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June 21, 2017

To: Environmental Quality Council
From: Jameson Walker, Staff Attorney
Re: Overview of Administrative Rulemaking and Rule Review

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 to these agencies for administrative purposes: (1) the Department of Environmental Quality (DEQ); (2) the Department of 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 function, legal staff will provide regular updates to the EQC on agency rulemaking activities through the interim. Legal staff will also inform the EQC members of specific issues associated with rulemaking if and when such issues arise.

ADMINISTRATIVE RULEMAKING

Overview

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 the administrative agencies are oftentimes better suited to flesh out technical and scientific details. Additionally, 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.

What is a rule?

Rules are promulgated through the Montana Administrative Procedures Act (MAPA).¹ MAPA 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

¹ See Title 2, chapter 4, MCA.

practice requirements of an agency.² Most agency rules have the force and effect of law.

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are updated by the Montana Administrative Register (MAR), which publishes all proposed, new, transferred, amended, and repealed rules and all adopted rules twice a month.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. The ARMs are broken down into Title, chapter, and subchapter.

Why are rules adopted?

Administrative rules are adopted to fill in gaps left by legislation and to provide the public with certainty as to what is required and to allow public input into what the rules will be.

What governs the rulemaking process?

MAPA governs the rulemaking process for most agencies. MAPA does not grant agencies 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. This is where the EQC's role as rule reviewer emerges.

What is rule review?

Before an agency can adopt, amend, or repeal a rule, the agency must give written notice of its proposed action (proposal notice) and, upon adoption, amendment, or repeal of a rule, must issue a written statement of its reasons for and against the adoption (adoption notice). Staff reviews each proposal and adoption notice for conformance with MAPA, which requires that these proposal and adoption notices be published in the MAR within a certain timeframe and contain certain information, both of which are described below under **Administrative Rule Review**. If a potential issue is noted, staff will contact the agency rule reviewer to address the issue. If staff cannot resolve the issue with the agency, the issue will be brought to the EQC's attention for further direction. Information about proposal and adoption notices are posted on the EQC's website. The EQC will also receive a rules report in each mailing.

ADMINISTRATIVE RULE REVIEW

Staff reviews proposal notices for the following to ensure that they meet the requirements of MAPA:

Authority and Necessity

In general, a proposal notice must:

- # include a description of the substance of the intended action or subjects and issues

² § 2-4-102.

involved;³

- # cite to the specific statutory grant of rulemaking authority pursuant to which the rule is adopted and to the specific statutes being implemented;⁴ and
- # include a statement of reasonable necessity, identifying the principal reasons for the intended action and for each adoption, amendment, or repeal and, if alternative approaches are available, explanations for the rationale behind the particular approach taken.⁵

Notice to Sponsor

Notice to a primary bill sponsor is required when the agency begins to work on the substantive content of a proposal notice for the first rule implementing legislation. The agency is required to document its attempts to reach the primary bill sponsor via the contact on file with Secretary of State and the date and manner of contact with the sponsor. Failure to contact a sponsor invalidates the rule notice.⁶

Fee Increase or Decrease

If an agency is proposing a fee increase or decrease, the agency must include an estimate of the cumulative amount of the increase or decrease or new amount and an estimate of the number of persons affected.⁷

Small Business Impact Statement

Prior to the adoption of a proposed rule, an agency is required to determine if the rule will significantly and directly impact a small business.⁸ The determination must be published in the MAR when the proposed rule is published. The agency is required to prepare a small business impact analysis that, at a minimum:

- # identifies by class or group the small businesses probably affected by the proposed rule;
- # includes a statement of the probable significant and direct effects of the proposed rule on the small businesses identified; and

³ § 2-4-302(1)(a).

⁴ § 2-4-305(3).

⁵ § 2-4-305(6)(b).

⁶ § 2-4-302.

⁷ § 2-4-302(1)(c).

⁸ A "small business" means a business entity, including its affiliates, that is independently owned and operated and that employs fewer than 50 full-time employees.

- # includes 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.⁹

Adoptions by Reference

An agency may adopt by reference a publication if it would be unduly cumbersome, expensive, or otherwise inexpedient and it is reasonable. An adoption by reference:

- # must contain a citation to the material adopted by reference and where it may be found;
- # must contain a statement of the general subject matter of the omitted rule;
- # must be in existence at the time the proposed rule is published and may not be altered between the time of publication of the proposed rule and the adoption of the rule except to respond to comments received in the rulemaking record; and
- # must be available to the public for comment through publication in the register or in an electronic format while the rule is subject to public comment.

Any alterations to the material adopted by reference may not be made without being subject to the rulemaking process.¹⁰

Notice to Public and Publication

Notice of a proposed action must be published in the MAR at least 30 days before the date of the proposed action, unless imminent peril to the public health, safety, or welfare requires earlier action.¹¹ A public hearing is not necessary unless it is required by statute or the proposed action involves a matter of significant interest to the public. If a public hearing is not scheduled, the proposal notice 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 committee, or by an association having at least 25 members who will be directly affected. The agency must provide at least 20 days' notice from the date of publication of the proposal notice of any hearing to be held and must provide at least 28 days from the date of publication of the notice for submission of oral and written comments.¹²

⁹ § 2-4-111.

¹⁰ § 2-4-307.

¹¹ § 2-4-302(2)(c); § 2-4-303.

¹² § 2-4-302.

In addition, staff reviews adoption notices for the following to ensure that they meet the requirements of MAPA:

Adoption Notice

The time between publication of the proposal notice and publication of the adoption notice may not be more than 6 months. 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, unless the time limit was extended by the publication of an amended or supplemental notice of proposed or final rulemaking before the time limit expired.¹³ If the agency received public comment or comments from the primary sponsor, the agency must include in the adoption notice a statement of reasons, including reasons for overruling (or accepting) considerations submitted via public comment or from the primary sponsor.¹⁴

EQC INVOLVEMENT

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

- # Request an agency's rulemaking records to check for compliance with MAPA.¹⁵
- # 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.¹⁶
- # Require that a rulemaking hearing be held.¹⁷
- # Participate in litigation involving MAPA.¹⁸
- # Review the incidence and conduct of administrative proceedings under MAPA.¹⁹
- # Poll the Legislature by mail to determine if a proposed rule is consistent with legislative

¹³ § 2-4-302; § 2-4-305.

¹⁴ § 2-4-305.

¹⁵ § 2-4-402(2)(a).

¹⁶ § 2-4-402(2)(b).

¹⁷ § 2-4-402(2)(c).

¹⁸ § 2-4-402(2)(d).

¹⁹ § 2-4-402(2)(e).

intent. The results of the poll are admissible in any court proceeding involving the validity of the rule.²⁰

- # Require an economic impact statement relating to the adoption of a rule.²¹
- # Request publication of material adopted by reference in a rule.²²
- # Publish statement with Secretary of State concerning advisory nature of adjective or interpretive rule.²³
- # Receive reports on litigation and request documents in litigation involving judicial construction of a rule or MAPA.²⁴
- # Object to all or a portion of a proposed or adopted rule. Discussed in further detail below.

OBJECTING TO A RULE -- PROCESS AND EFFECT

If a majority of EQC members notify the chair that they object to a *proposed* rule, the EQC must notify the agency of the objection and that the EQC 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 EQC may withdraw its objection and allow the adoption notice to be published during this 6-month period.²⁵

If the EQC meets and objects to all or some portion of a proposed rule because the EQC 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 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 the EQC withdraws its objection before the rule is adopted or the rule is adopted with changes that in the opinion of a majority of the EQC members, as communicated in writing to the chair and staff, make the rule comply with the

²⁰ § 2-4-403; § 2-4-404.

²¹ § 2-4-405.

²² § 2-4-307.

²³ § 2-4-308.

²⁴ § 2-4-410.

²⁵ § 2-4-305(9).

EQC's objection and concerns.²⁶

If the EQC objects to a proposed or adopted rule for failure to substantially comply with 2-4-302, 2-4-303, or 2-4-305 and if the EQC 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.²⁷

INDIVIDUAL INVOLVEMENT

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

- # Petition for the adoption, amendment, or repeal of a rule.²⁸
- # If a rule initially implements legislation of which the individual was a primary sponsor, provide comments and receive notice.²⁹
- # Request an agency to hold an informal conference or appoint a committee to develop a proposed rule before the agency publishes notice.³⁰
- # Join an agency's list of interested persons for purposes of rulemaking.³¹
- # Contribute to the rulemaking process by submitting oral or written testimony on a proposed rule.

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²⁶ § 2-4-306(4)(c).

²⁷ §2-4-406.

²⁸ § 2-4-315.

²⁹ § 2-4-302.

³⁰ § 2-4-304.

³¹ § 2-4-302.