



## Energy and Telecommunications Interim Committee

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### 63rd Montana Legislature

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June 5, 2013

**TO:** Energy and Telecommunications Interim Committee Members

**FROM:** Todd Everts, Staff Attorney

**RE:** Overview of Administrative Rulemaking and Rule Review

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One of the duties of the Energy and Telecommunications Interim Committee (Committee) is to review administrative rules within the Committee's jurisdiction for compliance with the Montana Administrative Procedure Act (MAPA). The Committee has jurisdiction over the Department of Public Service Regulation (DPSR) for administrative purposes. The rulemaking and rule review processes and the Committee's and individual legislator's roles in these processes are described below.

### ADMINISTRATIVE RULEMAKING

1. *What is a rule?* MAPA<sup>1</sup> defines a rule as an agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency.<sup>2</sup> Most agency rules have the force and effect of law.
2. *Where are the rules located?* The Administrative Rules of Montana (ARMs) are the administrative rules in their entirety and are updated by the Montana Administrative Register (MAR), which publishes all proposed new, transferred, amended, and repealed rules and all adopted rules twice a month. The ARMs and MAR are available and searchable online at [www.mtrules.org](http://www.mtrules.org). The ARMs are broken down into Title, chapter, and subchapter (i.e., 38.1.101). DPSR rules are located in Title 38 in the ARMs.
3. *Why are rules adopted?* Administrative rules are adopted to "fill in gaps" left by legislation and provide the public with certainty as to what is required and to allow public input into what the rules will be.

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<sup>1</sup> See Title 2, chapter 4, MCA.

<sup>2</sup> See § 2-4-102.

4. *What governs the rulemaking process?*
  - a. MAPA governs the rulemaking process for most agencies, including DPSR. MAPA does not give an agency authority to adopt rules; rulemaking authority must be granted elsewhere by the Legislature. In order for a rule to be valid, it must be adopted in substantial compliance with the requirements contained in MAPA.
  - b. Before an agency can adopt, amend, or repeal a rule, the agency is required to give written notice of its proposed action. Upon adoption, amendment, or repeal of a rule, an agency must issue a written statement of its reasons for and against the adoption. These proposal and adoption notices must be published in the MAR within a certain timeframe and must contain certain information. This is where the Committee's role as rule reviewer emerges. Rule review begins with staff review of the items identified below under **Administrative Rule Review**. Problems with a rule will be brought to your attention for resolution only if staff cannot resolve the issue with the agency. Proposal and adoption notices will be brought to the Committee's attention in the manner the Committee determines at its first, organizational meeting and sometimes via e-mail between meetings if the situation warrants.

## **ADMINISTRATIVE RULE REVIEW**

Staff uses the following checklist to ensure that proposed and adopted rules meet the requirements of MAPA:

### **Authority and Necessity.**

1. \_\_\_\_\_ Description of substance of intended action OR subjects and issues involved. § 2-4-302(1)(a).
2. \_\_\_\_\_ Citation to specific statutory grant of rulemaking authority pursuant to which the rule is adopted. § 2-4-305(3).
3. \_\_\_\_\_ Citation to specific statutes being implemented. § 2-4-305(3).
4. \_\_\_\_\_ If implementing policy of governing board/commission, citation to and description of any policy of a governing board or commission being implemented. § 2-4-305(4).
5. \_\_\_\_\_ Acted within scope of authority. § 2-4-305(5).
6. \_\_\_\_\_ Statement of REASONABLE NECESSITY. *A statement that merely explains what the rule provides is not sufficient.*
  - a. \_\_\_\_\_ Principal reasons for the intended action and for each adoption, amendment, or repeal. § 2-4-305(6)(b).
  - b. \_\_\_\_\_ If alternative approaches are available, explanations for the rationale behind the particular approach taken. § 2-4-305(6)(b).

### **Notice to Sponsor.**

7. \_\_\_\_\_ Notice to primary bill sponsor. *Required when the agency begins to work on the substantive content of a proposal notice for the first rule implementing legislation.* § 2-4-302(2)(d)(i).
- a. \_\_\_\_\_ Attempted to reach primary bill sponsor via contact on file with Secretary of State (§ 2-4-302(8)(b)) AND date and manner of contact with sponsor (§ 2-4-302(1)(b)).
- b. \_\_\_\_\_ Failure to make contact INVALIDATES RULE NOTICE. § 2-4-302(1)(b).

**Fee Increase or Decrease.**

8. \_\_\_\_\_ If proposing a fee increase or decrease, must include:
- a. \_\_\_\_\_ An estimate of the cumulative amount of the increase or decrease or new amount AND
- b. \_\_\_\_\_ Estimate of number of persons affected. § 2-4-302(1)(c).

**Small Business Impact Statement [Effective July 1, 2013 -- terminates July 1, 2015].**

9. \_\_\_\_\_ If a proposed rule will significantly and directly impact a small business (defined as a business entity, including its affiliates, that is independently owned and operated and that employs fewer than 50 full-time employees), the agency must prepare and publish in the proposal notice a small business impact analysis that must:
- a. \_\_\_\_\_ Identify by class or group the small businesses probably affected by the proposed rule;
- b. \_\_\_\_\_ Include a statement of the probable significant and direct effects of the proposed rule on the small businesses; and
- c. \_\_\_\_\_ Include a description of any alternative methods that may be reasonably implemented to minimize or eliminate any potential adverse effects of adopting the proposed rule, while still achieving the purpose of the proposed rule. Ch. 318, sec. 1(1), L. 2013.

**Notice to Public & Publication.**

10. \_\_\_\_\_ Notice of public hearing. § 2-4-302(4).
- a. \_\_\_\_\_ Required by a specific statute? If not, then not necessary UNLESS involves matters of significant interest to the public. § 2-4-302(4).
- b. \_\_\_\_\_ If hearing is NOT scheduled, must state that a public hearing will be scheduled if requested by either 10% or 25, whichever is less, of the persons who will be directly affected by the rulemaking, by a governmental subdivision or agency, by the appropriate rule review committee, or by an association having not less than 25 members who will

- be directly affected. § 2-4-302(4).
- c. \_\_\_\_\_ Must provide at least 20 days' notice from the date of publication of any public hearing to be held. § 2-4-302(4).
11. \_\_\_\_\_ Must provide at least 28 days from the date of publication of the notice for submission of oral or written comments. § 2-4-302(4).
12. \_\_\_\_\_ Published in MAR at least 30 days before the date of the proposed action. § 2-4-302(2)(c). If not, emergency rules exception applicable? § 2-4-303.

**Adoption Notice.**

13. \_\_\_\_\_ Time between publication of the proposal notice and publication of the final agency action may not be more than 6 months. §§ 2-4-302(3) & 2-4-305(7).
- a. \_\_\_\_\_ Failure to publish an adoption notice within 6 months after the date of publication of the proposed notice invalidates the proposal and makes it necessary to publish a new proposal notice. § 2-4-302(6).
- b. \_\_\_\_\_ If not within deadline, was time limit extended by publishing an amended or supplemental notice of proposed or final rulemaking before the time limit expired? § 2-4-305(7).
14. \_\_\_\_\_ If received public comment or if comments submitted by primary sponsor not reflected, statement of reasons included? § 2-4-305(1).

**COMMITTEE INVOLVEMENT**

The Committee may become involved in the rulemaking process by doing one or more of the following:

1. Request an agency's rulemaking records to check for compliance with MAPA. § 2-4-402(2)(a).
2. Prepare and submit to the agency written recommendations for the adoption, amendment, or rejection of a rule and submit oral or written testimony at a rulemaking hearing. § 2-4-402(2)(b).
3. Require that a rulemaking hearing be held. § 2-4-402(2)(c).
4. Participate in litigation involving MAPA. § 2-4-402(2)(d).
5. Review the incidence and conduct of administrative proceedings under MAPA. § 2-4-402(2)(e).
6. Poll the Legislature by mail to determine if a proposed rule is consistent with legislative intent. § 2-4-403. The results of the poll are admissible in any court proceeding involving the validity of the rule. § 2-4-404.
7. Require an economic impact statement relating to the adoption of a rule. § 2-4-405.
8. Object to all or a portion of a proposed or adopted rule:

- a. Objection to Proposed Rule Delays Adoption of Rule:
  - i. If a majority of Committee members notify the chair that they object to a proposed rule, the Committee must notify the agency of the objection and that the Committee intends to address the objection at the next meeting. Following notice of the objection, the agency may not adopt the rule until publication of the last issue of the MAR that is published before the 6-month period during which the adoption notice must be published. The Committee may withdraw its objection and allow the adoption notice to be published during this 6-month period. § 2-4-305(9).
  - ii. If the Committee meets and objects to all or some portion of a proposed rule because the Committee believes that the rule was not proposed in substantial compliance with §§ 2-4-302 (notice, hearing, and submission of views requirements), 2-4-303 (emergency or temporary rules requirements), and 2-4-305 (authority and reasonable necessity requirements), the proposed rule or portion of the proposed rule is not effective until the day after final adjournment of the regular session of the Legislature that begins after the notice proposing the rule was published unless:
    - A. the Committee withdraws its objection before the rule is adopted; or
    - B. the rule is adopted with changes that in the opinion of a majority of the Committee members, as communicated in writing to the presiding officer and staff, make the rule comply with the Committee's objection and concerns. § 2-4-306(4)(c).
- b. Objection to Proposed or Adopted Rule -- Effect:

If the Committee objects to a proposed or adopted rule for failure to substantially comply with §§ 2-4-302, 2-4-303, and 2-4-305 and if the Committee does not withdraw its objection to the rule, it may vote to send the objection to the Secretary of State for publication in the MAR and ARM adjacent to the rule. If an objection is published, the agency bears the burden in any action challenging the legality of the rule of proving that the rule was adopted in substantial compliance with §§ 2-4-302, 2-4-303, and 2-4-305. If the rule is invalidated by the court because the agency failed to meet its burden of proof, the court may award costs and attorney fees against the agency. § 2-4-406.
- 9. Request publication of material adopted by reference in a rule. § 2-4-307.
- 10. Publish statement with Secretary of State concerning advisory nature of adjective or

- interpretive rule. § 2-4-308.
11. Request copies of documents in litigation involving judicial construction of rule or MAPA. § 2-4-410.

## **INDIVIDUAL INVOLVEMENT**

Members of the Committee may individually engage in the rulemaking process by doing one or more of the following:

1. Petition for the adoption, amendment, or repeal of a rule. § 2-4-315.
2. If a rule initially implement legislation of which the individual was a primary sponsor, provide comments and receive notice. § 2-4-302.
3. Request agency to hold an informal conference or appoint a committee to develop a proposed rule before agency publishes notice. § 2-4-304.
4. Join agency's list of interested persons for purposes of rulemaking. § 2-4-302.
5. Contribute to rulemaking process by submitting oral or written testimony on proposed rule.

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