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June 12, 2019

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

The Environmental Quality Council is required to review administrative rules promulgated by the Department of Environmental Quality (DEQ), the Department of Fish, Wildlife, and Parks (FWP), and the Department of Natural Resources and Conservation (DNRC) for compliance with the Montana Administrative Procedure Act (MAPA). The rulemaking and rule review processes and the Council's and an individual legislator's roles in these processes are outlined below.

ADMINISTRATIVE RULEMAKING

What is a rule? MAPA¹ 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.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are updated by the Montana Administrative Register (MAR), which publishes all proposed, new, transferred, amended, and repealed rules and all adopted rules twice a month.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 (i.e., 37.1.101). FWP rules are located in Title 12 of the ARMs. DEQ rules are located in Title 17, and DNRC rules are located in Title 36.

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.

¹ See Title 2, chapter 4, MCA.

² § 2-4-102.

What governs the rulemaking process? MAPA governs the rulemaking process for most agencies, including DEQ, FWP, and DNRC. 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.

ADMINISTRATIVE 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). Council legal 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 in detail below. 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 Council's attention for further direction. The Council will determine at its organizational meeting how it would like to receive legal staff administrative rule review reports.

Council legal staff reviews proposal notices for compliance with the following 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 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, which identifies the principal reasons for the intended action and for each adoption, amendment, or repeal and, if alternative approaches are available, explains 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 information 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

³ § 2-4-302(1)(a).

⁴ § 2-4-305(3).

⁵ § 2-4-305(6)(b).

⁶ § 2-4-302.

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.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, 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 alteration 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 not less than 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

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. (§ 2-4-102(13).)

⁹ § 2-4-111.

¹⁰ § 2-4-307.

¹¹ § 2-4-302(2)(c); § 2-4-303.

written comments.¹²

Adoption Notice

MAPA contains additional requirements particular to adoption notices. 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 proposal 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

COUNCIL INVOLVEMENT

The Council 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

¹² § 2-4-302.

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).

- poll the Legislature by mail to determine if a proposed rule is consistent with legislative 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 a statement with the Secretary of State concerning the advisory nature of an adjective or interpretive rule;²³
- receive reports on litigation and request documents in litigation involving judicial construction of a rule or MAPA;²⁴ or
- object to all or a portion of a proposed or adopted rule.

OBJECTING TO A RULE -- PROCESS AND EFFECT

MAPA provides separate processes for objecting to proposed rules and adopted rules. For the purposes of this memorandum, one process is referred to as an informal objection and the other process is referred to as a formal objection.

Informal Objection

If a majority of the Council members notify the chair that they object to a *proposed* rule, the Council must notify the agency of the objection and that the Council intends to address the objection at the next meeting of the Council. 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 **UNLESS** the Council withdraws its objection or meets during the 6-month period and does not sustain the objection. Under the informal objection, the Council is not required to set forth in writing its reasons for the objection.²⁵

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).

Formal Objection

If the Council informally objects to a *proposed* rule and believes that all or a portion of 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), or 2-4-305 (authority and reasonable necessity requirements), the Council may formally object to the proposed rule. The objection must be in writing and describe the Council's reasons for the objection. The agency is required to respond in writing to the objection within 14 days of the mailing of the objection. Unless the Council withdraws its objection before the proposed rule is adopted or determines, as communicated in writing by a majority of the Council members to the presiding officer and staff, that the rule has been adopted with changes that make the rule comply with the Council's objections and concerns, the rule is not effective until the day after final adjournment of the next regular session of the Legislature.²⁶ The Council may also send the objection to the Secretary of State for publication in the MAR, the effect of which is described below.

The Council may object to an *adopted* rule for failure to substantially comply with 2-4-302, 2-4-303, or 2-4-305. The objection process is the same as is described above; however, the effects differ. If the Council does not withdraw its objection to the adopted rule, it may vote to send the objection to the Secretary of State for publication, at the Council's expense, 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, or 2-4-305. If the rule is invalidated by the court because the agency failed to meet its burden of proof, and the court finds that the agency acted in arbitrary and capricious disregard of the authorizing statute, the court may award costs and attorney fees against the agency.²⁷

INDIVIDUAL INVOLVEMENT

Members of the Council 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

²⁶ § 2-4-306(4)(c); 2-4-406.

²⁷ §2-4-406.

²⁸ § 2-4-315.

²⁹ § 2-4-302.

- 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 or
- contribute to the rulemaking process by submitting oral or written testimony on a proposed rule.

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³⁰ § 2-4-304.

³¹ § 2-4-302.