

SENATE BILL NO. 72

INTRODUCED BY J. SESSO

BY REQUEST OF THE WATER POLICY INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE MONTANA ADMINISTRATIVE PROCEDURE ACT; DEFINING "SUPPLEMENTAL NOTICE"; REVISING THE OBJECTION PROCESS FOR THE ADMINISTRATIVE RULE REVIEW COMMITTEE; AMENDING SECTIONS 2-4-102 AND 2-4-305, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 2-4-102, MCA, is amended to read:

**"2-4-102. Definitions.** For purposes of this chapter, the following definitions apply:

(1) "Administrative rule review committee" or "committee" means the appropriate committee assigned subject matter jurisdiction in Title 5, chapter 5, part 2.

(2) (a) "Agency" means an agency, as defined in 2-3-102, of state government, except that the provisions of this chapter do not apply to the following:

(i) the state board of pardons and parole, which is exempt from the contested case and judicial review of contested cases provisions contained in this chapter. However, the board is subject to the remainder of the provisions of this chapter.

(ii) the supervision and administration of a penal institution with regard to the institutional supervision, custody, control, care, or treatment of youth or prisoners;

(iii) the board of regents and the Montana university system;

(iv) the financing, construction, and maintenance of public works;

(v) the public service commission when conducting arbitration proceedings pursuant to 47 U.S.C. 252 and 69-3-837.

(b) The term does not include a school district, a unit of local government, or any other political subdivision of the state.

(3) "ARM" means the Administrative Rules of Montana.

(4) "Contested case" means a proceeding before an agency in which a determination of legal rights,

1 duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term includes  
2 but is not restricted to ratemaking, price fixing, and licensing.

3 (5) (a) "Interested person" means a person who has expressed to the agency an interest concerning  
4 agency actions under this chapter and has requested to be placed on the agency's list of interested persons as  
5 to matters of which the person desires to be given notice.

6 (b) The term does not extend to contested cases.

7 (6) "License" includes the whole or part of an agency permit, certificate, approval, registration, charter,  
8 or other form of permission required by law but does not include a license required solely for revenue purposes.

9 (7) "Licensing" includes an agency process respecting the grant, denial, renewal, revocation,  
10 suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.

11 (8) "Party" means a person named or admitted as a party or properly seeking and entitled as of right to  
12 be admitted as a party, but this chapter may not be construed to prevent an agency from admitting any person  
13 as a party for limited purposes.

14 (9) "Person" means an individual, partnership, corporation, association, governmental subdivision,  
15 agency, or public organization of any character.

16 (10) "Register" means the Montana Administrative Register.

17 (11) (a) "Rule" means each agency regulation, standard, or statement of general applicability that  
18 implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice  
19 requirements of an agency. The term includes the amendment or repeal of a prior rule.

20 (b) The term does not include:

21 (i) statements concerning only the internal management of an agency or state government and not  
22 affecting private rights or procedures available to the public, including rules implementing the state personnel  
23 classification plan, the state wage and salary plan, or the statewide accounting, budgeting, and human resource  
24 system;

25 (ii) formal opinions of the attorney general and declaratory rulings issued pursuant to 2-4-501;

26 (iii) rules relating to the use of public works, facilities, streets, and highways when the substance of the  
27 rules is indicated to the public by means of signs or signals;

28 (iv) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when there is  
29 a statutory requirement for the publication of the rules and rules adopted annually or biennially relating to the  
30 seasonal recreational use of lands and waters owned or controlled by the state when the substance of the rules

1 is indicated to the public by means of signs or signals; or

2 (v) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in  
3 accordance with 2-4-306 and must be published in the ARM.

4 (12) (a) "Significant interest to the public" means agency actions under this chapter regarding matters  
5 that the agency knows to be of widespread citizen interest. These matters include issues involving a substantial  
6 fiscal impact to or controversy involving a particular class or group of individuals.

7 (b) The term does not extend to contested cases.

8 (13) "Small business" means a business entity, including its affiliates, that is independently owned and  
9 operated and that employs fewer than 50 full-time employees.

10 (14) "Substantive rules" are either:

11 (a) legislative rules, which if adopted in accordance with this chapter and under expressly delegated  
12 authority to promulgate rules to implement a statute have the force of law and when not so adopted are invalid;

13 or

14 (b) adjective or interpretive rules, which may be adopted in accordance with this chapter and under  
15 express or implied authority to codify an interpretation of a statute. The interpretation lacks the force of law.

16 (15) "Supplemental notice" means a notice that amends the proposed rules or changes the timeline for  
17 public participation."

18

19 **Section 2.** Section 2-4-305, MCA, is amended to read:

20 **"2-4-305. Requisites for validity -- authority and statement of reasons.** (1) (a) The agency shall fully  
21 consider written and oral submissions respecting the proposed rule, including comments submitted by the primary  
22 sponsor of the legislation prior to the drafting of the substantive content and wording of a proposed rule that  
23 initially implements legislation.

24 (b) (i) Upon adoption of a rule, an agency shall issue a concise statement of the principal reasons for  
25 and against its adoption, incorporating in the statement the reasons for overruling the considerations urged  
26 against its adoption. If substantial differences exist between the rule as proposed and as adopted and the  
27 differences have not been described or set forth in the adopted rule as that rule is published in the register, the  
28 differences must be described in the statement of reasons for and against agency action. When written or oral  
29 submissions have not been received, an agency may omit the statement of reasons.

30 (ii) If an adopted rule that initially implements legislation does not reflect the comments submitted by the

1 primary sponsor, the agency shall provide a statement explaining why the sponsor's comments were not  
2 incorporated into the adopted rule.

3 (2) Rules may not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory  
4 language in order to convey the meaning of a rule interpreting the language, the reference must clearly indicate  
5 the portion of the language that is statutory and the portion that is an amplification of the language.

6 (3) Each proposed and adopted rule must include a citation to the specific grant of rulemaking authority  
7 pursuant to which the rule or any part of the rule is adopted. In addition, each proposed and adopted rule must  
8 include a citation to the specific section or sections in the Montana Code Annotated that the rule purports to  
9 implement. A substantive rule may not be proposed or adopted unless:

10 (a) a statute granting the agency authority to adopt rules clearly and specifically lists the subject matter  
11 of the rule as a subject upon which the agency shall or may adopt rules; or

12 (b) the rule implements and relates to a subject matter or an agency function that is clearly and  
13 specifically included in a statute to which the grant of rulemaking authority extends.

14 (4) Each rule that is proposed and adopted by an agency and that implements a policy of a governing  
15 board or commission must include a citation to and description of the policy implemented. Each agency rule  
16 implementing a policy and the policy itself must be based on legal authority and otherwise comply with the  
17 requisites for validity of rules established by this chapter.

18 (5) To be effective, each substantive rule adopted must be within the scope of authority conferred and  
19 in accordance with standards prescribed by other provisions of law.

20 (6) Whenever by the express or implied terms of any statute a state agency has authority to adopt rules  
21 to implement, interpret, make specific, or otherwise carry out the provisions of the statute, an adoption,  
22 amendment, or repeal of a rule is not valid or effective unless it is:

23 (a) consistent and not in conflict with the statute; and

24 (b) reasonably necessary to effectuate the purpose of the statute. A statute mandating that the agency  
25 adopt rules establishes the necessity for rules but does not, standing alone, constitute reasonable necessity for  
26 a rule. The agency shall also address the reasonableness component of the reasonable necessity requirement  
27 by, as indicated in 2-4-302(1) and subsection (1) of this section, stating the principal reasons and the rationale  
28 for its intended action and for the particular approach that it takes in complying with the mandate to adopt rules.  
29 Subject to the provisions of subsection (8), reasonable necessity must be clearly and thoroughly demonstrated  
30 for each adoption, amendment, or repeal of a rule in the agency's notice of proposed rulemaking and in the

1 written and oral data, views, comments, or testimony submitted by the public or the agency and considered by  
2 the agency. A statement that merely explains what the rule provides is not a statement of the reasonable  
3 necessity for the rule.

4 (7) A rule is not valid unless notice of it is given and it is adopted in substantial compliance with 2-4-302,  
5 2-4-303, or 2-4-306 and this section and unless notice of adoption of the rule is published within 6 months of the  
6 publishing of notice of the proposed rule. The measure of whether an agency has adopted a rule in substantial  
7 compliance with 2-4-302, 2-4-303, or 2-4-306 and this section is not whether the agency has provided notice of  
8 the proposed rule, standing alone, but rather must be based on an analysis of the agency's substantial  
9 compliance with 2-4-302, 2-4-303, or 2-4-306 and this section. If an amended or supplemental notice of either  
10 proposed or final rulemaking, or both, is published concerning the same rule, the 6-month limit must be  
11 determined with reference to the latest notice in all cases.

12 (8) (a) An agency may use an amended proposal notice or the adoption notice to correct deficiencies  
13 in citations of authority for rules and in citations of sections implemented by rules.

14 (b) An agency may use an amended proposal notice but, except for clerical corrections, may not use the  
15 adoption notice to correct deficiencies in a statement of reasonable necessity.

16 (c) If an agency uses an amended proposal notice to amend a statement of reasonable necessity for  
17 reasons other than for corrections in citations of authority, in citations of sections being implemented, or of a  
18 clerical nature, the agency shall allow additional time for oral or written comments from the same interested  
19 persons who were notified of the original proposal notice, including from a primary sponsor, if primary sponsor  
20 notification was required under 2-4-302, and from any other person who offered comments or appeared at a  
21 hearing already held on the proposed rule.

22 (9) If a majority of the members of the appropriate administrative rule review committee notify the  
23 committee presiding officer that those members object to all or a portion of a notice of proposed rulemaking, the  
24 committee shall notify the agency in writing that the committee objects to all or a portion of the proposal notice  
25 and will address the objections at the next committee meeting. Following notice by the committee to the agency,  
26 ~~the~~ all or a portion of the proposal notice that the committee objects to may not be adopted until publication of  
27 the last issue of the register that is published before expiration of the 6-month period during which the adoption  
28 notice must be published, unless prior to that time, the committee meets and does not make the same objection.  
29 A copy of the committee's notification to the agency must be included in the committee's records.

30 (10) This section applies to the department of labor and industry adopting a rule relating to a commercial

1 drug formulary as provided in 39-71-704. This section does not apply to the automatic updating of department  
2 of labor and industry rules relating to commercial drug formularies as provided in 39-71-704."

3

4 NEW SECTION. **Section 3. Effective date.** [This act] is effective on passage and approval.

5

- END -