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## Montana Legislative Services Division

### Legal Services Office

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TO: Environmental Quality Council Members  
FROM: Helen Thigpen, Staff Attorney  
RE: EQC Administrative Rule Review Authority -- Current Administrative Rules  
DATE: May 11, 2011

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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 attached to these agencies for administrative purposes: (1) the Department of Environmental Quality (DEQ); (2) the Department 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, the EQC will receive an update at each meeting from legal staff on the status of agency rulemaking activities. The EQC may also receive information from legal staff on specific issues associated with the rulemaking process if and when they arise during the interim. This memorandum contains the following:

- I. A summary of administrative rulemaking.
- II. A summary of EQC's administrative rule review authority.
- III. An update on current agency rulemaking from DEQ, FWP, and DNRC.

#### **I. Summary of Administrative Rulemaking**

Administrative agencies are frequently authorized to carry out the Legislature's intent by adopting administrative rules, which have the full force of law. There are several reasons why the legislature may choose to authorize an agency to adopt administrative rules; the most common reason is that an agency, with its technical expertise and resources, is better suited to flesh out finer policy points. In addition, unlike statutes that may only be adopted every 2 years in Montana, administrative rules may be adopted throughout the year as circumstances change or as issues arise.

Administrative rule functions are governed by the Montana Administrative Procedures Act (MAPA), Title 2, chapter 4, MCA, and relevant case law. In Montana, an administrative rule is 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."<sup>1</sup>

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<sup>1</sup> See 2-4-102(11), MCA.

Agency administrative rules are published in the Administrative Rules of Montana (ARM), which is updated twice a month by a publication known as the Montana Administrative Register (MAR). The MAR contains notices of proposed new, amended, transferred, repealed, and adopted rules. The MAR also contains notices of public hearings, Attorney General's opinions, and notices of vacancies on state boards. The ARM and the MAR may be accessed electronically at the following website: <http://www.mtrules.org/>.

As noted above, MAPA and relevant case law govern the procedures and requirements for agency rulemaking in Montana.<sup>2</sup> However, MAPA does not provide the authority for an agency to adopt rules. The authority for an agency to adopt rules is delegated from the Legislature to the agency. A substantive rule may not be proposed or adopted unless "a statute granting the agency authority to adopt rules clearly and specifically lists the subject matter of the rule as a subject upon which the agency shall or may adopt rules" or "the rule implements and relates to a subject matter or an agency function that is clearly and specifically included in a statute to which the grant of rulemaking authority extends."<sup>3</sup> An agency rule may be invalidated if it exceeds the scope of the enabling statute, if it is inconsistent with statutory requirements, or if it adds requirements not contemplated by the Legislature.

MAPA provides several requirements, including the following:

- Notice of the proposed rule must be published in the MAR, which is published by the Secretary of State. The notice must comply with specific timelines. (2-4-302, MCA).
- The agency must contact the primary sponsor of legislation if the agency begins to work on the substantive content and the wording of a proposal notice for a rule that initially implements legislation. The purpose of the notification to the primary sponsor is to obtain the legislator's comments, inform the legislator of the date 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. (2-4-302, MCA).
- An agency must consider all oral and written submissions respecting a proposed rule. (2-4-305, MCA).
- A rule must include a citation to the specific grant of rulemaking authority and must be "reasonably necessary to effectuate the purpose of the statute." (2-4-305, MCA).

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<sup>2</sup> MAPA may be supplanted by specific procedures or requirements set forth in statute that are applicable to the agency.

<sup>3</sup> See 2-4-305(3)(a) and (b), MCA.

## **II. Summary of legislative committee and EQC administrative rule review authority.**

Pursuant to 75-1-324(10), MCA, the EQC reviews administrative rules from DEQ, FWP, and DNRC. Title 2, chapter 4, parts 3 and 4, MCA, describe the nature of legislative committee (and EQC) administrative rule review authority. Under these provisions, the EQC may:

- Request an agency's rulemaking records for checking compliance with MAPA. (2-4-402(2)(a), MCA).
- Prepare written recommendations for the adoption, amendment, or rejection of a rule and submit those recommendations to the department proposing the rule and submit oral or written testimony at a rulemaking hearing. (2-4-403(3), MCA).
- Require that a rulemaking hearing be held in accordance with the provisions of 2-4-302 through 2-4-305, MCA. (2-4-402(2)(c), MCA).
- Institute, intervene in, or otherwise participate in proceedings involving this chapter in the state and federal courts and administrative agencies. (2-4-402(2)(d), MCA).
- Review the incidence and conduct of administrative proceedings under this chapter. (2-4-402(2)(e), MCA).
- Commence a poll on an objection to a rule. (2-4-403, MCA).
- Require an economic impact statement relating to the adoption of a rule. (2-4-405, MCA).
- Object to a notice of proposed rulemaking and require up to a 6-month delay in the adoption of the rule. (2-4-305(9) and 2-4-306(4), MCA).
- Object to all or some portion of a proposed or adopted rule the committee considers not to have been proposed or adopted in conformance with MAPA. (2-4-406, MCA).
- Recommend a rule adoption or change. (2-4-411, MCA).

Failure of a committee to object to the adoption, amendment, or repeal of a rule is inadmissible in court to prove the validity of the rule. In addition, the agency must report to the committee any judicial proceedings in which the construction or interpretation of MAPA is at issue. The agency may also report to the committee any judicial proceedings in which the construction or interpretation of any rule of the agency is at issue. (2-4-410, MCA).

### III. Update on Current Agency Administrative Rulemaking Activities

\*\* Updated through May 23, 2011 \*\* New Notices Bolded \*\*

#### A. Department of Environmental Quality

- **For electronic access to DEQ rule notices visit:**  
<http://deq.mt.gov/dir/legal/default.mcp>

*Notice of Proposed Rules with Upcoming Public Hearings:*

<b>MAR Notice No.</b>	<b>Public Hearing Date</b>	<b>Where</b>	<b>Comment Due Date</b>	<b>Purpose</b>
17-317	June 1, 2011, at 1:30 p.m.	Room 35, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana	June 9, 2011, by 5 p.m.	(Asbestos) Notice of Second Public Hearing and Extension of Comment Period on Proposed Amendment, Adoption, and Repeal - Incorporation by Reference - OSHA Preclusion - Asbestos Project Management
17-321	June 1, 2011, at 9:30 a.m.	Room 122, 1100 North Last Chance Gulch, Helena, Montana	June 9, 2011, by 5 p.m.	(Petroleum Tank Release Compensation Board) Notice of Public Hearing on Proposed Amendment - Operation and Management of Petroleum Storage Tanks - Review and Determination of Claims for Reimbursement - Third-Party Damages
<b>17-322</b>	<b>July 7, 2011 at 1 p.m.</b>	<b>Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana</b>	<b>July 8, 2011, by 5 p.m.</b>	<b>(Board of Environmental Review) (Water Quality) Notice of Public Hearing on Proposed Amendment, Adoption, and Repeal - Montana Pollutant Discharge Elimination System Effluent Limitations and Standards - Standards of Performance - Treatment Requirements</b>
<b>17-323</b>	<b>July 7, 2011 at 2 p.m.</b>	<b>Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana</b>	<b>July 8, 2011, by 5 p.m.</b>	<b>(Board of Environmental Review) (Air Quality) Notice of Public Hearing on Proposed Amendment - Definitions - Ambient Air Increments - Major Stationary Sources - Source Impact Analysis - Source Information - Sources Impacting Federal Class I Areas - Definitions - When Air Quality Permit Required - Baseline for Determining Credit for Emissions - Air Quality Offsets</b>

*Proposed Rules Post Public Hearing But Pre Final Adoption:*

<b>MAR Notice No.</b>	<b>Public Hearing Date</b>	<b>Where</b>	<b>Comment Due Date</b>	<b>Purpose</b>
17-320	May 18, 2011, at 10 a.m.	Room 35, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana	May 26, 2011, by 5 p.m.	Notice of Public Hearing on Proposed Adoption (Department - Electronic Filing of Documents -
17-319	May 11, 2011, at 12 p.m. (or upon conclusion of public hearing for MAR Notice No. 17-318)	Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana	May 12, 2011, by 5 p.m.	Notice of Public Hearing on Proposed Amendment (Subdivisions/On-Site Subsurface Wastewater Treatment - Local Variances and Variance Appeals to the Department
17-318	May 11, 2011, at 1:30 p.m.	Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana	May 12, 2011, by 5 p.m.	Notice of Public Hearing on Proposed Amendment (Public Water and Sewage System Requirements - Plans for Public Water Supply or Wastewater System, Fees, Definitions, Water Supply, and Chemical Treatment of Water

**B. Department of Fish, Wildlife, and Parks**

- **For electronic access to FWP rule notices visit:**  
<http://fwp.mt.gov/news/publicNotices/armRules/>

*Notice of Proposed Rules with Upcoming Public Hearings:*

<b>MAR Notice No.</b>	<b>Public Hearing Date</b>	<b>Where</b>	<b>Comment Due Date</b>	<b>Purpose</b>
12-366	May 23, 2011, at 6 p.m.	Fish, Wildlife, and Parks Region 5 office located at 2300 Lake Elmo Drive, Billings, Montana	May 27, 2011	Notice of Public Hearing on Proposed Adoption - Aquatic Invasive Species Inspection Stations
12-366	May 23, 2011, at 6 p.m.	Fish, Wildlife, and Parks Headquarters, 1420 East Sixth Avenue, Helena, Montana	May 27, 2011	Notice of Public Hearing on Proposed Adoption - Aquatic Invasive Species Inspection Stations
<b>12-368</b>	<b>June 16, 2011, at 6 p.m.</b>	<b>Fish, Wildlife, and Parks Region 2 office located at 3201 Spurgin Road, Missoula, Montana.</b>	<b>June 27, 2011</b>	<b>(Fish, Wildlife and Parks Commission) Notice of Public Hearing on Proposed Amendment - Recreational Use Rules on the Bitterroot River, Blackfoot River, and Clark Fork River</b>

*Proposed Rules Post Public Hearing But Pre Final Adoption:*

<b>MAR Notice No.</b>	<b>Public Hearing Date</b>	<b>Where</b>	<b>Comment Due Date</b>	<b>Purpose</b>
12-366	May 19, 2011, at 6 p.m.	Fish, Wildlife, and Parks, Region 1 office located at 490 North Meridian Road, Kalispell, Montana	May 27, 2011	Notice of Public Hearing on Proposed Adoption - Aquatic Invasive Species Inspection Stations

**C. Department of Natural Resources and Conservation**

- **For electronic access to DNRC rule notices visit:**  
[http://dnrc.mt.gov/About\\_Us/notices.asp#AdminRules](http://dnrc.mt.gov/About_Us/notices.asp#AdminRules)

*Notice of Proposed Rules with Upcoming Public Hearings:*

<b>MAR Notice No.</b>	<b>Public Hearing Date</b>	<b>Where</b>	<b>Comment Due Date</b>	<b>Purpose</b>
<b>36-22-157</b>	<b>June 15, 2011</b>	<b>Richland County Fairgrounds Commercial Building, 2118 West Holly Street, Sidney, Montana</b>	<b>June 23, 2011, by 5 p.m.</b>	<b>(Board of Oil and Gas Conservation and the Department) Notice of Public Hearing on Proposed Adoption - Oil and Gas Well Stimulation</b>

*Proposed Rules Post Public Hearing But Pre Final Adoption:*

None

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