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## Montana Legislative Services Division

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### Legal Services Office

TO: Environmental Quality Council Members  
FROM: Helen Thigpen, Staff Attorney  
RE: Overview of Administrative Rulemaking  
DATE: May 18, 2015

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Administrative rule review is a primary function of the Environmental Quality Council (EQC). The EQC is responsible for reviewing administrative rules from the following agencies and the entities that are attached for administrative purposes to these agencies: (1) the Department of Environmental Quality (DEQ); (2) the Department Fish, Wildlife, and Parks (FWP); and (3) the Department of Natural Resources and Conservation (DNRC).

To assist the EQC in carrying out its administrative rule review functions, legal staff will provide regular updates throughout the interim to the EQC regarding agency rulemaking activities. Legal staff will also inform EQC members of specific issues associated with rulemaking if and when such issues arise. Specific information regarding proposed rules is also available on the EQC's interim committee website.

This memorandum contains an overview of administrative rulemaking in Montana and a summary of EQC's administrative rule review authority, including information regarding recent legislation affecting rule review authority for water-related matters.

#### **I. Overview of Administrative Rulemaking**

Administrative agencies are often authorized to carry out the Legislature's intent by adopting administrative rules, which have the full force and effect of law. There are several reasons why the Legislature may choose to authorize an agency to adopt administrative rules; the most common reason, however, is that administrative agencies are oftentimes better suited to flesh out technical and scientific details than the Legislature. In addition, unlike statutes that may only be adopted every 2 years in Montana, administrative rules may be adopted and revised throughout the year as circumstances change or as issues arise.

Administrative rule functions are governed by the Montana Administrative Procedures Act (MAPA), Title 2, chapter 4, MCA, and relevant court cases. In Montana, an administrative rule is 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>1</sup>

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<sup>1</sup> See 2-4-102(11), MCA.

Administrative rules are published in the Administrative Rules of Montana (ARM), which is updated twice a month by a publication known as the Montana Administrative Register (MAR). The MAR contains notices of proposed, amended, transferred, repealed, and adopted rules. The MAR also contains notices of public hearings, Attorney General's opinions, and notices of vacancies on state boards. The ARM and the MAR may be accessed electronically at the following website: <http://www.mtrules.org/>.

MAPA and various court opinions govern the procedures and requirements for administrative rulemaking in Montana.<sup>2</sup> However, MAPA does not provide the authority for an agency to adopt rules. The authority for an agency to adopt rules is delegated from the Legislature to the agency. A substantive rule may not be proposed or adopted unless "a statute granting the agency authority to adopt rules clearly and specifically lists the subject matter of the rule as a subject upon which the agency shall or may adopt rules" or "the rule implements and relates to a subject matter or an agency function that is clearly and specifically included in a statute to which the grant of rulemaking authority extends."<sup>3</sup> An agency rule may be invalidated if it exceeds the scope of the enabling statute, if it is inconsistent with statutory requirements, or if it adds requirements not contemplated by the Legislature.

MAPA requires that several actions be taken throughout the rulemaking process, including the following:

- Notice of the proposed rule must be published in the MAR, which is published by the Secretary of State. The notice must comply with specific timelines. (2-4-302, MCA).
- The agency must contact the primary sponsor of legislation if the agency begins to work on the substantive content and the wording of a proposal notice for a rule that initially implements legislation. The purpose of the notification to the primary sponsor is to obtain the legislator's comments, inform the legislator of the date by which each step of the rulemaking process must be completed, and provide the legislator with information about the time periods during which the legislator may comment on the proposed rules. (2-4-302, MCA).
- An agency must consider all oral and written submissions respecting a proposed rule. (2-4-305, MCA).
- A rule must include a citation to the specific grant of rulemaking authority and must be "reasonably necessary to effectuate the purpose of the statute." (2-4-305, MCA).

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<sup>2</sup> MAPA may be supplanted by specific procedures or requirements set forth in statute that are applicable to the agency.

<sup>3</sup> See 2-4-305(3)(a) and (b), MCA.

## **II. Summary of EQC Administrative Rule Review Authority**

Pursuant to 75-1-324(10), MCA, the EQC reviews administrative rules from DEQ, FWP, and DNRC. However, the EQC's rule review authority in regards to water-related matters was narrowed as a result of legislation adopted during the 2015 session. Pursuant to the adoption of S.B. 82 (2015), the Water Policy Interim Committee (WPIC) is now responsible for overseeing administrative rules associated with either the quality or quantity of water.

Administrative rule review authority by the Legislature is described in Title 2, chapter 4, parts 3 and 4, MCA. Under these provisions, the EQC may:

- Request an agency's rulemaking records for checking compliance with MAPA. (2-4-402(2)(a), MCA).
- Prepare written recommendations for the adoption, amendment, or rejection of a rule and submit those recommendations to the department proposing the rule and submit oral or written testimony at a rulemaking hearing. (2-4-403(3), MCA).
- Require that a rulemaking hearing be held in accordance with the provisions of 2-4-302 through 2-4-305, MCA. (2-4-402(2)(c), MCA).
- Institute, intervene in, or otherwise participate in proceedings involving this chapter in the state and federal courts and administrative agencies. (2-4-402(2)(d), MCA).
- Review the incidence and conduct of administrative proceedings under this chapter. (2-4-402(2)(e), MCA).
- Commence a poll on an objection to a rule. (2-4-403, MCA).
- Require an economic impact statement relating to the adoption of a rule. (2-4-405, MCA).
- Object to a notice of proposed rulemaking and require up to a 6-month delay in the adoption of the rule. (2-4-305(9) and 2-4-306(4), MCA).
- Object to all or some portion of a proposed or adopted rule the committee considers not to have been proposed or adopted in conformance with MAPA. (2-4-406, MCA).
- Recommend a rule adoption or change. (2-4-411, MCA).

Failure of a committee to object to the adoption, amendment, or repeal of a rule is inadmissible in court to prove the validity of the rule. In addition, the agency must report to the committee any judicial proceedings in which the construction or interpretation of MAPA is at issue. The agency may also report to the committee any judicial proceedings in which the construction or interpretation of any rule of the agency is at issue. (2-4-410, MCA).