

September 20, 2022

VIA EMAIL & CERTIFIED MAIL

Director Ronda Steciuk
Department of Agriculture, Conservation & Forestry
Animal Welfare Program
90 Blossom Lane, Deering Building
Augusta, Maine, 04333-0028
Ronda.Steciuk@maine.gov

Re: Citizen Petition for Rulemaking

Dear Director Steciuk:

We write in response to your letter dated September 1, 2022 (the “AWP Response Letter”), which unlawfully declined to initiate rulemaking for the purpose of implementing and enforcing Maine’s anti-cruelty statute to protect fish in Maine’s aquaculture facilities.

On August 1, 2022, 152 voters registered in the State of Maine, supported by eight interested organizations—Animal Outlook, Organic Consumers Association, Regeneration International, Friends of Harriet L. Hartley Conservation Area, Animal Equality, Farm Sanctuary, Maine Seaweed Exchange, and Aquatic Life Institute—petitioned Maine’s Department of Agriculture, Conservation and Forestry, Animal Welfare Program (“AWP”) to take legal action, as mandated by statute, to protect the welfare of millions of animals in Maine’s growing aquaculture industry (the “Petition”). For the reasons stated in the Petition and reiterated below, AWP has no lawful basis for “denying” the Petition and refusing to initiate rulemaking, and AWP’s deadline to initiate rulemaking remains October 3, 2022, 60 days after its receipt of the Petition.

1. AWP Must Commence Rulemaking when Petitioned by 150 or More Registered Maine Voters.

State law requires AWP to initiate rulemaking for the purpose described in the Petition. *See* 5 M.R.S. § 8055.

Under 5 M.R.S. § 8055, “any person” may petition a Maine agency to adopt or modify a rule. Although an agency may deny certain petitions by explaining its reasoning in writing, agencies have no discretion to deny petitions that have been signed by 150 or more registered Maine voters. Specifically, 5 M.R.S. § 8055(3) provides:

Whenever a petition to adopt or modify a rule is submitted by 150 or more registered voters of the State, the agency **shall initiate** appropriate rulemaking proceedings within 60 days after receipt of the petition.

(Emphasis added.)

As the AWP Response Letter acknowledges, more than 150 registered voters of the State of Maine signed the Petition, and the verified and certified signatures were submitted pursuant to 21-A M.R.S. § 354(7), along with the oath of the petition circulator. *See* Petition at 3, App. 1–2. These signatures demonstrate the importance to Maine’s voters of the welfare of millions of animals in Maine aquaculture facilities—animals whose welfare AWP is mandated, by statute, to protect. 7 M.R.S. § 3902. Accordingly, under the plain language of § 8055, AWP is legally mandated to commence rulemaking within 60 days of August 3, 2022.

2. AWP’s Rationale for Ostensibly Denying the Petition is Improper

Rather than abiding by the Maine Legislature’s mandate to initiate rulemaking when petitioned, AWP has proffered two reasons for denying the petition. Neither is valid. First, AWP has attempted to re-frame the Petition as an improper request for the adoption of policies rather than rules, but this is a false dichotomy. The Petition states a clear demand for new “rules” as defined in Maine’s Administrative Procedure Act. 5 M.R.S. § 8002(9)(A). Second, AWP claims that the Petition is defective because it does not provide the complete text of a proposed rule. However, AWP cites no authority for rejecting petitions that do not provide proposed rule language. Indeed, no statute would authorize AWP to delegate its rule-drafting obligations to ordinary Maine voters; rather, the agency must exercise its expertise, and fulfill its statutory obligations, when Maine voters call the agency to action.

a. The Petition Properly Demands Rulemaking

The Petition includes two primary demands, both of which are legitimate, enforceable, and obligatory: (1) that AWP issue a policy statement entitled “Welfare of Fish in Aquaculture Facilities,” setting forth AWP’s obligation to oversee and enforce animal cruelty laws in aquaculture facilities throughout the state, including by enacting training and inspection practices; and (2) that AWP promulgate rules to establish standards of care (namely Best Management Practices (“BMPs”)) specific to the welfare of fish in aquaculture facilities, so that Maine’s animal cruelty laws can more readily be applied to this industry. *See* Petition at 3, 19–32.

As the AWP Response Letter correctly cites, Maine’s broad definition of a “rule” under 5 M.R.S. § 8002(9)(A) is:

the whole or any part of every regulation, standard, code, statement of policy, or other agency guideline or statement of general applicability . . . that is or is intended to be judicially enforceable and implements, interprets or makes specific the law administered by an agency, or describes the procedures or practices of the agency.

The first demand in the Petition, a “statement of policy,” is expressly included in the definition of a rule. *Id.* Such a policy statement is appropriate for adoption as a rule because setting forth AWP’s obligation to oversee and enforce compliance with animal cruelty laws in aquaculture “describes the . . . practices of the agency.” Further, training and inspection protocols are “agency guidelines” that “describe[] the procedures . . . of the agency.” 5 M.R.S. § 8002(9)(A). Finally, all such rules are judicially enforceable; Maine’s citizens can seek redress from courts if AWP fails to comply with the oversight and enforcement requirements it promulgates.

Distorting the plain, statutory definition of a “rule,” AWP mischaracterizes M.R.S. § 8002(9)(B)(4) to argue that the definition excludes “any form, instruction or explanatory statement of policy that in itself is not judicially enforceable.” However, in making this argument, AWP omits key language from the latter half of the provision, which makes clear that § 8002(9)(B)(4) does not apply to the Petition. In full, the provision states that “rules” do not include:

[a]ny form, instruction or explanatory statement of policy that in itself is not judicially enforceable, **and that is intended solely as advice to assist persons in determining, exercising or complying with their legal rights, duties or privileges.**

5 M.R.S. § 8002(9)(B)(4) (emphasis added). The definition of “person” is “any individual, partnership, corporation, governmental entity, association or public or private organization of any character, **other than the agency conducting the proceeding.**” *Id.* § 8002(8) (emphasis added). Therefore, § 8002(9)(B)(4) does not apply to any policy statements directed at the agency itself. Since the Petition seeks a policy statement of *AWP’s obligations*, it is directed at the rulemaking agency, and falls within the definition of a “rule” without exemption.

The second demand in the Petition likewise falls within the definition of a “rule,” and AWP proffers no argument to the contrary. Best Management Practices “make[] specific the [animal cruelty] law administered by [the] agency.” Moreover, they are judicially enforceable; Maine’s aquaculture companies must abide by such standards to avoid liability for violating animal cruelty laws. In fact, Maine’s agencies, including the Department of Agriculture, Conservation & Forestry, frequently enact standards of care and BMPs through regulation, further proving that the Petition’s demands fall squarely within the definition of a “rule.” *See, e.g.*, 2021 ME Regulation Text 12162 (establishing standards for the proper care and housing facilities of animals).

Accordingly, AWP’s argument that “agency policies are not rules” is incorrect as a matter of law, and AWP must comply with the Petition’s proper demands and promptly initiate rulemaking.

b. The Petition Need Not Include the Full Text of the Proposed Rules

AWP’s second reason for denying the Petition—that it does not provide the complete text of the proposed rules—is likewise invalid. AWP points to no authority for such a requirement, nor can it, as there is none; AWP’s argument that Maine voters—who are laypeople—should write

its rules would invert the role of Maine’s voters and agencies. The role of the agency in state government is to provide and apply expertise to effectuate the legislature’s mandates. Requiring laypeople to write the rules would, counterintuitively, allow Maine agencies—whose very purpose is to utilize their expertise to regulate specific industries—to abdicate their statutory obligations and delegate these obligations to ordinary Maine citizens who lack such expertise. Moreover, if Maine voters were required to draft the text of proposed rules to petition an agency, Maine law would improperly favor a small subset of voters with higher education and subject matter expertise—even though the law is designed to advance the interests of “any person,” especially Maine’s “registered voters.” 5 M.R.S. § 8055.

Rather than citing authority for assigning its responsibility to ordinary citizens, AWP confesses that it has “no particular expertise” in regulating aquaculture, revealing its failure to comply with the obligations Maine’s legislature assigned the agency. AWP is the agency that Maine’s legislature tasked with regulating animal welfare for *all* animals, so AWP—the Animal Welfare Program—is required, by definition, to apply the necessary expertise to protect the welfare of animals in aquaculture. To the extent that AWP doesn’t have expertise about the welfare of aquatic animals, its job is to develop that expertise to comply with its statutory mandate.¹

In short, despite its protest, AWP should not need and is not entitled to receive canned language for its proposed rule, and must commence rulemaking promptly.

3. Millions of Animals Continue to Suffer Due to AWP’s Gamesmanship

For the past several years, AWP has provided conflicting rationales for refusing to protect fish in Maine’s aquaculture plants, abdicating its obligation to protect the welfare of all animals.

As detailed in the Petition, AWP has repeatedly asserted that it has no formal accountability for the welfare of animals in aquaculture facilities and, in fact, suggested that **no agency within the entire state** has such accountability. *See* Petition at 21. Further, AWP asserts that it lacks expertise to regulate animal welfare in aquaculture. At the same time, the AWP Response Letter provides assurances that AWP “can deal with circumstances of animal cruelty in aquaculture facilities under its existing statutes and rules”—assurances that contradict its other statements, and have proven to be empty. In 2019, for example, Animal Outlook’s investigation into Cooke Aquaculture hatchery in Bingham, Maine, documented Atlantic Salmon being slammed, stomped, violently thrown, and left in buckets to painfully suffocate and die, yet AWP insisted that it could not intervene. *See* Petition at 16–19, 21–22. In any case, an agency’s opinion that it “can deal” under existing rules does not obviate a legislative command to conduct rulemaking.

¹ Regardless, the Petition provides ample guidance for AWP to initiate rulemaking, including by specifying the regulations the AWP should amend and attaching a sister-state’s BMP’s for aquaculture.

In short, while AWP plays games to avoid rulemaking, tens of millions of animals in Maine's aquaculture facilities remain unprotected. AWP must act swiftly, as mandated by Maine law, to correct, prevent, and penalize the cruelty that it currently allows.

Conclusion

For the reasons stated above, AWP has no lawful reason or authority to deny the Petition. Because the Petition was received on August 3, 2022, AWP must initiate rulemaking by October 3, 2022, 60 days after receipt.

Respectfully,



Piper Hoffman, Esq.