



Revenue and Transportation Interim Committee

64th Montana Legislature

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MEGAN MOORE, Lead Staff
JARET COLES, Staff Attorney
FONG HOM, Secretary

TO: Committee Members

FROM: Jaret Coles, Staff Attorney

RE: Overview of Rulemaking and Administrative Rule Activity

DATE: June 23, 2015

Rulemaking and Powers of Rule Review Committees and Individual Members

1. General concepts:

- a. What is a rule? [Montana Administrative Procedure Act](#) (MAPA) defines it as an agency regulation, standard, or statement that implements, interprets, or prescribes law or policy. Most agency rules have the force and effect of law.
- b. Where are Montana's rules located? Administrative Rules of Montana (ARMs) are the administrative rules in their entirety. They are updated by the [Montana Administrative Register](#) (MAR), which is a twice-monthly publication containing all proposed new, transferred, amended, and repealed rules as well as adopted rule changes. The ARMs are also published to the Internet at <http://www.mtrules.org/>.
- c. Why are rules adopted?
 - (1) To "fill in gaps" left by legislation and provide the public with certainty as to what is required.
 - (2) To allow the public input into what the rules will be.

2. Citations to statutes concerning rulemaking:

- a. Montana Administrative Procedure Act (MAPA), [Title 2, chapter 4](#), MCA.
- b. Section [5-5-215](#), MCA -- interim committee powers generally.
- c. Section [5-5-227](#), MCA -- specific rulemaking review authority of Revenue and Transportation Interim Committee.
- d. Section [5-11-106](#), MCA -- interim committee investigatory powers generally.

- e. Section [2-4-102](#), MCA -- "rule" is adoption of an entire rule, an amendment to a rule, or repeal of a rule.

3. Rulemaking generally:

- a. Rule adoption system -- governs procedure only; generally, MAPA is not authority to adopt rules ([2-4-301](#), MCA).
- b. MAPA is procedure most used by agencies to adopt rules. Some agencies are exempted completely from MAPA; a few agencies have a different statutory system for rule adoption.
- c. Authority to adopt most rules must be express and not implied authority ([2-4-305](#), MCA).
- d. Two notices must be published in Montana Administrative Register (MAR): proposal notice and adoption notice. The notice format is specified by Secretary of State's rules ([2-4-306](#), MCA).
- e. Hearing on rule proposal required in some instances, but an agency can voluntarily hold a hearing ([2-4-302](#), MCA):
 - (1) matter of significant interest to public.
 - (2) request by a rule review committee.
 - (3) request by minimum of 25, or 10%, of those affected by proposed rule.
 - (4) request by association.
 - (5) request by agency or governmental subdivision.
- f. Time periods ([2-4-302](#), MCA):
 - (1) minimum 30 days' notice before agency action.
 - (2) minimum 20 days' notice of public hearing (if held).
 - (3) minimum 28 days to submit comments.
 - (4) total minimum time for rule adoption is 30 days' notice, plus approximately 2 weeks to publish adoption notice. This includes:
 - a. time period for hearing and written comments; or
 - b. time for written comment alone if no hearing.
 - (5) 6-month maximum for adoption and publication ([2-4-302](#) and [2-4-305](#), MCA).
 - (6) emergency rules exception ([2-4-303](#), MCA).
- g. Minimum requirements for content of notice of proposed rulemaking ([2-4-305](#), MCA):
 - (1) agency must have and cite in the proposal notice express statutory authority for rules (usually not in MAPA, per above).

- (2) agency must have and cite statute being implemented by proposed rule, which sometimes is the same as authority, though frequently different.
 - (3) agency must state rationale or statement of "reasonable necessity" for proposed rule.
 - (4) foregoing three requirements are where most agency errors occur in the rulemaking process.
- h. Committee work starts with committee staff review, on committee's behalf, for those three items in paragraph 2g above. Committee review is mandatory in accordance with [2-4-402\(1\)](#), MCA.
- (1) Problems with a proposed rule will be brought to committee for resolution only if staff can't resolve the issue with the agency.
 - (2) All proposals and adoptions will be brought to committee's attention at every meeting and sometimes by e-mail between meetings if the situation warrants.
- i. After rule is adopted through publication in the MAR, the rule is published in the Administrative Rules of Montana.

4. Committee powers:

- a. Mostly in MAPA -- some in other statutes ([5-5-215](#) and [5-11-107](#), MCA, mentioned earlier).
- b. Committee powers:
- (1) request and obtain agency rulemaking record for review ([2-4-402](#), MCA).
 - (2) recommend to the appropriate agency adoption, amendment, rejection, or repeal of any rule ([2-4-402](#), [2-4-411](#), and [2-4-412](#), MCA).
 - (3) request rulemaking hearing be held ([2-4-402](#), MCA).
 - (4) bring or participate in litigation involving MAPA ([2-4-402](#), MCA).
 - (5) review "incidence and conduct" of proceedings under MAPA ([2-4-402](#), MCA).
 - (6) object to proposed rules in order to delay adoption of the rule by an agency ([2-4-305\(9\)](#), MCA).
 - (7) submit oral or written comments to agency rulemaking record ([2-4-402](#), MCA).
 - (8) conduct poll of Legislature to see if rules follow legislative intent:
 - a. discretionary poll or mandatory poll ([2-4-403](#), MCA).
 - b. effect of poll ([2-4-404](#), MCA).
 - c. publication of results of poll ([2-4-306](#), MCA).
 - (9) request or have prepared an economic impact statement regarding a proposed rule ([2-4-405](#), MCA).
 - (10) object to a proposed rule for purposes of shifting the burden of showing legality of adoption ([2-4-306](#) and [2-4-406](#), MCA.)
 - (11) hold hearings and conduct investigations involving agency compliance with

- MAPA and other statutes ([5-11-107](#), MCA).
- (12) recommend amendments to MAPA or other state laws ([2-4-411](#), MCA).
 - (13) request publication of material adopted by reference in a rule ([2-4-307](#), MCA).
 - (14) request publication of statement on adjective or interpretive rules ([2-4-308](#), MCA).
 - (15) request and receive copies of documents in litigation involving judicial construction of rule or MAPA ([2-4-410](#), MCA).
 - (16) monitor operations of agency within committee's jurisdiction ([5-5-215](#), MCA).

5. Powers of individual members of committee or Legislature:

- a. As member of Legislature, petition for adoption, amendment, or repeal of a rule ([2-4-315](#), MCA).
- b. As primary sponsor, receive notice from agency, before it writes a rule, of its intent to write the rule. The manner and date of notice to the primary sponsor must be stated in the notice of proposed rulemaking ([2-4-302](#), MCA).
- c. Request agency to form informal conference or committee to develop proposed rule before agency publishes notice ([2-4-304](#), MCA).
- d. Join agency's list of interested persons for purposes of rulemaking ([2-4-302](#), MCA).
- e. Contribute to agency rulemaking record ([2-4-302](#) and [2-4-305](#), MCA) by:
 - (1) writing or e-mailing agency, as provided in agency's proposal notice, before the rulemaking record closes.
 - (2) testifying at any agency rulemaking hearing.
- f. Object to committee presiding officer regarding proposed rule in order to potentially delay adoption of rule so committee can review proposed rule ([2-4-305\(9\)](#), MCA). If a majority of the committee notifies the presiding officer of the objection, then the committee notifies the agency in writing of the objection and the agency must delay adoption of the proposal notice.
- g. Request, by motion, that interim committee take any of those actions authorized by law for committee to take (see 4b earlier).

Department of Revenue

Proposal and Adoption Notices are available on the Internet:

Department of Revenue notices can be found on the Secretary of State's website at <http://www.mtrules.org/>. Under the Montana Administrative Register heading, type the number "42" in the "Search by Notice No." box and click on the "Go" icon.

Notice of Proposed Rules:

Liquor Administration -- Responsible Alcohol Sales and Service Act Server Training Programs. MAR 42-2-928. A public hearing will be held on July 9, 2015, at 11 a.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The public comment period ends on July 20, 2015. The Department proposes to adopt four new rules, amend two rules, and repeal one rule regarding server training programs. The new rules provide definitions, state trainer qualification requirements, private training program requirements, curriculum requirements for all programs, and loss of approval status if the department revokes or suspends certification or program approval. The amendments establish the duties of the department, a state trainer, and a private trainer. The repeal eliminates a rule that restates portions of the Montana Code Annotated.

Note: The Responsible Server and Training Program requirements are set out in general terms under section 16-4-1006(1), MCA, and the Department is required to "certify all server and sales training programs" that include the seven statutory requirements. One of the requirements is "training for skills to handle difficult situations and to learn evaluation techniques regarding intoxicated persons or others that pose potential liability," while another requirement is "a final test." The proposal adds detail to these requirements. For example, the proposal requires a minimum of three hours of training and an exam that is provided by the Department. Staff is unable to verify whether the items listed in the proposal will provide "skills" or whether the intent of the legislation was to have a test that is provided by the Department. This is an example of an area where gaps in the legislation are filled in by rulemaking, and the public will have an opportunity to provide input.

Urban Renewal and Tax Increment Financing -- Targeted Economic Development Districts. MAR 42-2-929. A public hearing will be held on July 16, 2015, at 11 a.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The public comment period ends on July 27, 2015. The Department proposes to adopt one rule that provides definitions for the administration of urban renewal projects. The rule provides a definition for "value-adding economic projects" and provides that the definition does not include service-based projects,

including but not limited to hotels, restaurants, automobile dealerships, and other similar businesses or industries.

Note: Section 7-15-4278, MCA, was enacted in 2013, and a legislative finding provided that "infrastructure-deficient areas exist in the local governments of the state and constitute a serious impediment to the development of infrastructure-intensive, value-adding economic development in Montana." The term "value-adding" was not defined, but the term "secondary value-added products or commodities" is defined in section 7-15-4279, MCA, to mean "products or commodities that are manufactured, processed, produced, or created by changing the form of raw materials or intermediate products into more valuable products or commodities that are capable of being sold or traded in interstate commerce."

Notice of Negotiated Rulemaking:

Agency Liquor Stores -- Notice of Negotiated Rulemaking -- Soliciting Applications for Membership on a Negotiated Rulemaking Committee Relating to Agency Liquor Stores -- Senate Bill No. 193 (2015). MAR 42-2-930. Section 16-1-303, MCA, requires negotiated rulemaking for any rules relating to the operation of agency liquor stores. The Department is considering applications from interested people who desire to be part of a negotiated rulemaking committee. The committee will consider rule actions to implement Senate Bill 193 (2015), which established set commission rates for all agency liquor stores.

Adopted After RTIC Adjourned -- Not Reviewed by Committee:

Income Tax -- Withholding and Estimated Tax Payments - General Withholding and Mineral Royalty Withholding. MAR 42-2-926. Adopted January 15, 2015. A public hearing was held, and no testimony or comments were received. The Department amended eight rules and repealed one rule regarding income tax withholding on mineral royalty income. The changes generally update form names and dates while conforming the rules to existing practices.

Income Tax -- Recodification -- Housekeeping. MAR 42-2-927. Adopted June 11, 2015. No testimony or public comments were received, and the Department amended 13 rules as proposed. The amendments updated statutory references to reflect the correct statutory references after recodification of the income tax chapter in 2009. No language amendments were proposed.

Notice of Adopted Rules -- Brought in Front of Committee at November 2014 Meeting:

Income Tax -- Montana Family Education Savings Program Implementing Senate Bill No. 117 (2013) -- General Income Tax Provisions. MAR 42-2-919. Adopted December 11, 2014. A public hearing was held, and the Department adopted one rule and amended one rule regarding contributions to Montana Family Education Savings Plans in order to implement Senate Bill No.

117 (2013). Additionally, the Department amended two income tax provisions regarding the taxation of part-year residents and nonresidents.

Income Tax -- Filing Requirements for Pass-Through Entities with More than 100 Partners -- Senate Bill No. 179 (2013). MAR 42-2-920. Adopted December 11, 2014. A public hearing was held and no testimony or comments were received. The Department adopted one rule regarding electronic filing for certain partnerships in order to implement Senate Bill No. 179 (2013) as proposed. The rule provides that the 100-partner threshold is met if there are more than 100 partners on any one day over the course of the year. Additionally, a partnership is permitted to request a waiver of the electronic filing requirement.

Liquor Administration -- Liquor Licenses and Permits, Fees, and the Regulation of Licensees. MAR 42-2-921. Adopted December 11, 2014. A public hearing was held, and multiple comments were received. The Department adopted one rule, amended 12 rules, and repealed two rules as proposed. The department also revised nine proposed rule amendments based on public comments received. The amendments generally strike outdated language, increase administration fees, set hours for on-premises consumption of alcohol, define transfer of ownership requirements, provide for progressive penalties, provide alteration of premises requirements, and insert definitions. The repeals eliminate outdated language.

Property Tax -- Montana Reappraisal Plan. MAR 42-2-922. Adopted December 11, 2014. A public hearing was held and no testimony or comments were received. The Department amended seven rules and repealed seven rules regarding the Montana reappraisal plan. The amendments set forth the names and publication dates of the manuals the Department's appraisers use for residential, commercial, industrial, agricultural land, and forest land. In general, the amendments change dates from the 2008 reappraisal cycle to the 2015 reappraisal cycle, and the repeals delete rules that were applicable to the 2008 reappraisal cycle.

Property Tax -- Trended Depreciation Schedules for Valuing Property. MAR 42-2-923. Adopted December 11, 2014. A public hearing was held, and no testimony or comments were received. The Department amended 13 rules regarding various tables that are updated on an annual basis through Department rules. The tables generally show how the Department arrives at market value when valuing personal property, including rental equipment, farm machinery and equipment, heavy equipment, seismograph units and allied equipment, oil and gas field machinery and equipment, work-over and service rigs, oil drilling rigs, locally assessed cable television systems, ski lift equipment, and industrial machinery and equipment.

Property Tax -- Valuation and Classification of Real Property. MAR 42-2-924. Adopted December 11, 2014. A public hearing was held, and multiple comments were received. The Department adopted three rules, amended 26 rules, and repealed three rules as proposed. The

Department also revised six proposed rule amendments based on public comments received. The new rules pertain to agricultural appraisal and, among other things, adopt a 10-year Olympic average of prices, define a capitalization rate of 6.4%, and provide a process for certain parcels to be valued as agricultural land. The amendments pertain to a variety of property tax subjects, including property tax exemptions for tribal property, implementation of a Montana Supreme Court decision regarding agricultural land in a filed and platted subdivision, updating of dates for the 2015 reappraisal cycle, further refinement of what constitutes new construction, the determination of taxable value for newly taxable property, valuation of land without a soil survey, the criteria for agricultural land valuation for land less than 160 acres, and forest land classification for certain land that is reduced to less than 15 acres based on eminent domain. The proposed repeals eliminate outdated language.

Property Tax -- Value Before Reappraisal for Agricultural Land. MAR 42-2-925. Adopted December 24, 2014. A public hearing was held, and written public comment was received from one association that was generally in support of the rule. The Department adopted one rule as proposed to clarify the circumstances when a calculated value before reappraisal (VBR) is necessary for the 2015 reappraisal.

Department of Transportation

Proposal and Adoption Notices are available on the Internet:

Department of Transportation notices can be found on the Secretary of State's website at <http://www.mtrules.org/>. Under the Montana Administrative Register heading, type the number "18" in the "Search by Notice No." box and click on the "Go" icon.

Notice of Proposed Rules:

None as of June 25, 2015, Montana Administrative Register publication date.

Adopted After RTIC Adjourned -- Not Reviewed by Committee:

None.

Notice of Adopted Rules -- Brought in Front of Committee at November 2014 Meeting:

Highway Right-of-Way Encroachment Permits. MAR 18-151. Adopted November 20, 2014. No

testimony or public comments were received. The Department of Transportation adopted two rules, amended three rules, and repealed six rules as proposed. The first new rule establishes the general requirements that must be followed by a permit holder when constructing or upgrading an encroachment. The second new rule clarifies that a permit holder must hold the Department of Transportation harmless for damage or injury that may result from the presence of the encroachment. The amendments generally define the application process for encroachment permits and provide limitations for encroachments on a controlled access and noncontrolled access highways. The repeals were identified by the Department of Transportation as archaic and no longer in use.

Montana Environmental Policy Act -- Categorical Exclusions. MAR 18-152. Adopted December 11, 2014. No testimony or public comments were received, other than a suggestion regarding statutory citation from legislative staff. The Department of Transportation amended one rule pertaining to the type of actions that do not individually, collectively, or cumulatively require the preparation of an environment assessment or an environmental impact statement unless the action involves certain extraordinary circumstances. The Department of Transportation's reasonable necessity statement states that the "amendments are necessary because the department's rules on categorical exclusions must mirror the federal rules that accompany federal funding for the state of Montana road construction programs. The federal rules were amended on June 20, 2014, and October 6, 2014, in response to the federal Moving Ahead for Progress in the 21st Century Act (MAP-21), P.L. 112-141. MAP-21 funds national surface transportation programs, including road construction and other transportation projects in Montana. The department must update its administrative rules to be consistent with the federal regulations found at 23 CFR 771.117."

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