A to E continue in effect, except that proposed amendments to those rules are major substantive rules and must be reviewed and approved prior to final adoption in accordance with Title 5, section 8072. Rules proposed for adoption by the board after March 1, 2008 that pertain to topics specified in paragraphs F and G are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A. Rules in effect on March 1, 2008 that pertain to topics specified in paragraph G continue in effect, except that proposed amendments to those rules are major substantive rules and must be reviewed and approved prior to final adoption in accordance with Title 5, section 8072. Topics governed by this subsection are:

A. Drift from outside spraying; [2007, c. 145, §1 (NEW).]

B. Notification requirements for outside spraying; [2007, c. 145, §1 (NEW).]

C. Pesticides applications in occupied buildings; [2007, c. 145, §1 (NEW).]

D. A notification registry for indoor applications of pesticides; [2007, c. 484, §2 (AMD).]

E. Buffers from shorelines for broadcast applications of pesticides; [2007, c. 484, §2 (AMD).]

F. Use of organophosphate pesticides adjacent to occupied areas; and [2007, c. 484, §2 (NEW).]

G. Distribution and use of plant-incorporated protectants. [2007, c. 484, §2 (NEW).]

[2007, c. 484, §2 (AMD) .]

SECTION HISTORY
1975, c. 382, §3 (NEW). 1977, c. 694, §§62,63 (AMD). 1989, c. 878, §E9 (AMD). RR 2005, c. 2, §8 (COR). 2005, c. 620, §10 (AMD). 2007, c. 145, §1 (AMD). 2007, c. 484, §2 (AMD).

The State of Maine claims a copyright in its codified statutes. If you intend to republish this material, we require that you include the following disclaimer in your publication:

All copyrights and other rights to statutory text are reserved by the State of Maine. The text included in this publication reflects changes made through the First Special Session of the 128th Maine Legislature and is current through November 1, 2017. The text is subject to change without notice. It is a version that has not been officially certified by the Secretary of State. Refer to the Maine Revised Statutes Annotated and supplements for certified text.

The Office of the Revisor of Statutes also requests that you send us one copy of any statutory publication you may produce. Our goal is not to restrict publishing activity, but to keep track of who is publishing what, to identify any needless duplication and to preserve the State's copyright rights.

PLEASE NOTE: The Revisor's Office cannot perform research for or provide legal advice or interpretation of Maine law to the public. If you need legal assistance, please contact a qualified attorney.