

## ADMINISTRATIVE RULEMAKING 101

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for the Children, Families, Health and Human Services Interim Committee, June 2, 2009

- I. 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.
- II. Where are Montana's rules located? Administrative Rules of Montana (ARMs) are the administrative rules in their entirety and they are updated by MAR (the Montana Administrative Register) which is a twice-monthly publication containing all proposed new, transferred, amended, and repealed rules as well as adopted rule changes.
- III. Why are rules adopted?
  - A. To "fill in gaps" left by legislation and provide the public with certainty as to what is required.
  - B. To allow the public input into what the rules will be.
- IV. Procedural requirements (contained in MAPA)
  - A. The agency gives public notice of proposed rules
    1. How
      - a. Publication in MAR
      - b. Electronic notice
      - c. Mailing - agencies must keep list of interested persons and mail to them
      - d. Bill sponsor notification - if agency proposing initial rules to implement a bill, the agency must send notice to the chief sponsor of bill when it begins drafting rules (SB 71, 2007). Agency must also give opportunity for sponsor to comment and inform the legislator of known dates by which each step of the rulemaking process must be completed (SB 90, 2009).
    2. Contents of notice
      - a. Text of rule or rule amendments
      - b. Authorizing and implementing authority
      - c. Statement of reasonable necessity - the agency must explain the principle reasons and rationale for the proposed rules. Agency can't use amended notice of proposed rulemaking to cure a deficiency in a statement of reasonable necessity unless additional time for public comment given (SB 123, 2009).
      - d. Notice of how public may provide comments
  - B. Agency takes public comment on proposed rules
    1. Comment period - public must be given at least 28 days to submit written comments.
    2. Public hearing - agencies often hold public hearings to take oral comments. An agency must hold a hearing if one is requested by 25 persons or 10% of people affected.
  - C. Agency considers public comment including that of interim committee and sponsor of

initial legislation.

D. Agency considers final action

1. Agency may adopt rule as proposed, adopt rules with amendments suggested by the public, or decide not to adopt rules.

2. If the agency adopts the rule, it must publish notice of adoption in the MAR. In the notice, the agency must respond to all public comments, including those of sponsor of enacting legislation (SB 90, 2009). If comments are rejected, the agency must state its rationale for rejection.

V. What are substantive (non-procedural) requirements?

A. Agency must have statutory authority to adopt the rule. The Legislature grants rulemaking authority in one of two ways:

1. Specific grant of authority for a particular subject matter

2. Grant of rulemaking authority to implement statute(s)

B. The Legislature must set some standards to govern the agency's rulemaking. Otherwise, this is an unconstitutional delegation of legislative power to the executive branch.

C. Rules must be consistent with and not in conflict with the standards set in the statute.

D. Rule must be reasonably necessary to effectuate purpose of statute. The Montana Supreme Court has held that this means a rule cannot contain requirements that were not within the contemplation of the Legislature in adopting the statutes that the rule implements. (Germann v. Stephens, 2005 Mont. Dist. LEXIS 989 (2005)).

**2009 Legislation affecting administrative rulemaking**

SB 90 - When an agency begins to work on the substantive content of a proposal notice for a rule that initially implements legislation, that agency shall contact the legislator who was the primary sponsor of the legislation to obtain the legislator's comments, inform the legislator of the known dates 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, including the opportunity to provide comment to the appropriate rule review committee. If an adopted rule that initially implements legislation does not reflect the comments submitted by the primary sponsor, the agency shall provide a statement explaining why the sponsor's comments were not incorporated into the adopted rule. (Effective March 17, 2009).

SB 123 - If an agency uses an amended proposal notice to amend a statement of reasonable necessity for reasons other than corrections in citations of authority or of a clerical nature, the agency shall allow for additional time for oral or written comments from the same interested person who were notified of the original proposal notice, including from a primary sponsor, and from any other person who offered comments or appeared at a hearing already held on the proposed rule. (Effective April 17, 2009).