

House BILL NO. 389

Wm. E. Boharski

INTRODUCED BY

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR GREATER PUBLIC PARTICIPATION IN AGENCY RULEMAKING AND OTHER AGENCY ACTIONS; AMENDING PROVISIONS FOR NOTICE OF AGENCY RULES AND ACTIONS; DEFINING TERMS; CLARIFYING EXISTING PROVISIONS; STRENGTHENING THE REQUIREMENTS FOR AN EMERGENCY RULE; PROHIBITING THE USE OF AN ADOPTION NOTICE TO CURE DEFICIENCIES IN STATEMENTS OF REASONABLE NECESSITY; AND AMENDING SECTIONS 2-3-101, 2-3-102, 2-3-103, 2-3-104, 2-3-105, 2-3-112, 2-3-114, 2-3-203, 2-3-213, 2-3-221, 2-4-102, 2-4-302, 2-4-303, 2-4-305, AND 2-4-306, MCA."

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

Section 1. Section 2-3-101, MCA, is amended to read:

"2-3-101. Legislative intent. The legislature finds and declares pursuant to the mandate of Article II, section 8, of the 1972 Montana constitution that legislative guidelines should be established to secure to the people of Montana their constitutional right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of the agency and that this part must be liberally construed to achieve that purpose."

Section 2. Section 2-3-102, MCA, is amended to read:

"2-3-102. Definitions. As used in this part, the following definitions apply:

(1) "Agency" means any a board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts except:

- (a) the legislature and any or a branch, committee, or officer thereof of the legislature;
(b) the judicial branches and any branch or a committee or officer thereof of the judicial branch;
(c) the governor, except that an agency is not exempt merely because the governor has been designated as a member thereof of the agency; or
(d) the state military establishment and agencies concerned with civil defense and recovery from

1 hostile attack.

2 (2) "Agency action" means the whole or a part of, or the equivalent or denial of, the adoption of  
3 an agency rule, the issuance of a license or order, the award of a contract, or ~~the equivalent or denial~~  
4 ~~thereof~~ an agency decision that is of significant interest to the public.

5 (3) "Rule" means any agency regulation, standard, or statement of general applicability that  
6 implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice  
7 requirements of any agency. The term includes the amendment or repeal of a prior rule but does not  
8 include:

9 (a) statements concerning only the internal management of an agency and not affecting private  
10 rights or procedures available to the public; or

11 (b) declaratory rulings as to the applicability of any statutory provision or of any rule.

12 (4) "Significant interest to the public" means the undertaking of an agency action or decision that  
13 involves a controversial matter, a fiscal impact on a particular class or group of individuals, or significant  
14 citizen interest."

15

16 **Section 3.** Section 2-3-103, MCA, is amended to read:

17 **"2-3-103. Public participation -- governor to ~~insure~~ ensure guidelines adopted.** (1) Each agency  
18 shall develop procedures for permitting and encouraging the public to participate in agency decisions that  
19 are of significant interest to the public. The procedures ~~shall assure~~ must ensure adequate notice and assist  
20 public participation before a final agency action is taken that is of significant interest to the public. Each  
21 agency shall create and maintain an interested persons list. Each person submitting oral or written  
22 comments to, attending a hearing of, or in any way contacting the agency for any purpose concerning  
23 agency actions and decisions must be placed on the list by the agency and given notice of each intended  
24 or proposed agency action and each agency decision relating to matters in which the person has expressed  
25 an interest in the person's contacts with the agency.

26 (2) The governor shall ~~insure~~ ensure that each board, bureau, commission, department, authority,  
27 agency, or officer of the state adopts coordinated rules for its programs, ~~which~~ The guidelines shall must  
28 provide policies and procedures to facilitate public participation in those programs, consistent with  
29 subsection (1) ~~of this section.~~ These guidelines ~~shall~~ must be adopted as rules and published in a manner  
30 ~~which~~ that may be provided to a member of the public upon request."

1           **Section 4.** Section 2-3-104, MCA, is amended to read:

2           "**2-3-104. Requirements for compliance with notice provisions.** An agency ~~shall be considered to~~  
3 ~~have complied~~ complies with the notice provisions of 2-3-103 if:

4           (1) an environmental impact statement is prepared and distributed as required by the Montana  
5 Environmental Policy Act, Title 75, chapter 1;

6           ~~(2) a proceeding is held as required by the Montana Administrative Procedure Act;~~

7           ~~(3)(2)~~ (2) a public hearing, after appropriate and adequate notice is given, is held pursuant to ~~any other~~  
8 a provision of state law or a local ordinance or resolution; or

9           ~~(4)(3)~~ (3) a newspaper of general circulation within the area to be affected by a decision of significant  
10 interest to the public has carried ~~a news story or advertisement~~ an advertisement giving notice of  
11 opportunity to be heard concerning the decision sufficiently prior to a final decision to permit public  
12 comment on the matter. The advertisement must be printed in at least 12-point type and must comply with  
13 the notice requirements of 2-4-302(1). If the newspaper has a Sunday edition, the advertisement must be  
14 in that edition."

15

16           **Section 5.** Section 2-3-105, MCA, is amended to read:

17           "**2-3-105. Supplemental notice by radio or television.** (1) ~~Any~~ An official of the state or ~~any~~ of one  
18 of its political subdivisions who is required by law to publish any a notice required by law may, and is  
19 encouraged to, supplement ~~such the~~ the publication by a radio or television broadcast, or both, of a summary  
20 of ~~such the~~ the notice ~~or by both of such broadcasts when~~ if in his the official's judgment the public interest  
21 will be served.

22           (2) ~~The~~ When a summary of ~~such a~~ a notice ~~shall only be read with no reference to any person by~~  
23 ~~name then~~ is broadcast, a candidate for political office may not be referred to.

24           (3) ~~Such announcements shall be made~~ A summary may be broadcast only by ~~duty~~ employed  
25 personnel of the station from which ~~such the~~ the broadcast emanates.

26           (4) ~~Announcements~~ An announcement by a political ~~subdivisions~~ subdivision may be made only  
27 by ~~stations~~ a station situated within the county of origin of the ~~legal~~ notice unless ~~no~~ a broadcast station  
28 ~~exists~~ does not exist in ~~such that~~ that county, in which case ~~announcements~~ the announcement may be made  
29 by a station or stations situated in any county other than the county of origin of the ~~legal~~ notice."  
30

1           **Section 6.** Section 2-3-112, MCA, is amended to read:

2           **"2-3-112. Exceptions.** The provisions of 2-3-103 and 2-3-111 do not apply to:

3           (1) an agency decision that must be made to deal with an emergency situation affecting the public  
4 health, welfare, or safety;

5           (2) an agency decision ~~that must be made to maintain or protect the interests of the agency,~~  
6 ~~including but not limited to the filing of~~ to file a lawsuit in a court of law or ~~becoming~~ to become a party  
7 to an administrative proceeding; or

8           (3) a decision involving no more than a ministerial act."  
9

10          **Section 7.** Section 2-3-114, MCA, is amended to read:

11          **"2-3-114. Enforcement.** The district courts of the state have jurisdiction to set aside or declare  
12 void an agency decision under this part upon petition ~~made within 30 days of the date of the decision of~~  
13 ~~any~~ by a person whose rights have been prejudiced."  
14

15          **Section 8.** Section 2-3-203, MCA, is amended to read:

16          **"2-3-203. Meetings of public agencies and certain associations of public agencies to be open to**  
17 **public -- exceptions.** (1) All meetings of public or governmental bodies, boards, bureaus, commissions,  
18 agencies of the state, or any political subdivision of the state or organizations or agencies supported in  
19 whole or in part by public funds or expending public funds must be open to the public.

20          (2) All meetings of associations that are composed of public or governmental bodies referred to  
21 in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the  
22 public.

23          (3) ~~Provided, however, the~~ The presiding officer of ~~any~~ a meeting subject to subsections (1) and  
24 (2) may close the meeting during the time that the discussion relates to a matter of individual privacy ~~and~~  
25 ~~then if and only if~~ if the presiding officer determines that the demands of individual privacy clearly exceed  
26 the merits of public disclosure. The right of individual privacy may be waived by the individual about whom  
27 the discussion pertains, and, in that event, the meeting must be open.

28          (4) (a) ~~However, except~~ Except as provided in subsection (4)(b), a meeting may be closed to  
29 discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental  
30 effect on the litigating position of the public agency.

1 (b) A meeting may not be closed to discuss strategy to be followed in litigation involving the  
 2 enforcement or preservation of a constitutional right of the people or in which the only parties are public  
 3 bodies or associations described in subsections (1) and (2).

4 (5) ~~Any~~ A committee or subcommittee appointed by a public body or an association described in  
 5 subsection (2) for the purpose of conducting business ~~which that~~ is within the jurisdiction of that agency  
 6 is subject to the requirements of this section."

7  
 8 **Section 9.** Section 2-3-213, MCA, is amended to read:

9 "2-3-213. **Voidability.** ~~Any~~ A decision made in violation of 2-3-203 may be declared void by a  
 10 district court having jurisdiction. ~~A suit to void any such decision must be commenced within 30 days of~~  
 11 ~~the decision."~~

12  
 13 **Section 10.** Section 2-3-221, MCA, is amended to read:

14 "2-3-221. **Costs and attorney fees to plaintiff in certain actions to enforce constitutional right to**  
 15 **know.** A plaintiff who prevails in an action brought in district court to enforce ~~his~~ the plaintiff's rights under  
 16 Article II, ~~section 9,~~ of the Montana constitution ~~may~~ must be awarded ~~his~~ costs and reasonable ~~attorneys'~~  
 17 attorney fees as a matter of course. A prevailing plaintiff who is not represented by an attorney must be  
 18 awarded 90% of what the judge determines would be a reasonable attorney fee if the plaintiff had been  
 19 represented by an attorney."

20  
 21 **Section 11.** Section 2-4-102, MCA, is amended to read:

22 "2-4-102. **Definitions.** For purposes of this chapter, the following definitions apply:

23 (1) "Administrative code committee" or "committee" means the committee provided for in Title 5,  
 24 chapter 14.

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

27 (i) the state board of pardons and parole, except that the board is subject to the requirements of  
 28 2-4-103, 2-4-201, 2-4-202, and 2-4-306 and its rules must be published in the ~~Administrative Rules of~~  
 29 ~~Montana ARM~~ and the ~~Montana Administrative Register~~ register;

30 (ii) the supervision and administration of a penal institution with regard to the institutional

1 supervision, custody, control, care, or treatment of youths or prisoners;

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

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

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

6 (3) "Agency action" means the whole or a part of, or the equivalent or denial of, the adoption of  
7 an agency rule, the issuance of a license or order, the award of a contract, or an agency decision that is  
8 of significant interest to the public.

9 ~~(3)~~(4) "ARM" means the Administrative Rules of Montana.

10 ~~(4)~~(5) "Contested case" means a proceeding before an agency in which a determination of legal  
11 rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The  
12 term includes but is not restricted to ratemaking, price fixing, and licensing.

13 (6) "Interested person" means a person known to the committee or to an agency to have  
14 demonstrated in any way an interest concerning agency actions or other agency administrative matters.

15 ~~(5)~~(7) "License" includes the whole or part of ~~any~~ an agency permit, certificate, approval,  
16 registration, charter, or other form of permission required by law but does not include a license required  
17 solely for revenue purposes.

18 ~~(6)~~(8) "Licensing" includes ~~any~~ an agency process respecting the grant, denial, renewal, revocation,  
19 suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.

20 ~~(7)~~(9) "Party" means a person named or admitted as a party or properly seeking and entitled as of  
21 right to be admitted as a party, but ~~nothing in~~ this chapter may not be construed to prevent an agency from  
22 admitting any person as a party for limited purposes.

23 ~~(8)~~(10) "Person" means an individual, partnership, corporation, association, governmental  
24 subdivision, agency, or public organization of any character.

25 ~~(9)~~(11) "Register" means the Montana Administrative Register.

26 ~~(10)~~(12) "Rule" means each agency regulation, standard, or statement of general applicability that  
27 implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice  
28 requirements of an agency. The term includes the amendment or repeal of a prior rule but does not include:

29 (a) statements concerning only the internal management of an agency and not affecting private  
30 rights or procedures available to the public;

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

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

4 (d) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when  
5 there is a statutory requirement for the publication of the rules and rules adopted annually or biennially  
6 relating to the seasonal recreational use of lands and waters owned or controlled by the state when the  
7 substance of the rules is indicated to the public by means of signs or signals;

8 (e) rules implementing the state personnel classification plan, the state wage and salary plan, or  
9 the statewide budgeting and accounting system;

10 (f) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in  
11 accordance with 2-4-306 and must be published in the ~~Administrative Rules of Montana~~ ARM.

12 (13) "Significant interest to the public", when used in reference to agency action, means agency  
13 action that involves a controversial matter, a fiscal impact on a particular class or group of individuals, or  
14 significant citizen interest.

15 ~~(11)~~(14) "Substantive rules" are either:

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

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

22

23 **Section 12.** Section 2-4-302, MCA, is amended to read:

24 **"2-4-302. Notice, hearing, and submission of views.** (1) Prior to the adoption, amendment, or  
25 repeal of ~~any~~ a rule, the agency shall give written notice of its intended action. The notice ~~shall~~ must, at  
26 a minimum, include a statement of either the terms or substance of the intended action or a description of  
27 the subjects and issues involved, the rationale for the intended action, and the time when, place where,  
28 and manner in which interested persons may present their views ~~thereon~~ on the intended action. To  
29 promote the public's full comprehension of the notice, the notice must be written in plain and clear English  
30 and use familiar and understandable words and terms.

1           (2) (a) The notice ~~shall~~ must be filed with the secretary of state for publication in the register, as  
2 provided in 2-4-312, and mailed within 3 days of publication to interested persons who have made timely  
3 requests to the agency ~~for notice of its rulemaking proceedings to be informed of agency actions~~ and to  
4 the office of any professional, trade, or industrial society or organization or member ~~thereof~~ which ~~of those~~  
5 entities that has filed a request with the administrative code committee ~~when such request that~~ has been  
6 forwarded to the agency as provided in subsection (2)(b). Each agency shall create and maintain a list of  
7 interested persons. A person who submits an oral or written comment, attends a hearing, or contacts an  
8 agency by any means and for any purpose in regard to intended agency action must be informed of the list  
9 by the agency.

10           (b) The administrative code committee shall forward a list of all organizations or interested persons  
11 who have submitted a request to be informed of agency actions to all agencies publishing rulemaking  
12 notices in the ~~Montana Administrative Register~~ ARM. The list must be amended by the agency upon request  
13 of any interested person requesting to be added to or deleted from the list.

14           (c) The notice ~~shall~~ must be published and mailed at least 30 days in advance of the agency's  
15 intended action. If the intended action is of significant interest to the public, the notice must, at a  
16 minimum, be published as required in 2-3-104(3).

17           (3) If ~~any~~ a statute provides for a ~~different~~ method of publication different from that provided in  
18 subsection (2), the affected agency shall comply with the statute in addition to the requirements contained  
19 ~~herein in this section~~. However, ~~in no case may~~ the notice period may not be less than 30 days or more  
20 than 6 months.

21           (4) Prior to the adoption, amendment, or repeal of any rule, the agency shall afford interested  
22 persons at least 20 days' notice of a hearing and 28 days from the day of notice to submit data, views,  
23 or arguments, orally or in writing. In the case of substantive rules, the notice of proposed rulemaking must  
24 state that opportunity for oral hearing ~~shall~~ must be granted if requested by either 10% or 25, whichever  
25 is less, of the persons who will be directly affected by the proposed rule, by a governmental subdivision  
26 or agency, by the administrative code committee, or by an association having not less than 25 members  
27 who will be directly affected.

28           (5) An agency may continue a hearing date for cause. In the discretion of the agency, contested  
29 case procedures need not be followed in hearings held pursuant to this section. If a hearing is otherwise  
30 required by statute, nothing ~~herein in this section~~ alters that requirement.



1 (6) If an agency fails to publish a notice of adoption within the time required by 2-4-305(7) and  
2 the agency again proposes the same rule for adoption, amendment, or repeal, the proposal must be  
3 considered a new proposal for purposes of compliance with this chapter.

4 (7) At the commencement of ~~any~~ a hearing on the intended action, the person designated by the  
5 agency to preside at the hearing shall:

6 (a) read aloud the "Notice of Function of Administrative Code Committee" appearing in the register;

7 (b) explain the primary function and purpose of the administrative code committee and state how  
8 the administrative code committee may be contacted; and

9 (c) inform the persons at the hearing of the provisions of subsection (2)(a) and provide them an  
10 opportunity to place their names on the list."

11  
12 **Section 13.** Section 2-4-303, MCA, is amended to read:

13 **"2-4-303. Emergency or temporary rules.** (1) If an agency finds that an imminent peril to the public  
14 health, safety, or welfare requires adoption of a rule upon fewer than 30 days' notice and states in writing  
15 its reasons for that finding, it may proceed upon special notice filed with the committee, without prior  
16 notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an  
17 emergency rule. The rule may be effective for a period not longer than 120 days, after which a new  
18 emergency rule with the same or substantially the same text may not be adopted, but the adoption of an  
19 identical rule under 2-4-302 is not precluded. Because the exercise of emergency rulemaking power  
20 precludes the people's constitutional right to prior notice and participation in the operations of their  
21 government, it constitutes the exercise of extraordinary power requiring extraordinary safeguards against  
22 abuse. An emergency rule may be adopted only in circumstances that truly and clearly constitute an  
23 existing imminent peril to the public health, safety, or welfare that cannot be averted or remedied by any  
24 other administrative act. The sufficiency of the reasons for a finding of imminent peril to the public health,  
25 safety, or welfare is subject to immediate judicial review upon petition by any person. The sufficiency of  
26 the reasons justifying a finding of imminent peril and the necessity for emergency rulemaking must be  
27 compelling and, as written in the rule adoption notice, must stand on their own merits for purposes of  
28 judicial review. The dissemination of emergency rules required by 2-4-306 must be strictly observed and  
29 liberally accomplished.

30 (2) A statute enacted or amended to be effective prior to October 1 of the year of enactment or

1 amendment may be implemented by a temporary administrative rule, adopted before October 1 of that year,  
2 upon any abbreviated notice or hearing that the agency finds practicable, but the rule may not be filed with  
3 the secretary of state until at least 30 days have passed since publication of the notice of proposal to adopt  
4 the rule. The temporary rule is effective until October 1 of the year of adoption. The adoption of an identical  
5 rule under 2-4-302 is not precluded during the period that the temporary rule is effective.”

6

7 **Section 14.** Section 2-4-305, MCA, is amended to read:

8 **"2-4-305. Requisites for validity -- authority and statement of reasons.** (1) The agency shall fully  
9 consider ~~fully~~ written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency  
10 shall issue a ~~concise~~ statement of the principal reasons for and against its adoption, comprehensively  
11 incorporating in the statement the reasons for overruling the considerations urged against its adoption. If  
12 substantial differences exist between the rule as proposed and as adopted and the differences have not  
13 been described or set forth in the adopted rule as that rule is printed in the ~~Montana Administrative Register~~  
14 register, the differences must be described in the statement of reasons for and against agency action. When  
15 written or oral submissions have not been received, an agency may omit the statement of reasons.

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

20 (3) Each proposed and adopted rule must include a citation to the specific grant of rulemaking  
21 authority pursuant to which the rule or any part of the rule is adopted. In addition, each proposed and  
22 adopted rule must include a citation to the specific section or sections in the Montana Code Annotated that  
23 the rule purports to implement.

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

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

30 (6) Whenever by the express or implied terms of any statute a state agency has authority to adopt

1 rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, a rule  
2 adopted is not valid or effective unless it is:

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

4 (b) reasonably necessary to effectuate the purpose of the statute. Subject to the provisions of  
5 subsection (8), reasonable necessity must be demonstrated in the agency's notice of proposed rulemaking  
6 and in the written and oral data, views, comments, or testimony submitted by the public or the agency and  
7 considered by the agency.

8 (7) A rule is not valid unless notice of it is given and it is adopted, in ~~substantial~~ compliance with  
9 2-4-302 or 2-4-303 and this section, and unless 2-4-306 is complied with and notice of adoption of the  
10 rule is published within 6 months of the publishing of notice of the proposed rule. If an amended or  
11 supplemental notice of either proposed or final rulemaking, or both, is published concerning the same rule,  
12 the 6-month limit must be determined with reference to the latest notice in all cases.

13 (8) An agency may use an amended proposal notice or the adoption notice to correct deficiencies  
14 in ~~statements of reasonable necessity, in~~ citations of authority for rules, and in citations of sections  
15 implemented by rules. An agency may use an amended proposal notice, but not the adoption notice, to  
16 correct deficiencies in a statement of reasonable necessity."

17

18 **Section 15.** Section 2-4-306, MCA, is amended to read:

19 **"2-4-306. Filing, format, and effective date -- dissemination of emergency rules.** (1) Each agency  
20 shall file with the secretary of state a copy of each rule adopted by it.

21 (2) The secretary of state may prescribe a format, style, and arrangement for notices and rules  
22 ~~which that~~ are filed pursuant to this chapter and may refuse to accept the filing of any notice or rule that  
23 is not in compliance ~~therewith~~ with this chapter. ~~He~~ The secretary of state shall keep and maintain a  
24 permanent register of all notices and rules filed, including superseded and repealed rules, which ~~shall~~ must  
25 be open to public inspection and shall provide copies of any notice or rule upon request of any person.  
26 Unless otherwise provided by statute, the secretary of state may require the payment of the cost of  
27 providing ~~such~~ copies.

28 (3) In the event that the administrative code committee has conducted a poll of the legislature in  
29 accordance with 2-4-403 or the revenue oversight committee has conducted a poll in accordance with  
30 5-18-109, the results of the poll ~~shall~~ must be published with the rule.

1           (4) Each rule ~~shall become~~ becomes effective after publication in the register as provided in  
2 2-4-312, except that:

3           (a) if a later date is required by statute or specified in the rule, the later date ~~shall be~~ is the effective  
4 date;

5           (b) subject to applicable constitutional or statutory provisions:

6           (i) a temporary rule is effective immediately upon filing with the secretary of state or at a stated  
7 date following publication in the register; and

8           (ii) an emergency rule ~~shall become~~ becomes effective ~~immediately upon filing with the secretary~~  
9 ~~of state or~~ at a stated date following publication in the register or immediately upon filing with the secretary  
10 of state if the agency finds that this effective date is necessary because of imminent peril to the public  
11 health, safety, or welfare. The agency's finding and a brief statement of reasons ~~therefor shall~~ for the  
12 finding must be filed with the rule. The agency shall, in addition to the required publication in the register,  
13 take appropriate and extraordinary measures to make emergency rules known to every person who may  
14 be affected by them."

15

-END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0389, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

A bill providing for greater public participation in agency rulemaking and other agency actions, and amending provisions for notice of agency rules and actions.

ASSUMPTIONS:

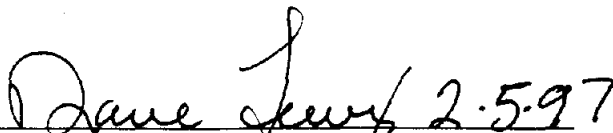
**General Information:**

1. This bill requires notice of agency decisions that are of a significant interest to the public. Section 2(4) defines "significant interest to the public" as the undertaking of an agency action or decision that involves a controversial matter, a fiscal impact on a particular class or group of individuals, of significant citizen interest.
2. A fiscal note response was requested from 28 state agencies in order for the OBPP to prepare the fiscal note for HB 389. Most of the smaller agencies responded with minimal or indeterminable impact. Fifteen agencies responded with some impact, or significant impact. In most cases, current accurate data is not available to provide a good estimate, and the bill is too broad to know exactly what agency functions actually apply.
3. Under Fiscal Information below is a brief description of the three main areas of fiscal concern. On the next page is a listing of the agencies fiscally impacted, and the approximate annual cost of each of the three areas, and FTEs, if needed.
4. It should be noted that the fiscal information appearing in this fiscal note is in summary form due to space constraints. The agency detail for the summary information is available in the OBPP.

**Fiscal Information:**

5. Section 3 requires that each agency create and maintain an interested persons list. The biggest cost in this category is postage, unless FTEs are required to maintain the listing. Most agencies are concerned with the lack of purging directions in the bill, and would appreciate more specifics on who and what.
6. Section 4 requires newspaper notification of agency decisions having a significant interest to the public. For purposes of this bill, most agencies would be using the Sunday rate and the 12 point size. Most agencies currently use the 6 point size. The switch to 12 point automatically doubles notification costs. DPHHS is offering a solution in this area by proposing to send a monthly newsletter to all households in the state, since all their decisions eventually affect all citizens.
7. Increased legal costs are predicted due to: 1) lifting of the 30-day filing requirement and changing to an indefinite period, 2) paying the prevailing plaintiff's legal costs, and 3) an increased number of cases due to greater communication required by this bill. Most agencies did not offer a legal cost impact because of the unavailability of trend caseload, but most agreed the result could be fiscally significant.

(continued)

  
DAVE LEWIS, BUDGET DIRECTOR      DATE  
Office of Budget and Program Planning

BRUCE SIMON, PRIMARY SPONSOR      DATE

Fiscal Note for HB0389, as introduced

**HB 389**

<u>Department of:</u>	<u>Mailing List Impact</u>	<u>Newspaper Ads Impact</u>	<u>Legal Costs</u>	<u>FTEs/ Cost/year</u>
Administration	extensive impact but unable to quantify.			
Agriculture		\$23,000		
Commerce	\$20,400	717,000	**	
Corrections	137,000	1,243,000		5.00/\$110,000
DEQ		251,700		
DNRC	28,000	7,500	**	
Justice	17,000	264,000	**	1.00/\$25,500
Labor	**	185,500		
Comm. Of Pol.	5,000	5,000		
PSC		294,000		
Bd. Of Public Ed.	48,000	700		
PHHS	***2,535,000			2.00/\$68,800
Revenue			\$200,000	
State Fund		15,600		
Transportation	<u>7,600</u>	<u>37,400</u>	<u>**</u>	<u>3.50/\$79,500</u>
Totals	\$2,798,000	\$3,044,400	\$200,000	11.50/\$283,800

\*\* Agency cannot provide an accurate estimate, but believes the impact could be potentially significant.

\*\*\*DPHHS has determined that a monthly newsletter mailed to all Montana households would be less expensive than individual mailings and newspaper advertisements.

FISCAL IMPACT:

	<u>FY98</u>	<u>FY99</u>
<u>Expenditures:</u>	<u>Difference</u>	<u>Difference</u>
FTE	11.50	11.50
Personal services	283,800	283,800
Operating expense	<u>6,042,400</u>	<u>6,042,400</u>
Total	6,326,200	6,326,200

Funding:

General fund (01)	\$2,789,300	2,789,300
State special (02)	1,472,400	1,472,400
Federal special (03)	<u>2,064,500</u>	<u>2,064,500</u>
Total	\$6,326,200	\$6,326,200

Note: The numbers presented are conservative due to the agencies noted above that were unable to provide a reasonable estimate.

Net Impact on Fund Balance: (Revenue minus expense)

General Fund (01)	(3,701,900)	(3,701,900)
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EFFECTS ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES:

The effects cannot be estimated with any degree of accuracy, but could be potentially significant statewide based on page 3, Section 4 amendments to 2-3-104, MCA.

TECHNICAL NOTES:

1. Section 10, by striking "section 9" from existing law, would require payment of attorney's fees in all cases brought under any section of Article II of the Montana Constitution if the state does not prevail. Frivolous suits may result. Moreover, the title of the code section is unchanged by the bill and it therefore appears that the provision is still intended to apply only to cases brought to enforce the right to know provisions of the constitution. This should be clarified in the bill in order to better determine the fiscal impact.
2. Section 12(b) is erroneous in that the notices must be published in the "MAR", not the "ARM".

MOTION TO TAKE FROM TABLE,  
PRINT & PLACE ON 2ND READING

JUDICIARY COMMITTEE

Wm. E. Boharski

House BILL NO. 389

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INTRODUCED BY

*William E. Boharski*  
*McLean Beck*  
*George*  
*Coakley*  
*HRP*

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR GREATER PUBLIC PARTICIPATION IN AGENCY RULEMAKING AND OTHER AGENCY ACTIONS; AMENDING PROVISIONS FOR NOTICE OF AGENCY RULES AND ACTIONS; DEFINING TERMS; CLARIFYING EXISTING PROVISIONS; STRENGTHENING THE REQUIREMENTS FOR AN EMERGENCY RULE; PROHIBITING THE USE OF AN ADOPTION NOTICE TO CURE DEFICIENCIES IN STATEMENTS OF REASONABLE NECESSITY; AND AMENDING SECTIONS 2-3-101, 2-3-102, 2-3-103, 2-3-104, 2-3-105, 2-3-112, 2-3-114, 2-3-203, 2-3-213, 2-3-221, 2-4-102, 2-4-302, 2-4-303, 2-4-305, AND 2-4-306, MCA."

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

**Section 1.** Section 2-3-101, MCA, is amended to read:

"2-3-101. **Legislative intent.** The legislature finds and declares pursuant to the mandate of Article II, section 8, of the 1972 Montana constitution that legislative guidelines should be established to secure to the people of Montana their constitutional right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of the agency and that this part must be liberally construed to achieve that purpose."

**Section 2.** Section 2-3-102, MCA, is amended to read:

"2-3-102. **Definitions.** As used in this part, the following definitions apply:

(1) "Agency" means ~~any~~ a board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts except:

- (a) the legislature ~~and any~~ or a branch, committee, or officer ~~thereof~~ of the legislature;
- (b) the judicial ~~branches and any~~ branch or a committee or officer thereof of the judicial branch;
- (c) the governor, except that an agency is not exempt merely because the governor has been designated as a member ~~thereof~~ of the agency; or
- (d) the state military establishment and agencies concerned with civil defense and recovery from

1 hostile attack.

2 (2) "Agency action" means the whole or a part of, or the equivalent or denial of, the adoption of  
3 an agency rule, the issuance of a license or order, the award of a contract, or ~~the equivalent or denial~~  
4 ~~thereof~~ an agency decision that is of significant interest to the public.

5 (3) "Rule" means any agency regulation, standard, or statement of general applicability that  
6 implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice  
7 requirements of any agency. The term includes the amendment or repeal of a prior rule but does not  
8 include:

9 (a) statements concerning only the internal management of an agency and not affecting private  
10 rights or procedures available to the public; or

11 (b) declaratory rulings as to the applicability of any statutory provision or of any rule.

12 (4) "Significant interest to the public" means the undertaking of an agency action or decision that  
13 involves a controversial matter, a fiscal impact on a particular class or group of individuals, or significant  
14 citizen interest."

15

16 **Section 3.** Section 2-3-103, MCA, is amended to read:

17 **"2-3-103. Public participation -- governor to ~~insure~~ ensure guidelines adopted.** (1) Each agency  
18 shall develop procedures for permitting and encouraging the public to participate in agency decisions that  
19 are of significant interest to the public. The procedures ~~shall assure~~ must ensure adequate notice and assist  
20 public participation before a final agency action is taken that is of significant interest to the public. Each  
21 agency shall create and maintain an interested persons list. Each person submitting oral or written  
22 comments to, attending a hearing of, or in any way contacting the agency for any purpose concerning  
23 agency actions and decisions must be placed on the list by the agency and given notice of each intended  
24 or proposed agency action and each agency decision relating to matters in which the person has expressed  
25 an interest in the person's contacts with the agency.

26 (2) The governor shall ~~insure~~ ensure that each board, bureau, commission, department, authority,  
27 agency, or officer of the state adopts coordinated rules for its programs, ~~which~~ The guidelines shall must  
28 provide policies and procedures to facilitate public participation in those programs, consistent with  
29 subsection (1) ~~of this section.~~ These guidelines ~~shall~~ must be adopted as rules and published in a manner  
30 ~~which~~ that may be provided to a member of the public upon request."



1           **Section 4.** Section 2-3-104, MCA, is amended to read:

2           "2-3-104. **Requirements for compliance with notice provisions.** An agency ~~shall be considered to~~  
3 ~~have complied~~ complies with the notice provisions of 2-3-103 if:

4           (1) an environmental impact statement is prepared and distributed as required by the Montana  
5 Environmental Policy Act, Title 75, chapter 1;

6           ~~(2) a proceeding is held as required by the Montana Administrative Procedure Act;~~

7           ~~(3)~~(2) a public hearing, after appropriate and adequate notice is given, is held pursuant to ~~any other~~  
8 a provision of state law or a local ordinance or resolution; or

9           ~~(4)~~(3) a newspaper of general circulation within the area to be affected by a decision of significant  
10 interest to the public has carried ~~a news story or advertisement~~ an advertisement giving notice of  
11 opportunity to be heard concerning the decision sufficiently prior to a final decision to permit public  
12 comment on the matter. The advertisement must be printed in at least 12-point type and must comply with  
13 the notice requirements of 2-4-302(1). If the newspaper has a Sunday edition, the advertisement must be  
14 in that edition."

15

16           **Section 5.** Section 2-3-105, MCA, is amended to read:

17           "2-3-105. **Supplemental notice by radio or television.** (1) ~~Any~~ An official of the state or ~~any~~ of one  
18 of its political subdivisions who is required by law to publish any a notice required by law may, and is  
19 encouraged to, supplement such the publication by a radio or television broadcast, or both, of a summary  
20 of such the notice or by both of such broadcasts when if in his the official's judgment the public interest  
21 will be served.

22           (2) ~~The~~ When a summary of ~~such a~~ such a notice ~~shall only be read with no reference to any person by~~  
23 ~~name then~~ is broadcast, a candidate for political office may not be referred to.

24           (3) ~~Such announcements shall be made~~ A summary may be broadcast only by ~~duly~~ employed  
25 personnel of the station from which ~~such the~~ the broadcast emanates.

26           (4) ~~Announcements~~ An announcement by a political ~~subdivisions~~ subdivision may be made only  
27 by ~~stations~~ a station situated within the county of origin of the ~~legal~~ notice unless ~~no~~ a broadcast station  
28 ~~exists~~ does not exist in ~~such that~~ that county, in which case ~~announcements~~ the announcement may be made  
29 by a station or stations situated in any county other than the county of origin of the ~~legal~~ notice."  
30

1           **Section 6.** Section 2-3-112, MCA, is amended to read:

2           "2-3-112. **Exceptions.** The provisions of 2-3-103 and 2-3-111 do not apply to:

3           (1) an agency decision that must be made to deal with an emergency situation affecting the public  
4 health, welfare, or safety;

5           (2) an agency decision ~~that must be made to maintain or protect the interests of the agency,~~  
6 ~~including but not limited to the filing of~~ to file a lawsuit in a court of law or ~~becoming~~ to become a party  
7 to an administrative proceeding; or

8           (3) a decision involving no more than a ministerial act."  
9

10          **Section 7.** Section 2-3-114, MCA, is amended to read:

11          "2-3-114. **Enforcement.** The district courts of the state have jurisdiction to set aside or declare  
12 void an agency decision under this part upon petition ~~made within 30 days of the date of the decision of~~  
13 ~~any~~ by a person whose rights have been prejudiced."  
14

15          **Section 8.** Section 2-3-203, MCA, is amended to read:

16          "2-3-203. **Meetings of public agencies and certain associations of public agencies to be open to**  
17 **public -- exceptions.** (1) All meetings of public or governmental bodies, boards, bureaus, commissions,  
18 agencies of the state, or any political subdivision of the state or organizations or agencies supported in  
19 whole or in part by public funds or expending public funds must be open to the public.

20          (2) All meetings of associations that are composed of public or governmental bodies referred to  
21 in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the  
22 public.

23          (3) ~~Provided, however, the~~ The presiding officer of ~~any~~ a meeting subject to subsections (1) and  
24 (2) may close the meeting during the time that the discussion relates to a matter of individual privacy ~~and~~  
25 ~~then if and only if~~ if the presiding officer determines that the demands of individual privacy clearly exceed  
26 the merits of public disclosure. The right of individual privacy may be waived by the individual about whom  
27 the discussion pertains, and, in that event, the meeting must be open.

28          (4) (a) ~~However, except~~ Except as provided in subsection (4)(b), a meeting may be closed to  
29 discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental  
30 effect on the litigating position of the public agency.

1 (b) A meeting may not be closed to discuss strategy to be followed in litigation involving the  
 2 enforcement or preservation of a constitutional right of the people or in which the only parties are public  
 3 bodies or associations described in subsections (1) and (2).

4 (5) ~~Any~~ A committee or subcommittee appointed by a public body or an association described in  
 5 subsection (2) for the purpose of conducting business ~~which~~ that is within the jurisdiction of that agency  
 6 is subject to the requirements of this section."

7  
 8 **Section 9.** Section 2-3-213, MCA, is amended to read:

9 "**2-3-213. Voidability.** ~~Any~~ A decision made in violation of 2-3-203 may be declared void by a  
 10 district court having jurisdiction. ~~A suit to void any such decision must be commenced within 30 days of~~  
 11 ~~the decision."~~

12  
 13 **Section 10.** Section 2-3-221, MCA, is amended to read:

14 "**2-3-221. Costs and attorney fees to plaintiff in certain actions to enforce constitutional right to**  
 15 **know.** A plaintiff who prevails in an action brought in district court to enforce ~~his~~ the plaintiff's rights under  
 16 Article II, ~~section 9,~~ of the Montana constitution ~~may~~ must be awarded ~~his~~ costs and reasonable attorneys'  
 17 attorney fees as a matter of course. A prevailing plaintiff who is not represented by an attorney must be  
 18 awarded 90% of what the judge determines would be a reasonable attorney fee if the plaintiff had been  
 19 represented by an attorney."

20  
 21 **Section 11.** Section 2-4-102, MCA, is amended to read:

22 "**2-4-102. Definitions.** For purposes of this chapter, the following definitions apply:

23 (1) "Administrative code committee" or "committee" means the committee provided for in Title 5,  
 24 chapter 14.

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

27 (i) the state board of pardons and parole, except that the board is subject to the requirements of  
 28 2-4-103, 2-4-201, 2-4-202, and 2-4-306 and its rules must be published in the ~~Administrative Rules of~~  
 29 ~~Montana~~ ARM and the ~~Montana Administrative Register~~ register;

30 (ii) the supervision and administration of a penal institution with regard to the institutional

1 supervision, custody, control, care, or treatment of youths or prisoners;

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

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

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

6 (3) "Agency action" means the whole or a part of, or the equivalent or denial of, the adoption of  
7 an agency rule, the issuance of a license or order, the award of a contract, or an agency decision that is  
8 of significant interest to the public.

9 ~~(3)~~(4) "ARM" means the Administrative Rules of Montana.

10 ~~(4)~~(5) "Contested case" means a proceeding before an agency in which a determination of legal  
11 rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The  
12 term includes but is not restricted to ratemaking, price fixing, and licensing.

13 (6) "Interested person" means a person known to the committee or to an agency to have  
14 demonstrated in any way an interest concerning agency actions or other agency administrative matters.

15 ~~(5)~~(7) "License" includes the whole or part of ~~any~~ an agency permit, certificate, approval,  
16 registration, charter, or other form of permission required by law but does not include a license required  
17 solely for revenue purposes.

18 ~~(6)~~(8) "Licensing" includes ~~any~~ an agency process respecting the grant, denial, renewal, revocation,  
19 suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.

20 ~~(7)~~(9) "Party" means a person named or admitted as a party or properly seeking and entitled as of  
21 right to be admitted as a party, but ~~nothing in~~ this chapter may not be construed to prevent an agency from  
22 admitting any person as a party for limited purposes.

23 ~~(8)~~(10) "Person" means an individual, partnership, corporation, association, governmental  
24 subdivision, agency, or public organization of any character.

25 ~~(9)~~(11) "Register" means the Montana Administrative Register.

26 ~~(10)~~(12) "Rule" means each agency regulation, standard, or statement of general applicability that  
27 implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice  
28 requirements of an agency. The term includes the amendment or repeal of a prior rule but does not include:

29 (a) statements concerning only the internal management of an agency and not affecting private  
30 rights or procedures available to the public;

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

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

4 (d) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when  
5 there is a statutory requirement for the publication of the rules and rules adopted annually or biennially  
6 relating to the seasonal recreational use of lands and waters owned or controlled by the state when the  
7 substance of the rules is indicated to the public by means of signs or signals;

8 (e) rules implementing the state personnel classification plan, the state wage and salary plan, or  
9 the statewide budgeting and accounting system;

10 (f) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in  
11 accordance with 2-4-306 and must be published in the ~~Administrative Rules of Montana~~ ARM.

12 (13) "Significant interest to the public", when used in reference to agency action, means agency  
13 action that involves a controversial matter, a fiscal impact on a particular class or group of individuals, or  
14 significant citizen interest.

15 ~~(14)~~(14) "Substantive rules" are either:

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

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

22

23 **Section 12.** Section 2-4-302, MCA, is amended to read:

24 **"2-4-302. Notice, hearing, and submission of views.** (1) Prior to the adoption, amendment, or  
25 repeal of ~~any~~ a rule, the agency shall give written notice of its intended action. The notice ~~shall~~ must, at  
26 a minimum, include a statement of either the terms or substance of the intended action or a description of  
27 the subjects and issues involved, the rationale for the intended action, and the time when, place where,  
28 and manner in which interested persons may present their views ~~thereon~~ on the intended action. To  
29 promote the public's full comprehension of the notice, the notice must be written in plain and clear English  
30 and use familiar and understandable words and terms.

1           (2) (a) The notice ~~shall~~ must be filed with the secretary of state for publication in the register, as  
2 provided in 2-4-312, and mailed within 3 days of publication to interested persons who have made timely  
3 requests to the agency ~~for notice of its rulemaking proceedings~~ to be informed of agency actions and to  
4 the office of any professional, trade, or industrial society or organization or member ~~thereof~~ which of those  
5 entities that has filed a request with the administrative code committee ~~when such request that~~ has been  
6 forwarded to the agency as provided in subsection (2)(b). Each agency shall create and maintain a list of  
7 interested persons. A person who submits an oral or written comment, attends a hearing, or contacts an  
8 agency by any means and for any purpose in regard to intended agency action must be informed of the list  
9 by the agency.

10           (b) The administrative code committee shall forward a list of all organizations or interested persons  
11 who have submitted a request to be informed of agency actions to all agencies publishing rulemaking  
12 notices in the ~~Montana Administrative Register~~ ARM. The list must be amended by the agency upon request  
13 of any interested person requesting to be added to or deleted from the list.

14           (c) The notice ~~shall~~ must be published and mailed at least 30 days in advance of the agency's  
15 intended action. If the intended action is of significant interest to the public, the notice must, at a  
16 minimum, be published as required in 2-3-104(3).

17           (3) If ~~any~~ a statute provides for a ~~different~~ different method of publication different from that provided in  
18 subsection (2), the affected agency shall comply with the statute in addition to the requirements contained  
19 ~~herein in this section~~. However, ~~in no case may~~ the notice period may not be less than 30 days or more  
20 than 6 months.

21           (4) Prior to the adoption, amendment, or repeal of any rule, the agency shall afford interested  
22 persons at least 20 days' notice of a hearing and 28 days from the day of notice to submit data, views,  
23 or arguments, orally or in writing. In the case of substantive rules, the notice of proposed rulemaking must  
24 state that opportunity for oral hearing ~~shall~~ must be granted if requested by either 10% or 25, whichever  
25 is less, of the persons who will be directly affected by the proposed rule, by a governmental subdivision  
26 or agency, by the administrative code committee, or by an association having not less than 25 members  
27 who will be directly affected.

28           (5) An agency may continue a hearing date for cause. In the discretion of the agency, contested  
29 case procedures need not be followed in hearings held pursuant to this section. If a hearing is otherwise  
30 required by statute, nothing ~~herein in this section~~ alters that requirement.

1 (6) If an agency fails to publish a notice of adoption within the time required by 2-4-305(7) and  
2 the agency again proposes the same rule for adoption, amendment, or repeal, the proposal must be  
3 considered a new proposal for purposes of compliance with this chapter.

4 (7) At the commencement of ~~any~~ a hearing on the intended action, the person designated by the  
5 agency to preside at the hearing shall:

6 (a) read aloud the "Notice of Function of Administrative Code Committee" appearing in the register;

7 (b) explain the primary function and purpose of the administrative code committee and state how  
8 the administrative code committee may be contacted; and

9 (c) inform the persons at the hearing of the provisions of subsection (2)(a) and provide them an  
10 opportunity to place their names on the list."

11  
12 **Section 13.** Section 2-4-303, MCA, is amended to read:

13 **"2-4-303. Emergency or temporary rules.** (1) If an agency finds that an imminent peril to the public  
14 health, safety, or welfare requires adoption of a rule upon fewer than 30 days' notice and states in writing  
15 its reasons for that finding, it may proceed upon special notice filed with the committee, without prior  
16 notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an  
17 emergency rule. The rule may be effective for a period not longer than 120 days, after which a new  
18 emergency rule with the same or substantially the same text may not be adopted, but the adoption of an  
19 identical rule under 2-4-302 is not precluded. Because the exercise of emergency rulemaking power  
20 precludes the people's constitutional right to prior notice and participation in the operations of their  
21 government, it constitutes the exercise of extraordinary power requiring extraordinary safeguards against  
22 abuse. An emergency rule may be adopted only in circumstances that truly and clearly constitute an  
23 existing imminent peril to the public health, safety, or welfare that cannot be averted or remedied by any  
24 other administrative act. The sufficiency of the reasons for a finding of imminent peril to the public health,  
25 safety, or welfare is subject to immediate judicial review upon petition by any person. The sufficiency of  
26 the reasons justifying a finding of imminent peril and the necessity for emergency rulemaking must be  
27 compelling and, as written in the rule adoption notice, must stand on their own merits for purposes of  
28 judicial review. The dissemination of emergency rules required by 2-4-306 must be strictly observed and  
29 liberally accomplished.

30 (2) A statute enacted or amended to be effective prior to October 1 of the year of enactment or

1 amendment may be implemented by a temporary administrative rule, adopted before October 1 of that year,  
2 upon any abbreviated notice or hearing that the agency finds practicable, but the rule may not be filed with  
3 the secretary of state until at least 30 days have passed since publication of the notice of proposal to adopt  
4 the rule. The temporary rule is effective until October 1 of the year of adoption. The adoption of an identical  
5 rule under 2-4-302 is not precluded during the period that the temporary rule is effective."  
6

7 **Section 14.** Section 2-4-305, MCA, is amended to read:

8 **"2-4-305. Requisites for validity -- authority and statement of reasons.** (1) The agency shall fully  
9 consider ~~fully~~ written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency  
10 shall issue a ~~concise~~ statement of the principal reasons for and against its adoption, comprehensively  
11 incorporating in the statement the reasons for overruling the considerations urged against its adoption. If  
12 substantial differences exist between the rule as proposed and as adopted and the differences have not  
13 been described or set forth in the adopted rule as that rule is printed in the ~~Montana Administrative Register~~  
14 register, the differences must be described in the statement of reasons for and against agency action. When  
15 written or oral submissions have not been received, an agency may omit the statement of reasons.

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

20 (3) Each proposed and adopted rule must include a citation to the specific grant of rulemaking  
21 authority pursuant to which the rule or any part of the rule is adopted. In addition, each proposed and  
22 adopted rule must include a citation to the specific section or sections in the Montana Code Annotated that  
23 the rule purports to implement.

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

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

30 (6) Whenever by the express or implied terms of any statute a state agency has authority to adopt



1 rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, a rule  
2 adopted is not valid or effective unless it is:

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

4 (b) reasonably necessary to effectuate the purpose of the statute. Subject to the provisions of  
5 subsection (8), reasonable necessity must be demonstrated in the agency's notice of proposed rulemaking  
6 and in the written and oral data, views, comments, or testimony submitted by the public or the agency and  
7 considered by the agency.

8 (7) A rule is not valid unless notice of it is given and it is adopted, in ~~substantial~~ compliance with  
9 2-4-302 or 2-4-303 and this section, and unless 2-4-306 is complied with and notice of adoption of the  
10 rule is published within 6 months of the publishing of notice of the proposed rule. If an amended or  
11 supplemental notice of either proposed or final rulemaking, or both, is published concerning the same rule,  
12 the 6-month limit must be determined with reference to the latest notice in all cases.

13 (8) An agency may use an amended proposal notice or the adoption notice to correct deficiencies  
14 in ~~statements of reasonable necessity~~, in citations of authority for rules, and in citations of sections  
15 implemented by rules. An agency may use an amended proposal notice, but not the adoption notice, to  
16 correct deficiencies in a statement of reasonable necessity.

17

18 **Section 15.** Section 2-4-306, MCA, is amended to read:

19 "**2-4-306. Filing, format, and effective date -- dissemination of emergency rules.** (1) Each agency  
20 shall file with the secretary of state a copy of each rule adopted by it.

21 (2) The secretary of state may prescribe a format, style, and arrangement for notices and rules  
22 ~~which that~~ are filed pursuant to this chapter and may refuse to accept the filing of any notice or rule that  
23 is not in compliance ~~therewith~~ with this chapter. ~~He~~ The secretary of state shall keep and maintain a  
24 permanent register of all notices and rules filed, including superseded and repealed rules, which ~~shall~~ must  
25 be open to public inspection and shall provide copies of any notice or rule upon request of any person.  
26 Unless otherwise provided by statute, the secretary of state may require the payment of the cost of  
27 providing ~~such~~ copies.

28 (3) In the event that the administrative code committee has conducted a poll of the legislature in  
29 accordance with 2-4-403 or the revenue oversight committee has conducted a poll in accordance with  
30 5-18-109, the results of the poll ~~shall~~ must be published with the rule.

1           (4) Each rule ~~shall become~~ becomes effective after publication in the register as provided in  
2 2-4-312, except that:  
3           (a) if a later date is required by statute or specified in the rule, the later date ~~shall be~~ is the effective  
4 date;  
5           (b) subject to applicable constitutional or statutory provisions:  
6           (i) a temporary rule is effective immediately upon filing with the secretary of state or at a stated  
7 date following publication in the register; and  
8           (ii) an emergency rule ~~shall become~~ becomes effective ~~immediately upon filing with the secretary~~  
9 ~~of state or~~ at a stated date following publication in the register or immediately upon filing with the secretary  
10 of state if the agency finds that this effective date is necessary because of imminent peril to the public  
11 health, safety, or welfare. The agency's finding and a brief statement of reasons ~~therefor shall~~ for the  
12 finding must be filed with the rule. The agency shall, in addition to the required publication in the register,  
13 take appropriate and extraordinary measures to make emergency rules known to every person who may  
14 be affected by them."

15

-END-

## HOUSE BILL NO. 389

INTRODUCED BY SIMON, ELLIS, GROSFIELD, GRINDE, BAER, BOHLINGER, SLITER, MCCANN, PECK,  
OHS, KNOX, BEAUDRY, DEBRUYCKER, HARP, COCCHIARELLA, BOHARSKI

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR GREATER PUBLIC PARTICIPATION IN AGENCY  
RULEMAKING AND OTHER AGENCY ACTIONS; AMENDING PROVISIONS FOR NOTICE OF AGENCY RULES  
AND ACTIONS; DEFINING TERMS; CLARIFYING EXISTING PROVISIONS; STRENGTHENING THE  
REQUIREMENTS FOR AN EMERGENCY RULE; PROHIBITING THE USE OF AN ADOPTION NOTICE TO CURE  
DEFICIENCIES IN STATEMENTS OF REASONABLE NECESSITY; AND AMENDING SECTIONS 2-3-101,  
2-3-102, 2-3-103, 2-3-104, 2-3-105, ~~2-3-112~~, 2-3-114, ~~2-3-203~~, 2-3-213, 2-3-221, 2-4-102, 2-4-302,  
2-4-303, 2-4-305, AND 2-4-306, MCA."

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

**Section 1.** Section 2-3-101, MCA, is amended to read:

**"2-3-101. Legislative intent.** The legislature finds and declares pursuant to the mandate of Article  
II, section 8, of the 1972 Montana constitution that legislative guidelines should be established to secure  
to the people of Montana their constitutional right to be afforded reasonable opportunity to participate in  
the operation of governmental agencies prior to the final decision of the agency and that this part must be  
liberally construed to achieve that purpose."

**Section 2.** Section 2-3-102, MCA, is amended to read:

**"2-3-102. Definitions.** As used in this part, the following definitions apply:

(1) "Agency" means ~~any~~ a board, bureau, commission, department, authority, or officer of the  
state or local government authorized by law to make rules, determine contested cases, or enter into  
contracts except:

(a) the legislature ~~and any~~ or a branch, committee, or officer ~~thereof~~ of the legislature;

(b) the judicial ~~branches and any~~ branch or a committee or officer ~~thereof~~ of the judicial branch;

(c) the governor, except that an agency is not exempt merely because the governor has been  
designated as a member ~~thereof~~ of the agency; or

1 (d) the state military establishment and agencies concerned with civil defense and recovery from  
2 hostile attack.

3 (2) "Agency action" means the whole or a part of, or the equivalent or denial of, the adoption of  
4 an agency rule, the issuance of a license or order, the award of a contract, or ~~the equivalent or denial~~  
5 ~~thereof~~ an agency decision that is of significant interest to the public.

6 (3) "Rule" means any agency regulation, standard, or statement of general applicability that  
7 implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice  
8 requirements of any agency. The term includes the amendment or repeal of a prior rule but does not  
9 include:

10 (a) statements concerning only the internal management of an agency and not affecting private  
11 rights or procedures available to the public; or

12 (b) declaratory rulings as to the applicability of any statutory provision or of any rule.

13 (4) "Significant interest to the public" means the undertaking of an agency action or decision that  
14 involves a controversial matter THAT THE AGENCY KNOWS TO BE CONTROVERSIAL, a SIGNIFICANT  
15 fiscal impact on a particular class or group of individuals, or significant citizen interest."

16

17 **Section 3.** Section 2-3-103, MCA, is amended to read:

18 **"2-3-103. Public participation -- governor to insure ensure guidelines adopted.** (1) Each agency  
19 shall develop procedures for permitting and encouraging the public to participate in agency decisions that  
20 are of significant interest to the public. The procedures ~~shall assure~~ must ensure adequate notice and assist  
21 public participation before a final agency action is taken that is of significant interest to the public. Each  
22 agency shall create and maintain an interested persons list CONTAINING THE SUBJECT OR SUBJECTS IN  
23 WHICH EACH PERSON ON THE LIST IS INTERESTED. Each person submitting oral or written comments  
24 to, attending a hearing of, or in any way contacting the agency for any purpose concerning agency actions  
25 and decisions must be ADVISED OF AND GIVEN AN OPPORTUNITY TO BE placed on the list by the agency  
26 and given notice of each intended or proposed agency action and each agency decision relating to matters  
27 in AS TO which the person has expressed an interest in the person's contacts with the agency REQUESTED  
28 NOTICE.

29 (2) The governor shall ~~insure~~ ensure that each board, bureau, commission, department, authority,  
30 agency, or officer of the state adopts coordinated rules for its programs, ~~which~~ The guidelines shall must

1 provide policies and procedures to facilitate public participation in those programs, consistent with  
 2 subsection (1) ~~of this section~~. These guidelines ~~shall~~ must be adopted as rules and published in a manner  
 3 ~~which~~ that may be provided to a member of the public upon request."

4

5 **Section 4.** Section 2-3-104, MCA, is amended to read:

6 **"2-3-104. Requirements for compliance with notice provisions.** An agency ~~shall be considered to~~  
 7 ~~have complied~~ complies with the notice provisions of 2-3-103 if:

8 (1) an environmental impact statement is prepared and distributed as required by the Montana  
 9 Environmental Policy Act, Title 75, chapter 1;

10 ~~(2) a proceeding is held as required by the Montana Administrative Procedure Act;~~

11 (2) A PROCEEDING IS HELD AS REQUIRED BY THE MONTANA ADMINISTRATIVE PROCEDURE  
 12 ACT AND NOTICE OF THE PROCEEDING IS EITHER POSTED ON THE STATE ELECTRONIC BULLETIN  
 13 BOARD OR IS PUBLISHED IN A PRESS RELEASE ISSUED BY THE AGENCY;

14 ~~(3)(2)(3) a public hearing, after appropriate and adequate notice is given, is held pursuant to any~~  
 15 ~~other~~ a provision of state law or a local ordinance or resolution; or

16 ~~(4)(3)(4) a newspaper of general circulation within the area to be affected by a decision of~~  
 17 significant interest to the public has carried ~~a news story or advertisement~~ A NEWS STORY OR an  
 18 advertisement giving notice of opportunity to be heard concerning the decision sufficiently prior to a final  
 19 decision to permit public comment on the matter. The AN advertisement must be printed in at least  
 20 12-point type and must comply with the notice requirements of 2-4-302(1). If the newspaper has a Sunday  
 21 edition, the advertisement must be in that edition."

22

23 **Section 5.** Section 2-3-105, MCA, is amended to read:

24 **"2-3-105. Supplemental notice by radio or television.** (1) ~~Any~~ An official of the state or ~~any~~ of one  
 25 of its political subdivisions who is required by law to publish ~~any~~ a notice ~~required by law~~ may, and is  
 26 encouraged to, supplement ~~such~~ the publication by a radio or television broadcast, or both, of a summary  
 27 of ~~such~~ the notice ~~or by both of such broadcasts when~~ if in ~~his~~ the official's judgment the public interest  
 28 will be served.

29 (2) ~~The~~ When a summary of ~~such~~ a notice ~~shall only be read with no reference to any person by~~  
 30 ~~name then~~ is broadcast, a candidate for political office may not be referred to.

1           (3) ~~Such announcements shall be made~~ A summary may be broadcast only by duly employed  
2 personnel of the station from which ~~such~~ the broadcast emanates.

3           (4) ~~Announcements~~ An announcement by a political subdivisions subdivision may be made only  
4 by ~~stations~~ a station situated within the county of origin of the legal notice unless ~~no~~ a broadcast station  
5 ~~exists~~ does not exist in ~~such~~ that county, in which case ~~announcements~~ the announcement may be made  
6 by a station or stations situated in any county other than the county of origin of the legal notice."  
7

8           ~~Section 6. Section 2-3-112, MCA, is amended to read:~~

9           ~~"2-3-112. Exceptions. The provisions of 2-3-103 and 2-3-111 do not apply to:~~

10           ~~(1) an agency decision that must be made to deal with an emergency situation affecting the public~~  
11 ~~health, welfare, or safety;~~

12           ~~(2) an agency decision that must be made to maintain or protect the interests of the agency,~~  
13 ~~including but not limited to the filing of to file a lawsuit in a court of law or becoming to become a party~~  
14 ~~to an administrative proceeding; or~~

15           ~~(3) a decision involving no more than a ministerial act."~~

16  
17           ~~Section 6. Section 2-3-114, MCA, is amended to read:~~

18           ~~"2-3-114. Enforcement. The district courts of the state have jurisdiction to set aside or declare~~  
19 ~~void an agency decision under this part upon petition made within 30 days of the date of the decision of~~  
20 ~~any by a person whose rights have been prejudiced~~ THAT IS FILED WITHIN 30 DAYS AFTER THE DATE  
21 OF THE DECISION OR WITHIN 30 DAYS AFTER THE DECISION BECOMES PUBLIC, WHICHEVER IS  
22 LATER."  
23

24           ~~Section 8. Section 2-3-203, MCA, is amended to read:~~

25           ~~"2-3-203. Meetings of public agencies and certain associations of public agencies to be open to~~  
26 ~~public exceptions. (1) All meetings of public or governmental bodies, boards, bureaus, commissions,~~  
27 ~~agencies of the state, or any political subdivision of the state or organizations or agencies supported in~~  
28 ~~whole or in part by public funds or expending public funds must be open to the public.~~

29           ~~(2) All meetings of associations that are composed of public or governmental bodies referred to~~  
30 ~~in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the~~

1 public.

2 ~~(3) Provided, however, the The presiding officer of any a meeting subject to subsections (1) and~~  
 3 ~~(2) may close the meeting during the time that the discussion relates to a matter of individual privacy and~~  
 4 ~~then if and only if the presiding officer determines that the demands of individual privacy clearly exceed~~  
 5 ~~the merits of public disclosure. The right of individual privacy may be waived by the individual about whom~~  
 6 ~~the discussion pertains, and, in that event, the meeting must be open.~~

7 ~~(4) (a) However, except Except as provided in subsection (4)(b), a meeting may be closed to~~  
 8 ~~discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental~~  
 9 ~~effect on the litigating position of the public agency.~~

10 ~~(b) A meeting may not be closed to discuss strategy to be followed in litigation involving the~~  
 11 ~~enforcement or preservation of a constitutional right of the people or in which the only parties are public~~  
 12 ~~bodies or associations described in subsections (1) and (2).~~

13 ~~(5) Any A committee or subcommittee appointed by a public body or an association described in~~  
 14 ~~subsection (2) for the purpose of conducting business which that is within the jurisdiction of that agency~~  
 15 ~~is subject to the requirements of this section."~~

16

17 **Section 7.** Section 2-3-213, MCA, is amended to read:

18 **"2-3-213. Voidability.** Any A decision made in violation of 2-3-203 may be declared void by a  
 19 district court having jurisdiction. ~~A suit to void any such decision must be commenced within 30 days of~~  
 20 ~~the decision. AN ACTION TO INVALIDATE THE DECISION MUST BE COMMENCED WITHIN 30 DAYS~~  
 21 ~~AFTER THE DATE OF THE DECISION OR WITHIN 30 DAYS AFTER THE DECISION BECOMES PUBLIC,~~  
 22 ~~WHICHEVER IS LATER."~~

23

24 **Section 8.**Section 2-3-221, MCA, is amended to read:

25 **"2-3-221. Costs and attorney fees to plaintiff PARTY in certain actions to enforce constitutional**  
 26 **right to know.** A plaintiff PARTY who prevails in an action brought in district court to enforce his the  
 27 ~~plaintiff's PARTY'S~~ rights under Article II, ~~section 9,~~ of the Montana constitution ~~may must~~ **MAY** be  
 28 awarded his costs and reasonable ~~attorneys' attorney~~ fees ~~as a matter of course.~~ **A prevailing plaintiff**  
 29 **PARTY who is not represented by an attorney must be awarded 90% of what the judge determines would**  
 30 **be a reasonable attorney fee if the plaintiff PARTY had been represented by an attorney."**

1           **Section 9.** Section 2-4-102, MCA, is amended to read:

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

3           (1) "Administrative code committee" or "committee" means the committee provided for in Title 5,  
4 chapter 14.

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

7           (i) the state board of pardons and parole, except that the board is subject to the requirements of  
8 2-4-103, 2-4-201, 2-4-202, and 2-4-306 and its rules must be published in the ~~Administrative Rules of~~  
9 ~~Montana~~ ARM and the ~~Montana Administrative Register~~ register;

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

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

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

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

16           (3) "Agency action" means the whole or a part of, or the equivalent or denial of, the adoption of  
17 an agency rule, the issuance of a license or order, the award of a contract, or an agency decision that is  
18 of significant interest to the public.

19           ~~(3)(4)~~ "ARM" means the Administrative Rules of Montana.

20           ~~(4)(5)~~ "Contested case" means a proceeding before an agency in which a determination of legal  
21 rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The  
22 term includes but is not restricted to ratemaking, price fixing, and licensing.

23           ~~(6)~~ "Interested person" means a person known to the committee or to an agency to have WHO  
24 HAS demonstrated in any way TO THE AGENCY an interest concerning agency actions or other agency  
25 administrative matters AND HAS REQUESTED TO BE PLACED ON THE AGENCY'S LIST OF INTERESTED  
26 PERSONS.

27           ~~(6)(7)~~ "License" includes the whole or part of ~~any~~ an agency permit, certificate, approval,  
28 registration, charter, or other form of permission required by law but does not include a license required  
29 solely for revenue purposes.

30           ~~(6)(8)~~ "Licensing" includes ~~any~~ an agency process respecting the grant, denial, renewal, revocation,



1 suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.

2 ~~(7)~~(9) "Party" means a person named or admitted as a party or properly seeking and entitled as of  
3 right to be admitted as a party, but ~~nothing in~~ this chapter may not be construed to prevent an agency from  
4 admitting any person as a party for limited purposes.

5 ~~(8)~~(10) "Person" means an individual, partnership, corporation, association, governmental  
6 subdivision, agency, or public organization of any character.

7 ~~(9)~~(11) "Register" means the Montana Administrative Register.

8 ~~(10)~~(12) "Rule" means each agency regulation, standard, or statement of general applicability that  
9 implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice  
10 requirements of an agency. The term includes the amendment or repeal of a prior rule but does not include:

11 (a) statements concerning only the internal management of an agency and not affecting private  
12 rights or procedures available to the public;

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

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

16 (d) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when  
17 there is a statutory requirement for the publication of the rules and rules adopted annually or biennially  
18 relating to the seasonal recreational use of lands and waters owned or controlled by the state when the  
19 substance of the rules is indicated to the public by means of signs or signals;

20 (e) rules implementing the state personnel classification plan, the state wage and salary plan, or  
21 the statewide budgeting and accounting system;

22 (f) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in  
23 accordance with 2-4-306 and must be published in the ~~Administrative Rules of Montana~~ ARM.

24 (13) "Significant interest to the public", when used in reference to agency action, means agency  
25 action that involves a controversial matter THAT THE AGENCY KNOWS TO BE CONTROVERSIAL, a  
26 SIGNIFICANT fiscal impact on a particular class or group of individuals, or significant citizen interest.

27 ~~(11)~~(14) "Substantive rules" are either:

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

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

4  
 5 **Section 10.** Section 2-4-302, MCA, is amended to read:

6 **"2-4-302. Notice, hearing, and submission of views.** (1) Prior to the adoption, amendment, or  
 7 repeal of ~~any a~~ rule, the agency shall give written notice of its intended action. The notice ~~shall~~ must, at  
 8 a minimum, include a statement of either the terms or substance of the intended action or a description of  
 9 the subjects and issues involved, the rationale for the intended action, and the time when, place where,  
 10 and manner in which interested persons may present their views ~~thereon~~ on the intended action. To  
 11 promote the public's full comprehension of the notice, the notice must be written in plain and clear English  
 12 and use familiar and understandable words and terms.

13 (2) (a) The notice ~~shall~~ must be filed with the secretary of state for publication in the register, as  
 14 provided in 2-4-312, and mailed within 3 days of publication to interested persons who have made timely  
 15 requests to the agency ~~for notice of its rulemaking proceedings to be informed of agency actions~~ and to  
 16 the office of any professional, trade, or industrial society or organization or member ~~thereof which~~ of those  
 17 entities that has filed a request with the administrative code committee ~~when such request that~~ has been  
 18 forwarded to the agency as provided in subsection (2)(b). Each agency shall create and maintain a list of  
 19 interested persons AND THE SUBJECT OR SUBJECTS IN WHICH EACH PERSON ON THE LIST IS  
 20 INTERESTED. A person who submits an oral or written comment, attends a hearing, or contacts an agency  
 21 by any means and for any purpose in regard to intended PROPOSED agency action must be informed of  
 22 the list by the agency.

23 (b) The administrative code committee shall forward a list of all organizations or interested persons  
 24 who have submitted a request to be informed of agency actions to all agencies publishing rulemaking  
 25 notices in the ~~Montana Administrative Register~~ ARM. The list must be amended by the agency upon request  
 26 of any interested person requesting to be added to or deleted from the list.

27 (c) The notice ~~shall~~ must be published and mailed at least 30 days in advance of the agency's  
 28 intended action. If the intended action is of significant interest to the public, the notice must, at a  
 29 minimum, be published as required in 2-3-104(3).

30 (3) If ~~any a~~ statute provides for a ~~different~~ method of publication different from that provided in

1 subsection (2), the affected agency shall comply with the statute in addition to the requirements contained  
2 herein in this section. However, ~~in no case may~~ the notice period may not be less than 30 days or more  
3 than 6 months.

4 (4) Prior to the adoption, amendment, or repeal of any rule, the agency shall afford interested  
5 persons at least 20 days' notice of a hearing and 28 days from the day of notice to submit data, views,  
6 or arguments, orally or in writing. In the case of substantive rules, the notice of proposed rulemaking must  
7 state that opportunity for oral hearing ~~shall~~ must be granted if requested by either 10% or 25, whichever  
8 is less, of the persons who will be directly affected by the proposed rule, by a governmental subdivision  
9 or agency, by the administrative code committee, or by an association having not less than 25 members  
10 who will be directly affected.

11 (5) An agency may continue a hearing date for cause. In the discretion of the agency, contested  
12 case procedures need not be followed in hearings held pursuant to this section. If a hearing is otherwise  
13 required by statute, nothing ~~herein~~ in this section alters that requirement.

14 (6) If an agency fails to publish a notice of adoption within the time required by 2-4-305(7) and  
15 the agency again proposes the same rule for adoption, amendment, or repeal, the proposal must be  
16 considered a new proposal for purposes of compliance with this chapter.

17 (7) At the commencement of ~~any~~ a hearing on the intended action, the person designated by the  
18 agency to preside at the hearing shall:

- 19 (a) read aloud the "Notice of Function of Administrative Code Committee" appearing in the register;  
20 (b) explain the primary function and purpose of the administrative code committee and state how  
21 the administrative code committee may be contacted; and  
22 (c) inform the persons at the hearing of the provisions of subsection (2)(a) and provide them an  
23 opportunity to place their names on the list."

24  
25 **Section 11.** Section 2-4-303, MCA, is amended to read:

26 **"2-4-303. Emergency or temporary rules.** (1) If an agency finds that an imminent peril to the public  
27 health, safety, or welfare requires adoption of a rule upon fewer than 30 days' notice and states in writing  
28 its reasons for that finding, it may proceed upon special notice filed with the committee, without prior  
29 notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an  
30 emergency rule. The rule may be effective for a period not longer than 120 days, after which a new

1 emergency rule with the same or substantially the same text may not be adopted, but the adoption of an  
 2 identical rule under 2-4-302 is not precluded. Because the exercise of emergency rulemaking power  
 3 precludes the people's constitutional right to prior notice and participation in the operations of their  
 4 government, it constitutes the exercise of extraordinary power requiring extraordinary safeguards against  
 5 abuse. An emergency rule may be adopted only in circumstances that truly and clearly constitute an  
 6 existing imminent peril to the public health, safety, or welfare that cannot be averted or remedied by any  
 7 other administrative act. The sufficiency of the reasons for a finding of imminent peril to the public health,  
 8 safety, or welfare is subject to immediate judicial review upon petition by any person. The sufficiency of  
 9 the reasons justifying a finding of imminent peril and the necessity for emergency rulemaking must be  
 10 compelling and, as written in the rule adoption notice, must stand on their own merits for purposes of  
 11 judicial review. The dissemination of emergency rules required by 2-4-306 must be strictly observed and  
 12 liberally accomplished.

13 (2) A statute enacted or amended to be effective prior to October 1 of the year of enactment or  
 14 amendment may be implemented by a temporary administrative rule, adopted before October 1 of that year,  
 15 upon any abbreviated notice or hearing that the agency finds practicable, but the rule may not be filed with  
 16 the secretary of state until at least 30 days have passed since publication of the notice of proposal to adopt  
 17 the rule. The temporary rule is effective until October 1 of the year of adoption. The adoption of an identical  
 18 rule under 2-4-302 is not precluded during the period that the temporary rule is effective."  
 19

20 **Section 12.** Section 2-4-305, MCA, is amended to read:

21 **"2-4-305. Requisites for validity -- authority and statement of reasons.** (1) The agency shall fully  
 22 consider ~~fully~~ written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency  
 23 shall issue a ~~concise~~ **CONCISE** statement of the principal reasons for and against its adoption,  
 24 comprehensively incorporating in the statement the reasons for overruling the considerations urged against  
 25 its adoption. If substantial differences exist between the rule as proposed and as adopted and the  
 26 differences have not been described or set forth in the adopted rule as that rule is printed in the ~~Montana~~  
 27 ~~Administrative Register~~ register, the differences must be described in the statement of reasons for and  
 28 against agency action. When written or oral submissions have not been received, an agency may omit the  
 29 statement of reasons.

30 (2) Rules may not unnecessarily repeat statutory language. Whenever it is necessary to refer to

1 statutory language in order to convey the meaning of a rule interpreting the language, the reference must  
2 clearly indicate the portion of the language that is statutory and the portion that is an amplification of the  
3 language.

4 (3) Each proposed and adopted rule must include a citation to the specific grant of rulemaking  
5 authority pursuant to which the rule or any part of the rule is adopted. In addition, each proposed and  
6 adopted rule must include a citation to the specific section or sections in the Montana Code Annotated that  
7 the rule purports to implement.

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

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

14 (6) Whenever by the express or implied terms of any statute a state agency has authority to adopt  
15 rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, a rule  
16 adopted is not valid or effective unless it is:

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

18 (b) reasonably necessary to effectuate the purpose of the statute. Subject to the provisions of  
19 subsection (8), reasonable necessity must be demonstrated in the agency's notice of proposed rulemaking  
20 and in the written and oral data, views, comments, or testimony submitted by the public or the agency and  
21 considered by the agency.

22 (7) A rule is not valid unless notice of it is given and it is adopted, in ~~substantial~~ compliance with  
23 2-4-302 or 2-4-303 and this section, and unless 2-4-306 is complied with and notice of adoption of the  
24 rule is published within 6 months of the publishing of notice of the proposed rule. If an amended or  
25 supplemental notice of either proposed or final rulemaking, or both, is published concerning the same rule,  
26 the 6-month limit must be determined with reference to the latest notice in all cases.

27 (8) An agency may use an amended proposal notice or the adoption notice to correct deficiencies  
28 in ~~statements of reasonable necessity~~, in citations of authority for rules, and in citations of sections  
29 implemented by rules. An agency may use an amended proposal notice, but not the adoption notice, to  
30 correct deficiencies in a statement of reasonable necessity."

1           **Section 13.** Section 2-4-306, MCA, is amended to read:

2           **"2-4-306. Filing, format, and effective date -- dissemination of emergency rules.** (1) Each agency  
3 shall file with the secretary of state a copy of each rule adopted by it.

4           (2) The secretary of state may prescribe a format, style, and arrangement for notices and rules  
5 ~~which that~~ are filed pursuant to this chapter and may refuse to accept the filing of any notice or rule that  
6 is not in compliance ~~therewith~~ with this chapter. ~~He~~ The secretary of state shall keep and maintain a  
7 permanent register of all notices and rules filed, including superseded and repealed rules, which ~~shall~~ must  
8 be open to public inspection and shall provide copies of any notice or rule upon request of any person.  
9 Unless otherwise provided by statute, the secretary of state may require the payment of the cost of  
10 providing ~~such~~ copies.

11           (3) In the event that the administrative code committee has conducted a poll of the legislature in  
12 accordance with 2-4-403 or the revenue oversight committee has conducted a poll in accordance with  
13 5-18-109, the results of the poll ~~shall~~ must be published with the rule.

14           (4) Each rule ~~shall become~~ becomes effective after publication in the register as provided in  
15 2-4-312, except that:

16           (a) if a later date is required by statute or specified in the rule, the later date ~~shall be~~ is the effective  
17 date;

18           (b) subject to applicable constitutional or statutory provisions:

19           (i) a temporary rule is effective immediately upon filing with the secretary of state or at a stated  
20 date following publication in the register; and

21           (ii) an emergency rule ~~shall become~~ becomes effective ~~immediately upon filing with the secretary~~  
22 ~~of state or~~ at a stated date following publication in the register or immediately upon filing with the secretary  
23 of state if the agency finds that this effective date is necessary because of imminent peril to the public  
24 health, safety, or welfare. The agency's finding and a brief statement of reasons ~~therefor shall~~ for the  
25 finding must be filed with the rule. The agency shall, in addition to the required publication in the register,  
26 take appropriate and extraordinary measures to make emergency rules known to every person who may  
27 be affected by them."

28

-END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0389, third reading, as amended

DESCRIPTION OF PROPOSED LEGISLATION:

A bill providing for greater public participation in agency rulemaking and other agency actions, and amending provisions for notice of agency rules and actions.

ASSUMPTIONS:

General Information:

1. This bill requires notice of agency decisions that are of a significant interest to the public. Section 2(4) defines "significant interest to the public" as the undertaking of an agency action or decision that involves a matter that the agency knows to be controversial, a significant fiscal impact on a particular class or group of individuals, or significant citizen interest.
2. A fiscal note response was requested from 28 state agencies in order for the OBPP to prepare the fiscal note for HB 389. Most of the smaller agencies responded with minimal or indeterminable impact. Fifteen agencies responded to the bill, as introduced, with some impact, or significant impact. One of those fifteen agencies determined that the bill, as amended, no longer has a significant fiscal impact. In most cases, current accurate data is not available to provide a precise estimate, and the bill is too broad to know exactly what agency functions actually apply.
3. Under Fiscal Information below is a brief description of the three main areas of fiscal concern. On the next page is a listing of the agencies fiscally impacted, and the approximate annual cost of each of the three areas, and FTE if estimated to be needed.
4. It should be noted that the fiscal information appearing in this fiscal note is in summary form due to space constraints. The agency detail for the summary information is available in the OBPP.

Fiscal Information:

5. Section 3 requires that each agency create and maintain an interested persons list containing the subject or subjects in which each person on the list is interested. The biggest cost in this category is postage, unless FTE are required to maintain the listing. Most agencies are concerned with the lack of purging directions in the bill, and would appreciate more specifics on who and what.
6. Section 4 requires newspaper notification of agency decisions having a significant interest to the public. For purposes of this bill, most agencies would be using the Sunday rate and the 12 point size. Most agencies currently use the 6 point size. The switch to 12 point automatically doubles notification costs. The Department of Public Health and Human Services (DPHHS) is offering a solution in this area by proposing to send a monthly newsletter to all households in the state, since all its decisions eventually affect all citizens.
7. Increased legal costs are predicted due to: 1) paying the prevailing plaintiff's legal costs, and 2) an increased number of cases due to greater communication required by this bill. Most agencies did not offer a legal cost impact because of the unavailability of trend caseload, but most agreed the result significant.

(continued)

*Dave Lewis* 3.14.97

DAVE LEWIS, BUDGET DIRECTOR DATE  
Office of Budget and Program Planning

BRUCE SIMON, PRIMARY SPONSOR DATE

Fiscal Note for HB0389, third reading,  
as amended

HB 389 #2

<u>Department of:</u>	<u>Annual Mailing List Impact</u>	<u>Annual Newspaper Ads Impact</u>	<u>Annual Legal Costs</u>	<u>FTEs/ Cost/year</u>
Administration	extensive impact but unable to quantify.			
Agriculture		-0-		
Commerce	-0-	227,000	**	
Corrections	137,000	1,243,000		5.00/\$110,000
DEQ		229,000		
DNRC	28,000	7,500	**	
Justice	25,000	3,500	**	1.25/\$31,000
Labor	**	185,500		
Comm Pol. Prac.	5,000	5,000		
Public Serv Reg	127,000			
Bd. Of Public Ed	48,000	700		
PHHS	***2,535,000			2.00/\$68,800
Revenue			\$200,000	
State Fund		15,600		
Transportation	<u>7,600</u>	<u>37,400</u>	<u>**</u>	<u>3.50/\$79,500</u>
Totals	\$2,912,600	\$1,954,200	\$200,000	11.75/\$289,300

\*\* Agency cannot provide an accurate estimate, but believes the impact could be potentially significant.

\*\*\*DPHHS has determined that a monthly newsletter mailed to all Montana households would be less expensive than individual mailings and newspaper advertisements.

FISCAL IMPACT:

	<u>FY98</u>	<u>FY99</u>
<u>Expenditures:</u>	<u>Difference</u>	<u>Difference</u>
FTE	11.75	11.75
Personal services	289,300	289,300
Operating expense	<u>5,066,800</u>	<u>5,066,800</u>
Total	5,356,100	5,356,100
<u>Funding:</u>		
General fund (01)	2,747,800	2,747,800
State special (02)	902,800	902,800
Federal special (03)	1,689,900	1,689,900
Proprietary (06)	<u>15,600</u>	<u>15,600</u>
Total	5,356,100	5,356,100

Note: The expenditure amounts presented are conservative due to the agencies noted above that were unable to provide a reasonable estimate.

Net Impact on Fund Balance: (Revenue minus expense)

General Fund (01)	(2,747,800)	(2,747,800)
-------------------	-------------	-------------

EFFECTS ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES:

The amendments to 2-3-104, MCA (section 4 of the bill) apply to local government entities and requires those entities to pay the costs of the required advertisements. The estimated fiscal impact, if any, is not subject to reasonable estimate.



HOUSE BILL NO. 389

INTRODUCED BY SIMON, ELLIS, GROSFIELD, GRINDE, BAER, BOHLINGER, SLITER, MCCANN, PECK,  
OHS, KNOX, BEAUDRY, DEBRUYCKER, HARP, COCCHIARELLA, BOHARSKI

A BILL FOR AN ACT ENTITLED: "~~AN ACT PROVIDING FOR GREATER PUBLIC PARTICIPATION IN AGENCY  
RULEMAKING AND OTHER AGENCY ACTIONS; AMENDING PROVISIONS FOR NOTICE OF AGENCY RULES  
AND ACTIONS; DEFINING TERMS; CLARIFYING EXISTING PROVISIONS;~~ STRENGTHENING THE  
REQUIREMENTS FOR AN EMERGENCY RULE; ~~PROHIBITING THE USE OF AN ADOPTION NOTICE TO CURE  
DEFICIENCIES IN STATEMENTS OF REASONABLE NECESSITY;~~ AND AMENDING SECTIONS ~~2-3-101,  
2-3-102, 2-3-103, 2-3-104, 2-3-105, 2-3-112, 2-3-114, 2-3-203, 2-3-213, 2-3-221, 2-4-102, 2-4-302,  
SECTIONS 2-4-303, 2-4-305, AND 2-4-306, MCA."~~

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

~~Section 1. Section 2-3-101, MCA, is amended to read:~~

~~"2-3-101. Legislative intent. The legislature finds and declares pursuant to the mandate of Article  
II, section 8, of the 1972 Montana constitution that legislative guidelines should be established to secure  
to the people of Montana their constitutional right to be afforded reasonable opportunity to participate in  
the operation of governmental agencies prior to the final decision of the agency and that this part must be  
liberally construed to achieve that purpose."~~

~~Section 2. Section 2-3-102, MCA, is amended to read:~~

~~"2-3-102. Definitions. As used in this part, the following definitions apply:~~

~~(1) "Agency" means any a board, bureau, commission, department, authority, or officer of the  
state or local government authorized by law to make rules, determine contested cases, or enter into  
contracts except:~~

- ~~(a) the legislature and any or a branch, committee, or officer thereof of the legislature;~~
- ~~(b) the judicial branches and any branch or a committee or officer thereof of the judicial branch;~~
- ~~(c) the governor, except that an agency is not exempt merely because the governor has been  
designated as a member thereof of the agency; or~~

1 ~~(d) the state military establishment and agencies concerned with civil defense and recovery from~~  
2 ~~hostile attack.~~

3 ~~(2) "Agency action" means the whole or a part of, or the equivalent or denial of, the adoption of~~  
4 ~~an agency rule, the issuance of a licence or order, the award of a contract, or the equivalent or denial~~  
5 ~~thereof an agency decision that is of significant interest to the public.~~

6 ~~(3) "Rule" means any agency regulation, standard, or statement of general applicability that~~  
7 ~~implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice~~  
8 ~~requirements of any agency. The term includes the amendment or repeal of a prior rule but does not~~  
9 ~~include:~~

10 ~~(a) statements concerning only the internal management of an agency and not affecting private~~  
11 ~~rights or procedures available to the public; or~~

12 ~~(b) declaratory rulings as to the applicability of any statutory provision or of any rule.~~

13 ~~(4) "Significant interest to the public" means the undertaking of an agency action or decision that~~  
14 ~~involves a controversial matter THAT THE AGENCY KNOWS TO BE CONTROVERSIAL, a SIGNIFICANT~~  
15 ~~fiscal impact on a particular class or group of individuals, or significant citizen interest."~~

16

17 **Section 3.** Section 2-3-103, MCA, is amended to read:

18 ~~"2-3-103. Public participation -- governor to insure ensure guidelines adopted. (1) Each agency~~  
19 ~~shall develop procedures for permitting and encouraging the public to participate in agency decisions that~~  
20 ~~are of significant interest to the public. The procedures shall ~~assure~~ must ensure adequate notice and assist~~  
21 ~~public participation before a final agency action is taken that is of significant interest to the public. Each~~  
22 ~~agency shall create and maintain an interested persons list CONTAINING THE SUBJECT OR SUBJECTS IN~~  
23 ~~WHICH EACH PERSON ON THE LIST IS INTERESTED. Each person submitting oral or written comments~~  
24 ~~to, attending a hearing of, or in any way contacting the agency for any purpose concerning agency actions~~  
25 ~~and decisions must be ADVISED OF AND GIVEN AN OPPORTUNITY TO BE placed on the list by the agency~~  
26 ~~and given notice of each intended or proposed agency action and each agency decision relating to matters~~  
27 ~~in AS TO which the person has expressed an interest in the person's contacts with the agency REQUESTED~~  
28 ~~NOTICE.~~

29 ~~(2) The governor shall insure ensure that each board, bureau, commission, department, authority,~~  
30 ~~agency, or officer of the state adopts coordinated rules for its programs, which The guidelines shall must~~

1 ~~provide policies and procedures to facilitate public participation in those programs, consistent with~~  
 2 ~~subsection (1) of this section. These guidelines shall must be adopted as rules and published in a manner~~  
 3 ~~which that may be provided to a member of the public upon request."~~

4  
 5 **Section 4.** ~~Section 2-3-104, MCA, is amended to read:~~

6 ~~"2-3-104. **Requirements for compliance with notice provisions.** An agency shall be considered to~~  
 7 ~~have complied complies with the notice provisions of 2-3-103 if:~~

8 ~~(1) an environmental impact statement is prepared and distributed as required by the Montana~~  
 9 ~~Environmental Policy Act, Title 76, chapter 1;~~

10 ~~(2) a proceeding is held as required by the Montana Administrative Procedure Act;~~

11 ~~(2) A PROCEEDING IS HELD AS REQUIRED BY THE MONTANA ADMINISTRATIVE PROCEDURE~~  
 12 ~~ACT AND NOTICE OF THE PROCEEDING IS EITHER POSTED ON THE STATE ELECTRONIC BULLETIN~~  
 13 ~~BOARD OR IS PUBLISHED IN A PRESS RELEASE ISSUED BY THE AGENCY;~~

14 ~~(3)(2)(3) a public hearing, after appropriate and adequate notice is given, is held pursuant to any~~  
 15 ~~other a provision of state law or a local ordinance or resolution; or~~

16 ~~(4)(3)(4) a newspaper of general circulation within the area to be affected by a decision of~~  
 17 ~~significant interest to the public has carried a news story or advertisement A NEWS STORY OR~~  
 18 ~~advertisement giving notice of opportunity to be heard concerning the decision sufficiently prior to a final~~  
 19 ~~decision to permit public comment on the matter. The AN advertisement must be printed in at least~~  
 20 ~~12 point type and must comply with the notice requirements of 2-4-302(1). If the newspaper has a Sunday~~  
 21 ~~edition, the advertisement must be in that edition."~~

22  
 23 **Section 5.** ~~Section 2-3-105, MCA, is amended to read:~~

24 ~~"2-3-105. **Supplemental notice by radio or television.** (1) Any An official of the state or any of one~~  
 25 ~~of its political subdivisions who is required by law to publish any a notice required by law may, and is~~  
 26 ~~encouraged to, supplement such the publication by a radio or television broadcast, or both, of a summary~~  
 27 ~~of such the notice or by both of such broadcasts when if in his the official's judgment the public interest~~  
 28 ~~will be served.~~

29 ~~(2) The When a summary of such a notice shall only be read with no reference to any person by~~  
 30 ~~name then is broadcast, a candidate for political office may not be referred to.~~

1           ~~(3) Such announcements shall be made. A summary may be broadcast only by duly employed~~  
2 ~~personnel of the station from which such the broadcast emanates.~~

3           ~~(4) Announcements. An announcement by a political subdivisions subdivision may be made only~~  
4 ~~by stations a station situated within the county of origin of the legal notice unless no a broadcast station~~  
5 ~~exists does not exist in such that county, in which case announcements the announcement may be made~~  
6 ~~by a station or stations situated in any county other than the county of origin of the legal notice."~~

7  
8           ~~Section 6. Section 2-3-112, MCA, is amended to read:~~

9           ~~"2-3-112. Exceptions. The provisions of 2-3-103 and 2-3-111 do not apply to:~~

10           ~~(1) an agency decision that must be made to deal with an emergency situation affecting the public~~  
11 ~~health, welfare, or safety;~~

12           ~~(2) an agency decision that must be made to maintain or protect the interests of the agency,~~  
13 ~~including but not limited to the filing of to file a lawsuit in a court of law or becoming to become a party~~  
14 ~~to an administrative proceeding; or~~

15           ~~(3) a decision involving no more than a ministerial act."~~

16  
17           ~~Section 6. Section 2-3-114, MCA, is amended to read:~~

18           ~~"2-3-114. Enforcement. The district courts of the state have jurisdiction to set aside or declare~~  
19 ~~void an agency decision under this part upon petition made within 30 days of the date of the decision of~~  
20 ~~any by a person whose rights have been prejudiced THAT IS FILED WITHIN 30 DAYS AFTER THE DATE~~  
21 ~~OF THE DECISION OR WITHIN 30 DAYS AFTER THE DECISION BECOMES PUBLIC, WHICHEVER IS~~  
22 ~~LATER."~~

23  
24           ~~Section 8. Section 2-3-203, MCA, is amended to read:~~

25           ~~"2-3-203. Meetings of public agencies and certain associations of public agencies to be open to~~  
26 ~~public exceptions. (1) All meetings of public or governmental bodies, boards, bureaus, commissions,~~  
27 ~~agencies of the state, or any political subdivision of the state or organizations or agencies supported in~~  
28 ~~whole or in part by public funds or expending public funds must be open to the public.~~

29           ~~(2) All meetings of associations that are composed of public or governmental bodies referred to~~  
30 ~~in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the~~

1 public.

2 ~~(3) Provided, however, the The presiding officer of any a meeting subject to subsections (1) and~~  
 3 ~~(2) may close the meeting during the time that the discussion relates to a matter of individual privacy and~~  
 4 ~~then if and only if the presiding officer determines that the demands of individual privacy clearly exceed~~  
 5 ~~the merits of public disclosure. The right of individual privacy may be waived by the individual about whom~~  
 6 ~~the discussion pertains, and, in that event, the meeting must be open.~~

7 ~~(4) (a) However, except Except as provided in subsection (4)(b), a meeting may be closed to~~  
 8 ~~discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental~~  
 9 ~~effect on the litigating position of the public agency.~~

10 ~~(b) A meeting may not be closed to discuss strategy to be followed in litigation involving the~~  
 11 ~~enforcement or preservation of a constitutional right of the people or in which the only parties are public~~  
 12 ~~bodies or associations described in subsections (1) and (2).~~

13 ~~(5) Any A committee or subcommittee appointed by a public body or an association described in~~  
 14 ~~subsection (2) for the purpose of conducting business which that is within the jurisdiction of that agency~~  
 15 ~~is subject to the requirements of this section."~~

16

17 **Section 7.** ~~Section 2-3-213, MCA, is amended to read:~~

18 ~~"2-3-213. Voidability. Any A decision made in violation of 2-3-203 may be declared void by a~~  
 19 ~~district court having jurisdiction. A suit to void any such decision must be commenced within 30 days of~~  
 20 ~~the decision. AN ACTION TO INVALIDATE THE DECISION MUST BE COMMENCED WITHIN 30 DAYS~~  
 21 ~~AFTER THE DATE OF THE DECISION OR WITHIN 30 DAYS AFTER THE DECISION BECOMES PUBLIC,~~  
 22 ~~WHICHEVER IS LATER."~~

23

24 **Section 8.** ~~Section 2-3-221, MCA, is amended to read:~~

25 ~~"2-3-221. Costs and attorney fees to plaintiff PARTY in certain actions to enforce constitutional~~  
 26 ~~right to know. A plaintiff PARTY who prevails in an action brought in district court to enforce his the~~  
 27 ~~plaintiff's PARTY'S rights under Article II, section 9, of the Montana constitution may must MAY be~~  
 28 ~~awarded his costs and reasonable attorneys' attorney fees as a matter of course. A prevailing plaintiff~~  
 29 ~~PARTY who is not represented by an attorney must be awarded 90% of what the judge determines would~~  
 30 ~~be a reasonable attorney fee if the plaintiff PARTY had been represented by an attorney."~~

1 ~~Section 9. Section 2-4-102, MCA, is amended to read:~~

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

3 ~~(1) "Administrative code committee" or "committee" means the committee provided for in Title 5,~~  
4 ~~chapter 14.~~

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

7 ~~(i) the state board of pardons and parole, except that the board is subject to the requirements of~~  
8 ~~2-4-103, 2-4-201, 2-4-202, and 2-4-306 and its rules must be published in the Administrative Rules of~~  
9 ~~Montana ARM and the Montana Administrative Register register;~~

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

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

13 ~~(iv) the financing, construction, and maintenance of public works.~~

14 ~~(b) Agency does not include a school district, unit of local government, or any other political~~  
15 ~~subdivision of the state.~~

16 ~~(3) "Agency action" means the whole or a part of, or the equivalent or denial of, the adoption of~~  
17 ~~an agency rule, the issuance of a license or order, the award of a contract, or an agency decision that is~~  
18 ~~of significant interest to the public.~~

19 ~~(3)(4) "ARM" means the Administrative Rules of Montana.~~

20 ~~(4)(5) "Contested case" means a proceeding before an agency in which a determination of legal~~  
21 ~~rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The~~  
22 ~~term includes but is not restricted to ratemaking, price fixing, and licensing.~~

23 ~~(6) "Interested person" means a person known to the committee or to an agency to have WHO~~  
24 ~~HAS demonstrated in any way TO THE AGENCY an interest concerning agency actions or other agency~~  
25 ~~administrative matters AND HAS REQUESTED TO BE PLACED ON THE AGENCY'S LIST OF INTERESTED~~  
26 ~~PERSONS.~~

27 ~~(5)(7) "License" includes the whole or part of any an agency permit, certificate, approval,~~  
28 ~~registration, charter, or other form of permission required by law but does not include a license required~~  
29 ~~solely for revenue purposes.~~

30 ~~(6)(8) "Licensing" includes any an agency process respecting the grant, denial, renewal, revocation,~~

1 ~~suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.~~

2 ~~(7)(9) "Party" means a person named or admitted as a party or properly seeking and entitled as of~~  
 3 ~~right to be admitted as a party, but nothing in this chapter may not be construed to prevent an agency from~~  
 4 ~~admitting any person as a party for limited purposes.~~

5 ~~(8)(10) "Person" means an individual, partnership, corporation, association, governmental~~  
 6 ~~subdivision, agency, or public organization of any character.~~

7 ~~(9)(11) "Register" means the Montana Administrative Register.~~

8 ~~(10)(12) "Rule" means each agency regulation, standard, or statement of general applicability that~~  
 9 ~~implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice~~  
 10 ~~requirements of an agency. The term includes the amendment or repeal of a prior rule but does not include:~~

11 ~~(a) statements concerning only the internal management of an agency and not affecting private~~  
 12 ~~rights or procedures available to the public;~~

13 ~~(b) formal opinions of the attorney general and declaratory rulings issued pursuant to 2-4-501;~~

14 ~~(c) rules relating to the use of public works, facilities, streets, and highways when the substance~~  
 15 ~~of the rules is indicated to the public by means of signs or signals;~~

16 ~~(d) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when~~  
 17 ~~there is a statutory requirement for the publication of the rules and rules adopted annually or biennially~~  
 18 ~~relating to the seasonal recreational use of lands and waters owned or controlled by the state when the~~  
 19 ~~substance of the rules is indicated to the public by means of signs or signals;~~

20 ~~(e) rules implementing the state personnel classification plan, the state wage and salary plan, or~~  
 21 ~~the statewide budgeting and accounting system;~~

22 ~~(f) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in~~  
 23 ~~accordance with 2-4-306 and must be published in the Administrative Rules of Montana ARM.~~

24 ~~(13) "Significant interest to the public", when used in reference to agency action, means agency~~  
 25 ~~action that involves a controversial matter THAT THE AGENCY KNOWS TO BE CONTROVERSIAL, a~~  
 26 ~~SIGNIFICANT fiscal impact on a particular class or group of individuals, or significant citizen interest.~~

27 ~~(11)(14) "Substantive rules" are either:~~

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

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

4  
 5 ~~Section 10. Section 2-4-302, MCA, is amended to read:~~

6 ~~"2-4-302. Notice, hearing, and submission of views. (1) Prior to the adoption, amendment, or~~  
 7 ~~repeal of any a rule, the agency shall give written notice of its intended action. The notice shall must, at~~  
 8 ~~a minimum, include a statement of either the terms or substance of the intended action or a description of~~  
 9 ~~the subjects and issues involved, the rationale for the intended action, and the time when, place where,~~  
 10 ~~and manner in which interested persons may present their views thereon on the intended action. To~~  
 11 ~~promote the public's full comprehension of the notice, the notice must be written in plain and clear English~~  
 12 ~~and use familiar and understandable words and terms.~~

13 ~~(2) (a) The notice shall must be filed with the secretary of state for publication in the register, as~~  
 14 ~~provided in 2-4-312, and mailed within 3 days of publication to interested persons who have made timely~~  
 15 ~~requests to the agency for notice of its rulemaking proceedings to be informed of agency actions and to~~  
 16 ~~the office of any professional, trade, or industrial society or organization or member thereof which of those~~  
 17 ~~entities that has filed a request with the administrative code committee when such request that has been~~  
 18 ~~forwarded to the agency as provided in subsection (2)(b). Each agency shall create and maintain a list of~~  
 19 ~~interested persons AND THE SUBJECT OR SUBJECTS IN WHICH EACH PERSON ON THE LIST IS~~  
 20 ~~INTERESTED. A person who submits an oral or written comment, attends a hearing, or contacts an agency~~  
 21 ~~by any means and for any purpose in regard to intended PROPOSED agency action must be informed of~~  
 22 ~~the list by the agency.~~

23 ~~(b) The administrative code committee shall forward a list of all organizations or interested persons~~  
 24 ~~who have submitted a request to be informed of agency actions to all agencies publishing rulemaking~~  
 25 ~~notices in the Montana Administrative Register ARM. The list must be amended by the agency upon request~~  
 26 ~~of any interested person requesting to be added to or deleted from the list.~~

27 ~~(c) The notice shall must be published and mailed at least 30 days in advance of the agency's~~  
 28 ~~intended action. If the intended action is of significant interest to the public, the notice must, at a~~  
 29 ~~minimum, be published as required in 2-3-104(3).~~

30 ~~(3) If any a statute provides for a different method of publication different from that provided in~~



1 ~~subsection (2), the affected agency shall comply with the statute in addition to the requirements contained~~  
 2 ~~herein in this section. However, in no case may the notice period may not be less than 30 days or more~~  
 3 ~~than 6 months.~~

4 ~~(4) Prior to the adoption, amendment, or repeal of any rule, the agency shall afford interested~~  
 5 ~~persons at least 20 days' notice of a hearing and 28 days from the day of notice to submit data, views,~~  
 6 ~~or arguments, orally or in writing. In the case of substantive rules, the notice of proposed rulemaking must~~  
 7 ~~state that opportunity for oral hearing shall must be granted if requested by either 10% or 25, whichever~~  
 8 ~~is less, of the persons who will be directly affected by the proposed rule, by a governmental subdivision~~  
 9 ~~or agency, by the administrative code committee, or by an association having not less than 25 members~~  
 10 ~~who will be directly affected.~~

11 ~~(5) An agency may continue a hearing date for cause. In the discretion of the agency, contested~~  
 12 ~~case procedures need not be followed in hearings held pursuant to this section. If a hearing is otherwise~~  
 13 ~~required by statute, nothing herein in this section alters that requirement.~~

14 ~~(6) If an agency fails to publish a notice of adoption within the time required by 2-4-305(7) and~~  
 15 ~~the agency again proposes the same rule for adoption, amendment, or repeal, the proposal must be~~  
 16 ~~considered a new proposal for purposes of compliance with this chapter.~~

17 ~~(7) At the commencement of any a hearing on the intended action, the person designated by the~~  
 18 ~~agency to preside at the hearing shall;~~

19 ~~(a) read aloud the "Notice of Function of Administrative Code Committee" appearing in the register;~~  
 20 ~~(b) explain the primary function and purpose of the administrative code committee and state how~~  
 21 ~~the administrative code committee may be contacted; and~~

22 ~~(c) inform the persons at the hearing of the provisions of subsection (2)(a) and provide them an~~  
 23 ~~opportunity to place their names on the list."~~

24  
 25 **Section 1.** Section 2-4-303, MCA, is amended to read:

26 **"2-4-303. Emergency or temporary rules.** (1) If an agency finds that an imminent peril to the public  
 27 health, safety, or welfare requires adoption of a rule upon fewer than 30 days' notice and states in writing  
 28 its reasons for that finding, it may proceed upon special notice filed with the committee, without prior  
 29 notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an  
 30 emergency rule. The rule may be effective for a period not longer than 120 days, after which a new

1 emergency rule with the same or substantially the same text may not be adopted, but the adoption of an  
 2 identical rule under 2-4-302 is not precluded. Because the exercise of emergency rulemaking power  
 3 precludes the people's constitutional right to prior notice and participation in the operations of their  
 4 government, it constitutes the exercise of extraordinary power requiring extraordinary safeguards against  
 5 abuse. An emergency rule may be adopted only in circumstances that truly and clearly constitute an  
 6 existing imminent peril to the public health, safety, or welfare that cannot be averted or remedied by any  
 7 other administrative act. The sufficiency of the reasons for a finding of imminent peril to the public health,  
 8 safety, or welfare is subject to immediate judicial review ~~upon petition by any person.~~ The sufficiency of  
 9 the reasons justifying a finding of imminent peril and the necessity for emergency rulemaking must be  
 10 compelling and, as written in the rule adoption notice, must stand on their own merits for purposes of  
 11 judicial review. The dissemination of emergency rules required by 2-4-306 must be strictly observed and  
 12 liberally accomplished.

13 (2) A statute enacted or amended to be effective prior to October 1 of the year of enactment or  
 14 amendment may be implemented by a temporary administrative rule, adopted before October 1 of that year,  
 15 upon any abbreviated notice or hearing that the agency finds practicable, but the rule may not be filed with  
 16 the secretary of state until at least 30 days have passed since publication of the notice of proposal to adopt  
 17 the rule. The temporary rule is effective until October 1 of the year of adoption. The adoption of an identical  
 18 rule under 2-4-302 is not precluded during the period that the temporary rule is effective."  
 19

20 ~~Section 12. Section 2-4-305, MCA, is amended to read:~~

21 ~~"2-4-305. **Requisites for validity -- authority and statement of reasons.** (1) The agency shall fully~~  
 22 ~~consider fully written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency~~  
 23 ~~shall issue a concise **CONCISE** statement of the principal reasons for and against its adoption,~~  
 24 ~~comprehensively incorporating in the statement the reasons for overruling the considerations urged against~~  
 25 ~~its adoption. If substantial differences exist between the rule as proposed and as adopted and the~~  
 26 ~~differences have not been described or set forth in the adopted rule as that rule is printed in the Montana~~  
 27 ~~Administrative Register register, the differences must be described in the statement of reasons for and~~  
 28 ~~against agency action. When written or oral submissions have not been received, an agency may omit the~~  
 29 ~~statement of reasons.~~

30 ~~(2) Rules may not unnecessarily repeat statutory language. Whenever it is necessary to refer to~~

1 ~~statutory language in order to convey the meaning of a rule interpreting the language, the reference must~~  
2 ~~clearly indicate the portion of the language that is statutory and the portion that is an amplification of the~~  
3 ~~language.~~

4 ~~(3) Each proposed and adopted rule must include a citation to the specific grant of rulemaking~~  
5 ~~authority pursuant to which the rule or any part of the rule is adopted. In addition, each proposed and~~  
6 ~~adopted rule must include a citation to the specific section or sections in the Montana Code Annotated that~~  
7 ~~the rule purports to implement.~~

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

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

14 ~~(6) Whenever by the express or implied terms of any statute a state agency has authority to adopt~~  
15 ~~rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, a rule~~  
16 ~~adopted is not valid or effective unless it is:~~

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

18 ~~(b) reasonably necessary to effectuate the purpose of the statute. Subject to the provisions of~~  
19 ~~subsection (8), reasonable necessity must be demonstrated in the agency's notice of proposed rulemaking~~  
20 ~~and in the written and oral data, views, comments, or testimony submitted by the public or the agency and~~  
21 ~~considered by the agency.~~

22 ~~(7) A rule is not valid unless notice of it is given and it is adopted, in substantial compliance with~~  
23 ~~2-4-302 or 2-4-303 and this section, and unless 2-4-306 is complied with and notice of adoption of the~~  
24 ~~rule is published within 6 months of the publishing of notice of the proposed rule. If an amended or~~  
25 ~~supplemental notice of either proposed or final rulemaking, or both, is published concerning the same rule,~~  
26 ~~the 6-month limit must be determined with reference to the latest notice in all cases.~~

27 ~~(8) An agency may use an amended proposal notice or the adoption notice to correct deficiencies~~  
28 ~~in statements of reasonable necessity, in citations of authority for rules, and in citations of sections~~  
29 ~~implemented by rules. An agency may use an amended proposal notice, but not the adoption notice, to~~  
30 ~~correct deficiencies in a statement of reasonable necessity."~~



## HOUSE BILL NO. 389

INTRODUCED BY SIMON, ELLIS, GROSFIELD, GRINDE, BAER, BOHLINGER, SLITER, MCCANN, PECK,  
OHS, KNOX, BEAUDRY, DEBRUYCKER, HARP, COCCHIARELLA, BOHARSKI

A BILL FOR AN ACT ENTITLED: "~~AN ACT PROVIDING FOR GREATER PUBLIC PARTICIPATION IN AGENCY  
RULEMAKING AND OTHER AGENCY ACTIONS; AMENDING PROVISIONS FOR NOTICE OF AGENCY RULES  
AND ACTIONS; DEFINING TERMS; CLARIFYING EXISTING PROVISIONS; STRENGTHENING THE  
REQUIREMENTS FOR AN EMERGENCY RULE; PROHIBITING THE USE OF AN ADOPTION NOTICE TO CURE  
DEFICIENCIES IN STATEMENTS OF REASONABLE NECESSITY; AND AMENDING SECTIONS 2-3-101,  
2-3-102, 2-3-103, 2-3-104, 2-3-105, 2-3-112, 2-3-114, 2-3-203, 2-3-213, 2-3-221, 2-4-102, 2-4-302,  
SECTIONS 2-4-303, 2-4-305, AND 2-4-306, MCA.~~"

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

~~Section 1. Section 2-3-101, MCA, is amended to read:~~

~~"2-3-101. Legislative intent. The legislature finds and declares pursuant to the mandate of Article  
II, section 8, of the 1972 Montana constitution that legislative guidelines should be established to secure  
to the people of Montana their constitutional right to be afforded reasonable opportunity to participate in  
the operation of governmental agencies prior to the final decision of the agency and that this part must be  
liberally construed to achieve that purpose."~~

~~Section 2. Section 2-3-102, MCA, is amended to read:~~

~~"2-3-102. Definitions. As used in this part, the following definitions apply:~~

~~(1) "Agency" means any a board, bureau, commission, department, authority, or officer of the  
state or local government authorized by law to make rules, determine contested cases, or enter into  
contracts except:~~

~~(a) the legislature and any or a branch, committee, or officer thereof of the legislature;~~

~~(b) the judicial branches and any branch or a committee or officer thereof of the judicial branch;~~

~~(c) the governor, except that an agency is not exempt merely because the governor has been  
designated as a member thereof of the agency; or~~

1           ~~(d) the state military establishment and agencies concerned with civil defense and recovery from~~  
2 ~~hostile attack.~~

3           ~~(2) "Agency action" means the whole or a part of, or the equivalent or denial of, the adoption of~~  
4 ~~an agency rule, the issuance of a license or order, the award of a contract, or the equivalent or denial~~  
5 ~~thereof an agency decision that is of significant interest to the public.~~

6           ~~(3) "Rule" means any agency regulation, standard, or statement of general applicability that~~  
7 ~~implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice~~  
8 ~~requirements of any agency. The term includes the amendment or repeal of a prior rule but does not~~  
9 ~~include:~~

10           ~~(a) statements concerning only the internal management of an agency and not affecting private~~  
11 ~~rights or procedures available to the public; or~~

12           ~~(b) declaratory rulings as to the applicability of any statutory provision or of any rule.~~

13           ~~(4) "Significant interest to the public" means the undertaking of an agency action or decision that~~  
14 ~~involves a controversial matter THAT THE AGENCY KNOWS TO BE CONTROVERSIAL, a SIGNIFICANT~~  
15 ~~fiscal impact on a particular class or group of individuals, or significant citizen interest."~~

16

17           **~~Section 3. Section 2-3-103, MCA, is amended to read:~~**

18           ~~"2-3-103. Public participation — governor to insure ensure guidelines adopted. (1) Each agency~~  
19 ~~shall develop procedures for permitting and encouraging the public to participate in agency decisions that~~  
20 ~~are of significant interest to the public. The procedures shall assure must ensure adequate notice and assist~~  
21 ~~public participation before a final agency action is taken that is of significant interest to the public. Each~~  
22 ~~agency shall create and maintain an interested persons list CONTAINING THE SUBJECT OR SUBJECTS IN~~  
23 ~~WHICH EACH PERSON ON THE LIST IS INTERESTED. Each person submitting oral or written comments~~  
24 ~~to, attending a hearing of, or in any way contacting the agency for any purpose concerning agency actions~~  
25 ~~and decisions must be ADVISED OF AND GIVEN AN OPPORTUNITY TO BE placed on the list by the agency~~  
26 ~~and given notice of each intended or proposed agency action and each agency decision relating to matters~~  
27 ~~in AS TO which the person has expressed an interest in the person's contacts with the agency REQUESTED~~  
28 ~~NOTICE.~~

29           ~~(2) The governor shall insure ensure that each board, bureau, commission, department, authority,~~  
30 ~~agency, or officer of the state adopts coordinated rules for its programs, which The guidelines shall must~~

1 ~~provide policies and procedures to facilitate public participation in those programs, consistent with~~  
 2 ~~subsection (1) of this section. These guidelines shall must be adopted as rules and published in a manner~~  
 3 ~~which that may be provided to a member of the public upon request."~~

4  
 5 ~~Section 4. Section 2-3-104, MCA, is amended to read:~~

6 ~~"2-3-104. Requirements for compliance with notice provisions. An agency shall be considered to~~  
 7 ~~have complied complies with the notice provisions of 2-3-103 if:~~

8 ~~(1) an environmental impact statement is prepared and distributed as required by the Montana~~  
 9 ~~Environmental Policy Act, Title 75, chapter 1;~~

10 ~~(2) a proceeding is held as required by the Montana Administrative Procedure Act;~~

11 ~~(2) A PROCEEDING IS HELD AS REQUIRED BY THE MONTANA ADMINISTRATIVE PROCEDURE~~  
 12 ~~ACT AND NOTICE OF THE PROCEEDING IS EITHER POSTED ON THE STATE ELECTRONIC BULLETIN~~  
 13 ~~BOARD OR IS PUBLISHED IN A PRESS RELEASE ISSUED BY THE AGENCY;~~

14 ~~(3)(2)(3) a public hearing, after appropriate and adequate notice is given, is held pursuant to any~~  
 15 ~~other a provision of state law or a local ordinance or resolution; or~~

16 ~~(4)(3)(4) a newspaper of general circulation within the area to be affected by a decision of~~  
 17 ~~significant interest to the public has carried a news story or advertisement A NEWS STORY OR an~~  
 18 ~~advertisement giving notice of opportunity to be heard concerning the decision sufficiently prior to a final~~  
 19 ~~decision to permit public comment on the matter. The AN advertisement must be printed in at least~~  
 20 ~~12-point type and must comply with the notice requirements of 2-4-302(1). If the newspaper has a Sunday~~  
 21 ~~edition, the advertisement must be in that edition."~~

22

23 ~~Section 5. Section 2-3-105, MCA, is amended to read:~~

24 ~~"2-3-105. Supplemental notice by radio or television. (1) Any An official of the state or any of one~~  
 25 ~~of its political subdivisions who is required by law to publish any a notice required by law may, and is~~  
 26 ~~encouraged to, supplement such the publication by a radio or television broadcast, or both, of a summary~~  
 27 ~~of such the notice or by both of such broadcasts when if in his the official's judgment the public interest~~  
 28 ~~will be served.~~

29 ~~(2) The When a summary of such a notice shall only be read with no reference to any person by~~  
 30 ~~name then is broadcast, a candidate for political office may not be referred to.~~

1           ~~(3) Such announcements shall be made. A summary may be broadcast only by duly employed~~  
2 ~~personnel of the station from which such the broadcast emanates.~~

3           ~~(4) Announcements. An announcement by a political subdivisions subdivision may be made only~~  
4 ~~by stations a station situated within the county of origin of the legal notice unless no a broadcast station~~  
5 ~~exists does not exist in such that county, in which case announcements the announcement may be made~~  
6 ~~by a station or stations situated in any county other than the county of origin of the legal notice."~~

7  
8           ~~Section 6. Section 2-3-112, MCA, is amended to read:~~

9           ~~"2-3-112. Exceptions. The provisions of 2-3-103 and 2-3-111 do not apply to:~~

10           ~~(1) an agency decision that must be made to deal with an emergency situation affecting the public~~  
11 ~~health, welfare, or safety;~~

12           ~~(2) an agency decision that must be made to maintain or protect the interests of the agency,~~  
13 ~~including but not limited to the filing of to file a lawsuit in a court of law or becoming to become a party~~  
14 ~~to an administrative proceeding; or~~

15           ~~(3) a decision involving no more than a ministerial act."~~

16  
17           ~~Section 6. Section 2-3-114, MCA, is amended to read:~~

18           ~~"2-3-114. Enforcement. The district courts of the state have jurisdiction to set aside or declare~~  
19 ~~void an agency decision under this part upon petition made within 30 days of the date of the decision of~~  
20 ~~any by a person whose rights have been prejudiced THAT IS FILED WITHIN 30 DAYS AFTER THE DATE~~  
21 ~~OF THE DECISION OR WITHIN 30 DAYS AFTER THE DECISION BECOMES PUBLIC, WHICHEVER IS~~  
22 ~~LATER."~~

23  
24           ~~Section 8. Section 2-3-203, MCA, is amended to read:~~

25           ~~"2-3-203. Meetings of public agencies and certain associations of public agencies to be open to~~  
26 ~~public exceptions. (1) All meetings of public or governmental bodies, boards, bureaus, commissions,~~  
27 ~~agencies of the state, or any political subdivision of the state or organizations or agencies supported in~~  
28 ~~whole or in part by public funds or expending public funds must be open to the public.~~

29           ~~(2) All meetings of associations that are composed of public or governmental bodies referred to~~  
30 ~~in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the~~



1 public.

2 ~~(3) Provided, however, the The presiding officer of any a meeting subject to subsections (1) and~~  
 3 ~~(2) may close the meeting during the time that the discussion relates to a matter of individual privacy and~~  
 4 ~~then if and only if the presiding officer determines that the demands of individual privacy clearly exceed~~  
 5 ~~the merits of public disclosure. The right of individual privacy may be waived by the individual about whom~~  
 6 ~~the discussion pertains, and, in that event, the meeting must be open.~~

7 ~~(4) (a) However, except Except as provided in subsection (4)(b), a meeting may be closed to~~  
 8 ~~discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental~~  
 9 ~~effect on the litigating position of the public agency.~~

10 ~~(b) A meeting may not be closed to discuss strategy to be followed in litigation involving the~~  
 11 ~~enforcement or preservation of a constitutional right of the people or in which the only parties are public~~  
 12 ~~bodies or associations described in subsections (1) and (2).~~

13 ~~(5) Any A committee or subcommittee appointed by a public body or an association described in~~  
 14 ~~subsection (2) for the purpose of conducting business which that is within the jurisdiction of that agency~~  
 15 ~~is subject to the requirements of this section."~~

16

17 ~~Section 7. Section 2-3-213, MCA, is amended to read:~~

18 ~~"2-3-213. Voidability. Any A decision made in violation of 2-3-203 may be declared void by a~~  
 19 ~~district court having jurisdiction. A suit to void any such decision must be commenced within 30 days of~~  
 20 ~~the decision. AN ACTION TO INVALIDATE THE DECISION MUST BE COMMENCED WITHIN 30 DAYS~~  
 21 ~~AFTER THE DATE OF THE DECISION OR WITHIN 30 DAYS AFTER THE DECISION BECOMES PUBLIC,~~  
 22 ~~WHICHEVER IS LATER."~~

23

24 ~~Section 8. Section 2-3-221, MCA, is amended to read:~~

25 ~~"2-3-221. Costs and attorney fees to plaintiff PARTY in certain actions to enforce constitutional~~  
 26 ~~right to know. A plaintiff PARTY who prevails in an action brought in district court to enforce his the~~  
 27 ~~plaintiff's PARTY'S rights under Article II, section 9, of the Montana constitution may must MAY be~~  
 28 ~~awarded his costs and reasonable attorneys' attorney fees as a matter of course. A prevailing plaintiff~~  
 29 ~~PARTY who is not represented by an attorney must be awarded 90% of what the judge determines would~~  
 30 ~~be a reasonable attorney fee if the plaintiff PARTY had been represented by an attorney."~~

1 ~~Section 9. Section 2-4-102, MCA, is amended to read:~~

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

3 ~~(1) "Administrative code committee" or "committee" means the committee provided for in Title 5,~~  
4 ~~chapter 14.~~

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

7 ~~(i) the state board of pardons and parole, except that the board is subject to the requirements of~~  
8 ~~2-4-103, 2-4-201, 2-4-202, and 2-4-306 and its rules must be published in the Administrative Rules of~~  
9 ~~Montana ARM and the Montana Administrative Register register;~~

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

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

13 ~~(iv) the financing, construction, and maintenance of public works.~~

14 ~~(b) Agency does not include a school district, unit of local government, or any other political~~  
15 ~~subdivision of the state.~~

16 ~~(3) "Agency action" means the whole or a part of, or the equivalent or denial of, the adoption of~~  
17 ~~an agency rule, the issuance of a license or order, the award of a contract, or an agency decision that is~~  
18 ~~of significant interest to the public.~~

19 ~~(3)(4) "ARM" means the Administrative Rules of Montana.~~

20 ~~(4)(5) "Contested case" means a proceeding before an agency in which a determination of legal~~  
21 ~~rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The~~  
22 ~~term includes but is not restricted to ratemaking, price fixing, and licensing.~~

23 ~~(6) "Interested person" means a person known to the committee or to an agency to have WHO~~  
24 ~~HAS demonstrated in any way TO THE AGENCY an interest concerning agency actions or other agency~~  
25 ~~administrative matters AND HAS REQUESTED TO BE PLACED ON THE AGENCY'S LIST OF INTERESTED~~  
26 ~~PERSONS.~~

27 ~~(5)(7) "License" includes the whole or part of any an agency permit, certificate, approval,~~  
28 ~~registration, charter, or other form of permission required by law but does not include a license required~~  
29 ~~solely for revenue purposes.~~

30 ~~(6)(8) "Licensing" includes any an agency process respecting the grant, denial, renewal, revocation,~~

1 ~~suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.~~

2 ~~(7)(9) "Party" means a person named or admitted as a party or properly seeking and entitled as of~~  
 3 ~~right to be admitted as a party, but nothing in this chapter may not be construed to prevent an agency from~~  
 4 ~~admitting any person as a party for limited purposes.~~

5 ~~(8)(10) "Person" means an individual, partnership, corporation, association, governmental~~  
 6 ~~subdivision, agency, or public organization of any character.~~

7 ~~(9)(11) "Register" means the Montana Administrative Register.~~

8 ~~(10)(12) "Rule" means each agency regulation, standard, or statement of general applicability that~~  
 9 ~~implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice~~  
 10 ~~requirements of an agency. The term includes the amendment or repeal of a prior rule but does not include:~~

11 ~~(a) statements concerning only the internal management of an agency and not affecting private~~  
 12 ~~rights or procedures available to the public;~~

13 ~~(b) formal opinions of the attorney general and declaratory rulings issued pursuant to 2-4-501;~~

14 ~~(c) rules relating to the use of public works, facilities, streets, and highways when the substance~~  
 15 ~~of the rules is indicated to the public by means of signs or signals;~~

16 ~~(d) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when~~  
 17 ~~there is a statutory requirement for the publication of the rules and rules adopted annually or biennially~~  
 18 ~~relating to the seasonal recreational use of lands and waters owned or controlled by the state when the~~  
 19 ~~substance of the rules is indicated to the public by means of signs or signals;~~

20 ~~(e) rules implementing the state personnel classification plan, the state wage and salary plan, or~~  
 21 ~~the statewide budgeting and accounting system;~~

22 ~~(f) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in~~  
 23 ~~accordance with 2-4-306 and must be published in the Administrative Rules of Montana ARM.~~

24 ~~(13) "Significant interest to the public", when used in reference to agency action, means agency~~  
 25 ~~action that involves a controversial matter THAT THE AGENCY KNOWS TO BE CONTROVERSIAL, a~~  
 26 ~~SIGNIFICANT fiscal impact on a particular class or group of individuals, or significant citizen interest.~~

27 ~~(11)(14) "Substantive rules" are either:~~

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

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

4  
 5           **Section 10.** ~~Section 2-4-302, MCA, is amended to read:~~

6           ~~"2-4-302. Notice, hearing, and submission of views. (1) Prior to the adoption, amendment, or~~  
 7 ~~repeal of any a rule, the agency shall give written notice of its intended action. The notice shall must, at~~  
 8 ~~a minimum, include a statement of either the terms or substance of the intended action or a description of~~  
 9 ~~the subjects and issues involved, the rationale for the intended action, and the time when, place where,~~  
 10 ~~and manner in which interested persons may present their views thereon on the intended action. To~~  
 11 ~~promote the public's full comprehension of the notice, the notice must be written in plain and clear English~~  
 12 ~~and use familiar and understandable words and terms.~~

13           ~~(2) (a) The notice shall must be filed with the secretary of state for publication in the register, as~~  
 14 ~~provided in 2-4-312, and mailed within 3 days of publication to interested persons who have made timely~~  
 15 ~~requests to the agency for notice of its rulemaking proceedings to be informed of agency actions and to~~  
 16 ~~the office of any professional, trade, or industrial society or organization or member thereof which of those~~  
 17 ~~entities that has filed a request with the administrative code committee when such request that has been~~  
 18 ~~forwarded to the agency as provided in subsection (2)(b). Each agency shall create and maintain a list of~~  
 19 ~~interested persons AND THE SUBJECT OR SUBJECTS IN WHICH EACH PERSON ON THE LIST IS~~  
 20 ~~INTERESTED. A person who submits an oral or written comment, attends a hearing, or contacts an agency~~  
 21 ~~by any means and for any purpose in regard to intended PROPOSED agency action must be informed of~~  
 22 ~~the list by the agency.~~

23           ~~(b) The administrative code committee shall forward a list of all organizations or interested persons~~  
 24 ~~who have submitted a request to be informed of agency actions to all agencies publishing rulemaking~~  
 25 ~~notices in the Montana Administrative Register ARM. The list must be amended by the agency upon request~~  
 26 ~~of any interested person requesting to be added to or deleted from the list.~~

27           ~~(c) The notice shall must be published and mailed at least 30 days in advance of the agency's~~  
 28 ~~intended action. If the intended action is of significant interest to the public, the notice must, at a~~  
 29 ~~minimum, be published as required in 2-3-104(3).~~

30           ~~(3) If any a statute provides for a different method of publication different from that provided in~~

1 ~~subsection (2), the affected agency shall comply with the statute in addition to the requirements contained~~  
 2 ~~herein in this section. However, in no case may the notice period may not be less than 30 days or more~~  
 3 ~~than 6 months.~~

4 ~~(4) Prior to the adoption, amendment, or repeal of any rule, the agency shall afford interested~~  
 5 ~~persons at least 20 days' notice of a hearing and 28 days from the day of notice to submit data, views,~~  
 6 ~~or arguments, orally or in writing. In the case of substantive rules, the notice of proposed rulemaking must~~  
 7 ~~state that opportunity for oral hearing shall must be granted if requested by either 10% or 25, whichever~~  
 8 ~~is less, of the persons who will be directly affected by the proposed rule, by a governmental subdivision~~  
 9 ~~or agency, by the administrative code committee, or by an association having not less than 25 members~~  
 10 ~~who will be directly affected.~~

11 ~~(5) An agency may continue a hearing date for cause. In the discretion of the agency, contested~~  
 12 ~~case procedures need not be followed in hearings held pursuant to this section. If a hearing is otherwise~~  
 13 ~~required by statute, nothing herein in this section alters that requirement.~~

14 ~~(6) If an agency fails to publish a notice of adoption within the time required by 2-4-305(7) and~~  
 15 ~~the agency again proposes the same rule for adoption, amendment, or repeal, the proposal must be~~  
 16 ~~considered a new proposal for purposes of compliance with this chapter.~~

17 ~~(7) At the commencement of any a hearing on the intended action, the person designated by the~~  
 18 ~~agency to preside at the hearing shall:~~

19 ~~(a) read aloud the "Notice of Function of Administrative Code Committee" appearing in the register;~~  
 20 ~~(b) explain the primary function and purpose of the administrative code committee and state how~~  
 21 ~~the administrative code committee may be contacted; and~~

22 ~~(c) inform the persons at the hearing of the provisions of subsection (2)(a) and provide them an~~  
 23 ~~opportunity to place their names on the list."~~

24  
 25 **Section 1.** Section 2-4-303, MCA, is amended to read:

26 **"2-4-303. Emergency or temporary rules.** (1) If an agency finds that an imminent peril to the public  
 27 health, safety, or welfare requires adoption of a rule upon fewer than 30 days' notice and states in writing  
 28 its reasons for that finding, it may proceed upon special notice filed with the committee, without prior  
 29 notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an  
 30 emergency rule. The rule may be effective for a period not longer than 120 days, after which a new

1 emergency rule with the same or substantially the same text may not be adopted, but the adoption of an  
 2 identical rule under 2-4-302 is not precluded. Because the exercise of emergency rulemaking power  
 3 precludes the people's constitutional right to prior notice and participation in the operations of their  
 4 government, it constitutes the exercise of extraordinary power requiring extraordinary safeguards against  
 5 abuse. An emergency rule may be adopted only in circumstances that truly and clearly constitute an  
 6 existing imminent peril to the public health, safety, or welfare that cannot be averted or remedied by any  
 7 other administrative act. The sufficiency of the reasons for a finding of imminent peril to the public health,  
 8 safety, or welfare is subject to ~~immediate~~ judicial review ~~upon petition by any person.~~ The sufficiency of  
 9 the reasons justifying a finding of imminent peril and the necessity for emergency rulemaking must be  
 10 compelling and, as written in the rule adoption notice, must stand on their own merits for purposes of  
 11 judicial review. The dissemination of emergency rules required by 2-4-306 must be strictly observed and  
 12 liberally accomplished.

13 (2) A statute enacted or amended to be effective prior to October 1 of the year of enactment or  
 14 amendment may be implemented by a temporary administrative rule, adopted before October 1 of that year,  
 15 upon any abbreviated notice or hearing that the agency finds practicable, but the rule may not be filed with  
 16 the secretary of state until at least 30 days have passed since publication of the notice of proposal to adopt  
 17 the rule. The temporary rule is effective until October 1 of the year of adoption. The adoption of an identical  
 18 rule under 2-4-302 is not precluded during the period that the temporary rule is effective."  
 19

20 ~~Section 12. Section 2-4-305, MCA, is amended to read:~~

21 ~~"2-4-305. **Requisites for validity—authority and statement of reasons.** (1) The agency shall fully~~  
 22 ~~consider fully written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency~~  
 23 ~~shall issue a concise CONCISE statement of the principal reasons for and against its adoption,~~  
 24 ~~comprehensively incorporating in the statement the reasons for overruling the considerations urged against~~  
 25 ~~its adoption. If substantial differences exist between the rule as proposed and as adopted and the~~  
 26 ~~differences have not been described or set forth in the adopted rule as that rule is printed in the Montana~~  
 27 ~~Administrative Register register, the differences must be described in the statement of reasons for and~~  
 28 ~~against agency action. When written or oral submissions have not been received, an agency may omit the~~  
 29 ~~statement of reasons.~~

30 ~~(2) Rules may not unnecessarily repeat statutory language. Whenever it is necessary to refer to~~

1 ~~statutory language in order to convey the meaning of a rule interpreting the language, the reference must~~  
2 ~~clearly indicate the portion of the language that is statutory and the portion that is an amplification of the~~  
3 ~~language.~~

4 ~~(3) Each proposed and adopted rule must include a citation to the specific grant of rulemaking~~  
5 ~~authority pursuant to which the rule or any part of the rule is adopted. In addition, each proposed and~~  
6 ~~adopted rule must include a citation to the specific section or sections in the Montana Code Annotated that~~  
7 ~~the rule purports to implement.~~

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

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

14 ~~(6) Whenever by the express or implied terms of any statute a state agency has authority to adopt~~  
15 ~~rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, a rule~~  
16 ~~adopted is not valid or effective unless it is:~~

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

18 ~~(b) reasonably necessary to effectuate the purpose of the statute. Subject to the provisions of~~  
19 ~~subsection (8), reasonable necessity must be demonstrated in the agency's notice of proposed rulemaking~~  
20 ~~and in the written and oral data, views, comments, or testimony submitted by the public or the agency and~~  
21 ~~considered by the agency.~~

22 ~~(7) A rule is not valid unless notice of it is given and it is adopted, in substantial compliance with~~  
23 ~~2-4-302 or 2-4-303 and this section, and unless 2-4-306 is complied with and notice of adoption of the~~  
24 ~~rule is published within 6 months of the publishing of notice of the proposed rule. If an amended or~~  
25 ~~supplemental notice of either proposed or final rulemaking, or both, is published concerning the same rule,~~  
26 ~~the 6-month limit must be determined with reference to the latest notice in all cases.~~

27 ~~(8) An agency may use an amended proposal notice or the adoption notice to correct deficiencies~~  
28 ~~in statements of reasonable necessity, in citations of authority for rules, and in citations of sections~~  
29 ~~implemented by rules. An agency may use an amended proposal notice, but not the adoption notice, to~~  
30 ~~correct deficiencies in a statement of reasonable necessity.~~





STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0389, reference bill, as amended

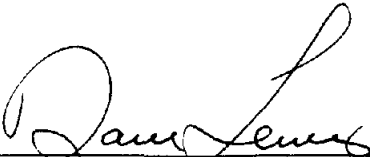
DESCRIPTION OF PROPOSED LEGISLATION: An act strengthening the requirements for an emergency rule.

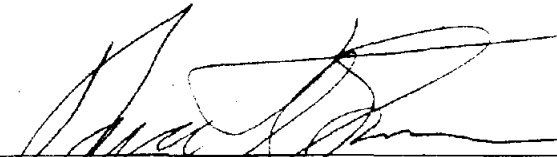
ASSUMPTIONS:

1. Current state law sets requirements for emergency rulemaking.
2. Emergency rulemaking occurs relatively infrequently.
3. The bill, as amended, will have minimal or no fiscal impact to state agencies.

FISCAL IMPACT:

The bill will have minimal or no fiscal impact to state agencies.

  
DAVE LEWIS, BUDGET DIRECTOR      DATE  
Office of Budget and Program Planning      4-3-97

  
BRUCE SIMON, PRIMARY SPONSOR      DATE

Fiscal Note for HB0389, reference bill,  
as amended

HB 389-#3



## FREE CONFERENCE COMMITTEE

on House Bill 389

Report No. 1, April 16, 1997

Page 1 of 7

Mr. Speaker and Mr. President:

We, your Free Conference Committee met and considered **House Bill 389** (reference copy -- salmon) and recommend that **House Bill 389** be amended as follows:

1. Title, line 7.

Following: "~~PROVISIONS,~~"

Insert: "PROVIDING FOR GREATER PUBLIC PARTICIPATION IN AGENCY RULEMAKING; AMENDING PROVISIONS FOR NOTICE OF AGENCY RULES; DEFINING TERMS;"

2. Title, line 9.

Following: "~~NECESSITY,~~"

Insert: "PROHIBITING THE USE OF AN ADOPTION NOTICE TO CURE DEFICIENCIES IN STATEMENTS OF REASONABLE NECESSITY;"

3. Title, line 11.

Following: "SECTIONS"

Insert: "2-4-102, 2-4-302,"

Following: "~~2-4-305,~~"

Insert: ", 2-4-305,"

4. Page 9.

Following: line 23

Insert: "**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 code committee" or "committee" means the committee provided for in Title 5, chapter 14.

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

(i) the state board of pardons and parole, except that the board is subject to the requirements of 2-4-103, 2-4-201, 2-4-202, and 2-4-306 and its rules must be published in the ~~Administrative Rules of Montana~~ ARM and the Montana ~~Administrative Register~~ register;

ADOPT

REJECT

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HB 389

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

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

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

(b) Agency does not include a school district, 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, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term includes but is not restricted to ratemaking, price fixing, and licensing.

(5) "Interested person" means a person who has expressed to the agency an interest concerning agency actions under this chapter and has requested to be placed on the agency's list of interested persons as to matters of which the persons desires to be given notice. The term does not extend to contested cases.

~~(5)(6)~~ "License" includes the whole or part of any an agency permit, certificate, approval, registration, charter, or other form of permission required by law but does not include a license required solely for revenue purposes.

~~(6)(7)~~ "Licensing" includes any an agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.

~~(7)(8)~~ "Party" means a person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party, but ~~nothing in~~ this chapter may not be construed to prevent an agency from admitting any person as a party for limited purposes.

~~(8)(9)~~ "Person" means an individual, partnership, corporation, association, governmental subdivision, agency, or public organization of any character.

~~(9)(10)~~ "Register" means the Montana Administrative Register.

~~(10)(11)~~ "Rule" means each 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. The term includes the amendment or repeal of a prior rule but does not include:

(a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public;

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

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

(d) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when there is a statutory requirement for the publication of the rules and rules adopted annually or biennially relating to the seasonal recreational use of lands and waters owned or controlled by the state when the substance of the rules is indicated to the public by means of signs or signals;

(e) rules implementing the state personnel classification plan, the state wage and salary plan, or the statewide budgeting and accounting system;

(f) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in accordance with 2-4-306 and must be published in the Administrative Rules of Montana ARM.

(12) "Significant interest to the public" means agency actions under this chapter regarding matters that the agency knows to be of widespread citizen interest. These matters include issues involving a substantial fiscal impact to or controversy involving a particular class or group of individuals. The term does not extend to contested cases.

~~(11)~~ (13) "Substantive rules" are either:

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

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

**Section 2.** Section 2-4-302, MCA, is amended to read:

**"2-4-302. Notice, hearing, and submission of views. (1)** Prior to the adoption, amendment, or repeal of any rule, the agency shall give written notice of its intended action. The notice ~~shall~~ must include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, the rationale for the intended action, and the time when, place where, and manner in which interested persons may present their views ~~thereon~~ on the intended action. The rationale must be written in plain, easily understood language.

(2) (a) The notice ~~shall~~ must be filed with the secretary of state for publication in the register as provided in 2-4-312 and mailed within 3 days of publication to interested persons

who have made timely requests to the agency ~~for notice to be informed~~ of its rulemaking proceedings and to the office of any professional, trade, or industrial society or organization or member thereof ~~which~~ of those entities that has filed a request with the administrative code committee when such request that has been forwarded to the agency as provided in subsection (2)(b). Each agency shall create and maintain a list of interested persons and the subject or subjects in which each person on the list is interested. A person who submits a written comment or attends a hearing in regard to proposed agency action under this part must be informed of the list by the agency. An agency complies with this subsection if it includes in the notice an advisement explaining how persons may be placed on the list of interested persons and if it complies with subsection (7).

(b) The administrative code committee shall forward a list of all organizations or persons who have submitted a request to be informed of agency actions to all agencies publishing rulemaking notices in the ~~Montana Administrative Register~~ ARM. The list must be amended by the agency upon request of any person requesting to be added to or deleted from the list.

(c) The notice ~~shall~~ must be published and mailed at least 30 days in advance of the agency's intended action. In addition to publishing and mailing the notice under subsection (2)(a) of this section, the agency shall post the notice of the state electronic bulletin board or other electronic communications system available to the public.

(3) If ~~any~~ a statute provides for a ~~different~~ different method of publication different from that provided in subsection (2), the affected agency shall comply with the statute in addition to the requirements contained ~~herein~~ in this section. However, ~~in no case may~~ the notice period may not be less than 30 days or more than 6 months.

(4) Prior to the adoption, amendment, or repeal of any rule, the agency shall afford interested persons at least 20 days' notice of a hearing and 28 days from the day of notice to submit data, views, or arguments, orally or in writing. In the case of substantive rules, the notice of proposed rulemaking must state that opportunity for oral hearing ~~shall~~ must be granted if requested by either 10% or 25, whichever is less, of the persons who will be directly affected by the proposed rule, by a governmental subdivision or agency, by the administrative code committee, or by an association having not less than 25 members who will be directly affected. If the proposed rulemaking involves matters of significant interest to the public, the agency shall schedule an oral hearing.

(5) An agency may continue a hearing date for cause. In the discretion of the agency, contested case procedures need not be followed in hearings held pursuant to this section. If a hearing

is otherwise required by statute, nothing ~~herein~~ in this section alters that requirement.

(6) If an agency fails to publish a notice of adoption within the time required by 2-4-305(7) and the agency again proposes the same rule for adoption, amendment, or repeal, the proposal must be considered a new proposal for purposes of compliance with this chapter.

(7) At the commencement of any hearing on the intended action, the person designated by the agency to preside at the hearing shall:

(a) read aloud the "Notice of Function of Administrative Code Committee" appearing in the register; and

(b) inform the persons at the hearing of the provisions of subsection (2) (a) and provide them an opportunity to place their names on the list."

Renumber: subsequent sections

5. Page 10, line 8.

Following: "~~person~~"

Insert: "upon petition by any person. The matter must be set for hearing at the earliest possible time and takes precedence over all other matters except older matters of the same character"

6. Page 11.

Following: line 30

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

**"2-4-305. Requisites for validity -- authority and statement of reasons.** (1) The agency shall fully consider ~~fully~~ written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency shall issue a concise statement of the principal reasons for and against its adoption, incorporating in the statement the reasons for overruling the considerations urged against its adoption. If substantial differences exist between the rule as proposed and as adopted and the differences have not been described or set forth in the adopted rule as that rule is printed in the ~~Montana Administrative Register~~ register, the differences must be described in the statement of reasons for and against agency action. When written or oral submissions have not been received, an agency may omit the statement of reasons.

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

(3) Each proposed and adopted rule must include a citation to the specific grant of rulemaking authority pursuant to which

the rule or any part of the rule is adopted. In addition, each proposed and adopted rule must include a citation to the specific section or sections in the Montana Code Annotated that the rule purports to implement.

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

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

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

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

(b) reasonably necessary to effectuate the purpose of the statute. Subject to the provisions of subsection (8), reasonable necessity must be demonstrated in the agency's notice of proposed rulemaking and in the written and oral data, views, comments, or testimony submitted by the public or the agency and considered by the agency.

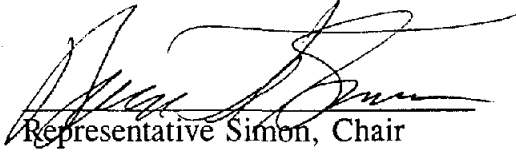
(7) A rule is not valid unless notice of it is given and it is adopted in substantial compliance with 2-4-302, ~~or~~ 2-4-303, or 2-4-306 and this section and unless notice of adoption of the rule is published within 6 months of the publishing of notice of the proposed rule. If an amended or supplemental notice of either proposed or final rulemaking, or both, is published concerning the same rule, the 6-month limit must be determined with reference to the latest notice in all cases.

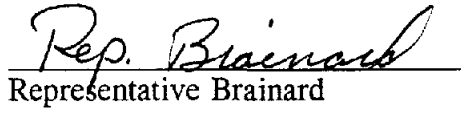
(8) An agency may use an amended proposal notice or the adoption notice to correct deficiencies in ~~statements of reasonable necessity,~~ in citations of authority for rules, and in citations of sections implemented by rules. An agency may use an amended proposal notice, but, except for clerical corrections, may not use the adoption notice to correct deficiencies in a statement of reasonable necessity."

Re-number: subsequent section

And this FREE Conference Committee report be adopted.

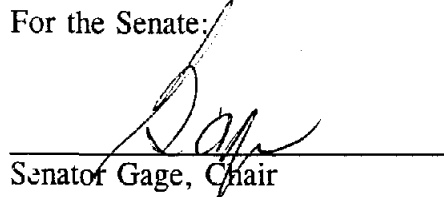
For the House:

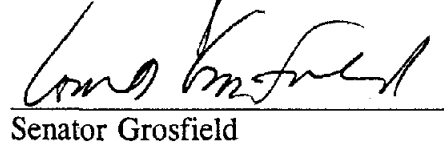
  
Representative Simon, Chair


  
Representative Brainard

  
Representative Galvin

For the Senate:

  
Senator Gage, Chair

  
Senator Grosfield

  
Senator Wilson



## HOUSE BILL NO. 389

INTRODUCED BY SIMON, ELLIS, GROSFIELD, GRINDE, BAER, BOHLINGER, SLITER, MCCANN, PECK,  
OHS, KNOX, BEAUDRY, DEBRUYCKER, HARP, COCCHIARELLA, BOHARSKI

A BILL FOR AN ACT ENTITLED: "~~AN ACT PROVIDING FOR GREATER PUBLIC PARTICIPATION IN AGENCY  
RULEMAKING AND OTHER AGENCY ACTIONS; AMENDING PROVISIONS FOR NOTICE OF AGENCY RULES  
AND ACTIONS; DEFINING TERMS; CLARIFYING EXISTING PROVISIONS; PROVIDING FOR GREATER  
PUBLIC PARTICIPATION IN AGENCY RULEMAKING; AMENDING PROVISIONS FOR NOTICE OF AGENCY  
RULES; DEFINING TERMS; STRENGTHENING THE REQUIREMENTS FOR AN EMERGENCY RULE;  
PROHIBITING THE USE OF AN ADOPTION NOTICE TO CURE DEFICIENCIES IN STATEMENTS OF  
REASONABLE NECESSITY; PROHIBITING THE USE OF AN ADOPTION NOTICE TO CURE DEFICIENCIES  
IN STATEMENTS OF REASONABLE NECESSITY; AND AMENDING SECTIONS 2-3-101, 2-3-102, 2-3-103,  
2-3-104, 2-3-105, 2-3-112, 2-3-114, 2-3-203, 2-3-213, 2-3-221, 2-4-102, 2-4-302, SECTIONS 2-4-102,  
2-4-302, 2-4-303, 2-4-305, 2-4-305, AND 2-4-306, MCA.~~"

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

~~Section 1. Section 2-3-101, MCA, is amended to read:~~

~~"2-3-101. Legislative intent. The legislature finds and declares pursuant to the mandate of Article  
II, section 8, of the 1972 Montana constitution that legislative guidelines should be established to secure  
to the people of Montana their constitutional right to be afforded reasonable opportunity to participate in  
the operation of governmental agencies prior to the final decision of the agency and that this part must be  
liberally construed to achieve that purpose."~~

~~Section 2. Section 2-3-102, MCA, is amended to read:~~

~~"2-3-102. Definitions. As used in this part, the following definitions apply:~~

~~(1) "Agency" means any a board, bureau, commission, department, authority, or officer of the  
state or local government authorized by law to make rules, determine contested cases, or enter into  
contracts except:~~

~~(a) the legislature and any or a branch, committee, or officer thereof of the legislature;~~

1 ~~(b) the judicial branches and any branch or a committee or officer thereof of the judicial branch;~~  
 2 ~~(c) the governor, except that an agency is not exempt merely because the governor has been~~  
 3 ~~designated as a member thereof of the agency; or~~

4 ~~(d) the state military establishment and agencies concerned with civil defense and recovery from~~  
 5 ~~hostile attack.~~

6 ~~(2) "Agency action" means the whole or a part of, or the equivalent or denial of, the adoption of~~  
 7 ~~an agency rule, the issuance of a license or order, the award of a contract, or the equivalent or denial~~  
 8 ~~thereof an agency decision that is of significant interest to the public.~~

9 ~~(3) "Rule" means any agency regulation, standard, or statement of general applicability that~~  
 10 ~~implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice~~  
 11 ~~requirements of any agency. The term includes the amendment or repeal of a prior rule but does not~~  
 12 ~~include:~~

13 ~~(a) statements concerning only the internal management of an agency and not affecting private~~  
 14 ~~rights or procedures available to the public; or~~

15 ~~(b) declaratory rulings as to the applicability of any statutory provision or of any rule.~~

16 ~~(4) "Significant interest to the public" means the undertaking of an agency action or decision that~~  
 17 ~~involves a controversial matter THAT THE AGENCY KNOWS TO BE CONTROVERSIAL, a SIGNIFICANT~~  
 18 ~~fiscal impact on a particular class or group of individuals, or significant citizen interest."~~

19

20 ~~Section 3. Section 2-3-103, MCA, is amended to read:~~

21 ~~"2-3-103. Public participation — governor to insure ensure guidelines adopted. (1) Each agency~~  
 22 ~~shall develop procedures for permitting and encouraging the public to participate in agency decisions that~~  
 23 ~~are of significant interest to the public. The procedures shall assure must ensure adequate notice and assist~~  
 24 ~~public participation before a final agency action is taken that is of significant interest to the public. Each~~  
 25 ~~agency shall create and maintain an interested persons list CONTAINING THE SUBJECT OR SUBJECTS IN~~  
 26 ~~WHICH EACH PERSON ON THE LIST IS INTERESTED. Each person submitting oral or written comments~~  
 27 ~~to, attending a hearing of, or in any way contacting the agency for any purpose concerning agency actions~~  
 28 ~~and decisions must be ADVISED OF AND GIVEN AN OPPORTUNITY TO BE placed on the list by the agency~~  
 29 ~~and given notice of each intended or proposed agency action and each agency decision relating to matters~~  
 30 ~~in AS TO which the person has expressed an interest in the person's contacts with the agency REQUESTED~~

1 NOTICE.

2 ~~(2) The governor shall insure ensure that each board, bureau, commission, department, authority,~~  
 3 ~~agency, or officer of the state adopts coordinated rules for its programs, which The guidelines shall must~~  
 4 ~~provide policies and procedures to facilitate public participation in those programs, consistent with~~  
 5 ~~subsection (1) of this section. These guidelines shall must be adopted as rules and published in a manner~~  
 6 ~~which that may be provided to a member of the public upon request."~~

7

8 ~~Section 4. Section 2-3-104, MCA, is amended to read:~~

9 ~~"2-3-104. Requirements for compliance with notice provisions. An agency shall be considered to~~  
 10 ~~have complied complies with the notice provisions of 2-3-103 if:~~

11 ~~(1) an environmental impact statement is prepared and distributed as required by the Montana~~  
 12 ~~Environmental Policy Act, Title 75, chapter 1;~~

13 ~~(2) a proceeding is held as required by the Montana Administrative Procedure Act;~~

14 ~~(2) A PROCEEDING IS HELD AS REQUIRED BY THE MONTANA ADMINISTRATIVE PROCEDURE~~  
 15 ~~ACT AND NOTICE OF THE PROCEEDING IS EITHER POSTED ON THE STATE ELECTRONIC BULLETIN~~  
 16 ~~BOARD OR IS PUBLISHED IN A PRESS RELEASE ISSUED BY THE AGENCY;~~

17 ~~(3)~~(2)~~(3) a public hearing, after appropriate and adequate notice is given, is held pursuant to any~~  
 18 ~~other a provision of state law or a local ordinance or resolution; or~~

19 ~~(4)~~(3)~~(4) a newspaper of general circulation within the area to be affected by a decision of~~  
 20 ~~significant interest to the public has carried a news story or advertisement A NEWS STORY OR~~  
 21 ~~advertisement giving notice of opportunity to be heard concerning the decision sufficiently prior to a final~~  
 22 ~~decision to permit public comment on the matter. The AN advertisement must be printed in at least~~  
 23 ~~12 point type and must comply with the notice requirements of 2-4-302(1). If the newspaper has a Sunday~~  
 24 ~~edition, the advertisement must be in that edition."~~

25

26 ~~Section 5. Section 2-3-105, MCA, is amended to read:~~

27 ~~"2-3-105. Supplemental notice by radio or television. (1) Any An official of the state or any of one~~  
 28 ~~of its political subdivisions who is required by law to publish any a notice required by law may, and is~~  
 29 ~~encouraged to, supplement such the publication by a radio or television broadcast, or both, of a summary~~  
 30 ~~of such the notice or by both of such broadcasts when if in his the official's judgment the public interest~~

1 will be served.

2 ~~(2) The When a summary of such a notice shall only be read with no reference to any person by~~  
3 ~~name then is broadcast, a candidate for political office may not be referred to.~~

4 ~~(3) Such announcements shall be made. A summary may be broadcast only by duly employed~~  
5 ~~personnel of the station from which such the broadcast emanates.~~

6 ~~(4) Announcements. An announcement by a political subdivisions subdivision may be made only~~  
7 ~~by stations a station situated within the county of origin of the legal notice unless no a broadcast station~~  
8 ~~exists does not exist in such that county, in which case announcements the announcement may be made~~  
9 ~~by a station or stations situated in any county other than the county of origin of the legal notice."~~

10

11 ~~Section 6. Section 2-3-112, MCA, is amended to read:~~

12 ~~"2-3-112. Exceptions. The provisions of 2-3-103 and 2-3-111 do not apply to:~~

13 ~~(1) an agency decision that must be made to deal with an emergency situation affecting the public~~  
14 ~~health, welfare, or safety;~~

15 ~~(2) an agency decision that must be made to maintain or protect the interests of the agency,~~  
16 ~~including but not limited to the filing of to file a lawsuit in a court of law or becoming to become a party~~  
17 ~~to an administrative proceeding; or~~

18 ~~(3) a decision involving no more than a ministerial act."~~

19

20 ~~Section 6. Section 2-3-114, MCA, is amended to read:~~

21 ~~"2-3-114. Enforcement. The district courts of the state have jurisdiction to set aside or declare~~  
22 ~~void an agency decision under this part upon petition made within 30 days of the date of the decision of~~  
23 ~~any by a person whose rights have been prejudiced THAT IS FILED WITHIN 30 DAYS AFTER THE DATE~~  
24 ~~OF THE DECISION OR WITHIN 30 DAYS AFTER THE DECISION BECOMES PUBLIC, WHICHEVER IS~~  
25 ~~LATER."~~

26

27 ~~Section 8. Section 2-3-203, MCA, is amended to read:~~

28 ~~"2-3-203. Meetings of public agencies and certain associations of public agencies to be open to~~  
29 ~~public exceptions. (1) All meetings of public or governmental bodies, boards, bureaus, commissions,~~  
30 ~~agencies of the state, or any political subdivision of the state or organizations or agencies supported in~~

1 ~~whole or in part by public funds or expending public funds must be open to the public.~~

2 ~~(2) All meetings of associations that are composed of public or governmental bodies referred to~~  
 3 ~~in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the~~  
 4 ~~public.~~

5 ~~(3) Provided, however, the The presiding officer of any a meeting subject to subsections (1) and~~  
 6 ~~(2) may close the meeting during the time that the discussion relates to a matter of individual privacy and~~  
 7 ~~then if and only if the presiding officer determines that the demands of individual privacy clearly exceed~~  
 8 ~~the merits of public disclosure. The right of individual privacy may be waived by the individual about whom~~  
 9 ~~the discussion pertains, and, in that event, the meeting must be open.~~

10 ~~(4) (a) However, except Except as provided in subsection (4)(b), a meeting may be closed to~~  
 11 ~~discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental~~  
 12 ~~effect on the litigating position of the public agency.~~

13 ~~(b) A meeting may not be closed to discuss strategy to be followed in litigation involving the~~  
 14 ~~enforcement or preservation of a constitutional right of the people or in which the only parties are public~~  
 15 ~~bodies or associations described in subsections (1) and (2).~~

16 ~~(5) Any A committee or subcommittee appointed by a public body or an association described in~~  
 17 ~~subsection (2) for the purpose of conducting business which that is within the jurisdiction of that agency~~  
 18 ~~is subject to the requirements of this section."~~

19

20 ~~**Section 7.** Section 2-3-213, MCA, is amended to read:~~

21 ~~"**2-3-213. Voidability.** Any A decision made in violation of 2-3-203 may be declared void by a~~  
 22 ~~district court having jurisdiction. A suit to void any such decision must be commenced within 30 days of~~  
 23 ~~the decision. AN ACTION TO INVALIDATE THE DECISION MUST BE COMMENCED WITHIN 30 DAYS~~  
 24 ~~AFTER THE DATE OF THE DECISION OR WITHIN 30 DAYS AFTER THE DECISION BECOMES PUBLIC,~~  
 25 ~~WHICHEVER IS LATER."~~

26

27 ~~**Section 8.** Section 2-3-221, MCA, is amended to read:~~

28 ~~"**2-3-221. Costs and attorney fees to plaintiff PARTY in certain actions to enforce constitutional**~~  
 29 ~~**right to know.** A plaintiff PARTY who prevails in an action brought in district court to enforce his the~~  
 30 ~~plaintiff's PARTY'S rights under Article II, section 9, of the Montana constitution may must MAY be~~

1 ~~awarded his costs and reasonable attorneys' attorney fees as a matter of course. A prevailing plaintiff~~  
 2 ~~PARTY who is not represented by an attorney must be awarded 90% of what the judge determines would~~  
 3 ~~be a reasonable attorney fee if the plaintiff PARTY had been represented by an attorney."~~

4

5 **Section 9.** Section 2-4-102, MCA, is amended to read:

6 **"2-4-102. Definitions.** For purposes of this chapter, the following definitions apply:

7 (1) ~~"Administrative code committee" or "committee" means the committee provided for in Title 5,~~  
 8 ~~chapter 14.~~

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

11 (i) ~~the state board of pardons and parole, except that the board is subject to the requirements of~~  
 12 ~~2-4-103, 2-4-201, 2-4-202, and 2-4-306 and its rules must be published in the Administrative Rules of~~  
 13 ~~Montana ARM and the Montana Administrative Register register;~~

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

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

17 (iv) ~~the financing, construction, and maintenance of public works.~~

18 (b) ~~Agency does not include a school district, unit of local government, or any other political~~  
 19 ~~subdivision of the state.~~

20 (3) ~~"Agency action" means the whole or a part of, or the equivalent or denial of, the adoption of~~  
 21 ~~an agency rule, the issuance of a license or order, the award of a contract, or an agency decision that is~~  
 22 ~~of significant interest to the public.~~

23 (3)(4) ~~"ARM" means the Administrative Rules of Montana.~~

24 (4)(5) ~~"Contested case" means a proceeding before an agency in which a determination of legal~~  
 25 ~~rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The~~  
 26 ~~term includes but is not restricted to ratemaking, price fixing, and licensing.~~

27 (6) ~~"Interested person" means a person known to the committee or to an agency to have WHO~~  
 28 ~~HAS demonstrated in any way TO THE AGENCY an interest concerning agency actions or other agency~~  
 29 ~~administrative matters AND HAS REQUESTED TO BE PLACED ON THE AGENCY'S LIST OF INTERESTED~~  
 30 ~~PERSONS.~~

1 ~~(5)(7) "License" includes the whole or part of any an agency permit, certificate, approval,~~  
 2 ~~registration, charter, or other form of permission required by law but does not include a license required~~  
 3 ~~solely for revenue purposes.~~

4 ~~(6)(8) "Licensing" includes any an agency process respecting the grant, denial, renewal, revocation,~~  
 5 ~~suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.~~

6 ~~(7)(9) "Party" means a person named or admitted as a party or properly seeking and entitled as of~~  
 7 ~~right to be admitted as a party, but nothing in this chapter may not be construed to prevent an agency from~~  
 8 ~~admitting any person as a party for limited purposes.~~

9 ~~(8)(10) "Person" means an individual, partnership, corporation, association, governmental~~  
 10 ~~subdivision, agency, or public organization of any character.~~

11 ~~(9)(11) "Register" means the Montana Administrative Register.~~

12 ~~(10)(12) "Rule" means each agency regulation, standard, or statement of general applicability that~~  
 13 ~~implements, interprets, or proscribes law or policy or describes the organization, procedures, or practice~~  
 14 ~~requirements of an agency. The term includes the amendment or repeal of a prior rule but does not include:~~

15 ~~(a) statements concerning only the internal management of an agency and not affecting private~~  
 16 ~~rights or procedures available to the public;~~

17 ~~(b) formal opinions of the attorney general and declaratory rulings issued pursuant to 2-4-501;~~

18 ~~(c) rules relating to the use of public works, facilities, streets, and highways when the substance~~  
 19 ~~of the rules is indicated to the public by means of signs or signals;~~

20 ~~(d) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when~~  
 21 ~~there is a statutory requirement for the publication of the rules and rules adopted annually or biennially~~  
 22 ~~relating to the seasonal recreational use of lands and waters owned or controlled by the state when the~~  
 23 ~~substance of the rules is indicated to the public by means of signs or signals;~~

24 ~~(e) rules implementing the state personnel classification plan, the state wage and salary plan, or~~  
 25 ~~the statewide budgeting and accounting system;~~

26 ~~(f) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in~~  
 27 ~~accordance with 2-4-306 and must be published in the Administrative Rules of Montana ARM.~~

28 ~~(13) "Significant interest to the public", when used in reference to agency action, means agency~~  
 29 ~~action that involves a controversial matter THAT THE AGENCY KNOWS TO BE CONTROVERSIAL, a~~  
 30 ~~SIGNIFICANT fiscal impact on a particular class or group of individuals, or significant citizen interest.~~

1           ~~(11)(14)~~ "Substantive rules" are either;

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

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

8

9           **Section 10.** ~~Section 2-4-302, MCA, is amended to read:~~

10           ~~"2-4-302. Notice, hearing, and submission of views. (1) Prior to the adoption, amendment, or~~  
11 ~~repeal of any a rule, the agency shall give written notice of its intended action. The notice shall must, at~~  
12 ~~a minimum, include a statement of either the terms or substance of the intended action or a description of~~  
13 ~~the subjects and issues involved, the rationale for the intended action, and the time when, place where,~~  
14 ~~and manner in which interested persons may present their views thereon on the intended action. To~~  
15 ~~promote the public's full comprehension of the notice, the notice must be written in plain and clear English~~  
16 ~~and use familiar and understandable words and terms.~~

17           ~~(2) (a) The notice shall must be filed with the secretary of state for publication in the register, as~~  
18 ~~provided in 2-4-312, and mailed within 3 days of publication to interested persons who have made timely~~  
19 ~~requests to the agency for notice of its rulemaking proceedings to be informed of agency actions and to~~  
20 ~~the office of any professional, trade, or industrial society or organization or member thereof which of these~~  
21 ~~entities that has filed a request with the administrative code committee when such request that has been~~  
22 ~~forwarded to the agency as provided in subsection (2)(b). Each agency shall create and maintain a list of~~  
23 ~~interested persons AND THE SUBJECT OR SUBJECTS IN WHICH EACH PERSON ON THE LIST IS~~  
24 ~~INTERESTED. A person who submits an oral or written comment, attends a hearing, or contacts an agency~~  
25 ~~by any means and for any purpose in regard to intended PROPOSED agency action must be informed of~~  
26 ~~the list by the agency.~~

27           ~~(b) The administrative code committee shall forward a list of all organizations or interested persons~~  
28 ~~who have submitted a request to be informed of agency actions to all agencies publishing rulemaking~~  
29 ~~notices in the Montana Administrative Register ARM. The list must be amended by the agency upon request~~  
30 ~~of any interested person requesting to be added to or deleted from the list.~~



1 ~~(e) The notice shall must be published and mailed at least 30 days in advance of the agency's~~  
 2 ~~intended action. If the intended action is of significant interest to the public, the notice must, at a~~  
 3 ~~minimum, be published as required in 2-3-104(3).~~

4 ~~(3) If any a statute provides for a different method of publication different from that provided in~~  
 5 ~~subsection (2), the affected agency shall comply with the statute in addition to the requirements contained~~  
 6 ~~herein in this section. However, in no case may the notice period may not be less than 30 days or more~~  
 7 ~~than 6 months.~~

8 ~~(4) Prior to the adoption, amendment, or repeal of any rule, the agency shall afford interested~~  
 9 ~~persons at least 20 days' notice of a hearing and 28 days from the day of notice to submit data, views,~~  
 10 ~~or arguments, orally or in writing. In the case of substantive rules, the notice of proposed rulemaking must~~  
 11 ~~state that opportunity for oral hearing shall must be granted if requested by either 10% or 25, whichever~~  
 12 ~~is less, of the persons who will be directly affected by the proposed rule, by a governmental subdivision~~  
 13 ~~or agency, by the administrative code committee, or by an association having not less than 25 members~~  
 14 ~~who will be directly affected.~~

15 ~~(5) An agency may continue a hearing date for cause. In the discretion of the agency, contested~~  
 16 ~~case procedures need not be followed in hearings held pursuant to this section. If a hearing is otherwise~~  
 17 ~~required by statute, nothing herein in this section alters that requirement.~~

18 ~~(6) If an agency fails to publish a notice of adoption within the time required by 2-4-305(7) and~~  
 19 ~~the agency again proposes the same rule for adoption, amendment, or repeal, the proposal must be~~  
 20 ~~considered a new proposal for purposes of compliance with this chapter.~~

21 ~~(7) At the commencement of any a hearing on the intended action, the person designated by the~~  
 22 ~~agency to preside at the hearing shall:~~

23 ~~(a) read aloud the "Notice of Function of Administrative Code Committee" appearing in the register;~~

24 ~~(b) explain the primary function and purpose of the administrative code committee and state how~~  
 25 ~~the administrative code committee may be contacted; and~~

26 ~~(c) inform the persons at the hearing of the provisions of subsection (2)(a) and provide them an~~  
 27 ~~opportunity to place their names on the list."~~

28  
 29 **SECTION 1. SECTION 2-4-102, MCA, IS AMENDED TO READ:**

30 **"2-4-102. Definitions.** For purposes of this chapter, the following definitions apply:

1 (1) "Administrative code committee" or "committee" means the committee provided for in Title 5,  
2 chapter 14.

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

5 (i) the state board of pardons and parole, except that the board is subject to the requirements of  
6 2-4-103, 2-4-201, 2-4-202, and 2-4-306 and its rules must be published in the ~~Administrative Rules of~~  
7 ~~Montana ARM~~ and the ~~Montana Administrative Register~~ register;

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

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

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

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

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

15 (4) "Contested case" means a proceeding before an agency in which a determination of legal rights,  
16 duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term  
17 includes but is not restricted to ratemaking, price fixing, and licensing.

18 (5) "Interested person" means a person who has expressed to the agency an interest concerning  
19 agency actions under this chapter and has requested to be placed on the agency's list of interested persons  
20 as to matters of which the person desires to be given notice. The term does not extend to contested cases.

21 ~~(6)~~(6) "License" includes the whole or part of ~~any~~ an agency permit, certificate, approval,  
22 registration, charter, or other form of permission required by law but does not include a license required  
23 solely for revenue purposes.

24 ~~(7)~~(7) "Licensing" includes ~~any~~ an agency process respecting the grant, denial, renewal, revocation,  
25 suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.

26 ~~(8)~~(8) "Party" means a person named or admitted as a party or properly seeking and entitled as of  
27 right to be admitted as a party, but ~~nothing~~ in this chapter may not be construed to prevent an agency from  
28 admitting any person as a party for limited purposes.

29 ~~(9)~~(9) "Person" means an individual, partnership, corporation, association, governmental  
30 subdivision, agency, or public organization of any character.

1           ~~(9)~~(10) "Register" means the Montana Administrative Register.

2           ~~(10)~~(11) "Rule" means each agency regulation, standard, or statement of general applicability that  
3 implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice  
4 requirements of an agency. The term includes the amendment or repeal of a prior rule but does not include:

5           (a) statements concerning only the internal management of an agency and not affecting private  
6 rights or procedures available to the public;

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

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

10           (d) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when  
11 there is a statutory requirement for the publication of the rules and rules adopted annually or biennially  
12 relating to the seasonal recreational use of lands and waters owned or controlled by the state when the  
13 substance of the rules is indicated to the public by means of signs or signals;

14           (e) rules implementing the state personnel classification plan, the state wage and salary plan, or  
15 the statewide budgeting and accounting system;

16           (f) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in  
17 accordance with 2-4-306 and must be published in the ~~Administrative Rules of Montana~~ ARM.

18           (12) "Significant interest to the public" means agency actions under this chapter regarding matters  
19 that the agency knows to be of widespread citizen interest. These matters include issues involving a  
20 substantial fiscal impact to or controversy involving a particular class or group of individuals. The term  
21 does not extend to contested cases.

22           ~~(11)~~(13) "Substantive rules" are either:

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

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

29

30           SECTION 2. SECTION 2-4-302, MCA, IS AMENDED TO READ:

1           **"2-4-302. Notice, hearing, and submission of views.** (1) Prior to the adoption, amendment, or  
2 repeal of any rule, the agency shall give written notice of its intended action. The notice ~~shall~~ must include  
3 a statement of either the terms or substance of the intended action or a description of the subjects and  
4 issues involved, the rationale for the intended action, and the time when, place where, and manner in which  
5 interested persons may present their views ~~thereon~~ on the intended action. The rationale must be written  
6 in plain, easily understood language.

7           (2) (a) The notice ~~shall~~ must be filed with the secretary of state for publication in the register as  
8 provided in 2-4-312 and mailed within 3 days of publication to interested persons who have made timely  
9 requests to the agency ~~for notice to be informed~~ of its rulemaking proceedings and to the office of any  
10 professional, trade, or industrial society or organization or member ~~thereof~~ which of those entities that has  
11 filed a request with the administrative code committee ~~when such request~~ that has been forwarded to the  
12 agency as provided in subsection (2)(b). Each agency shall create and maintain a list of interested persons  
13 and the subject or subjects in which each person on the list is interested. A person who submits a written  
14 comment or attends a hearing in regard to proposed agency action under this part must be informed of the  
15 list by the agency. An agency complies with this subsection if it includes in the notice an advisement  
16 explaining how persons may be placed on the list of interested persons and if it complies with subsection  
17 (7).

18           (b) The administrative code committee shall forward a list of all organizations or persons who have  
19 submitted a request to be informed of agency actions to all agencies publishing rulemaking notices in the  
20 ~~Montana Administrative Register~~ ARM. The list must be amended by the agency upon request of any person  
21 requesting to be added to or deleted from the list.

22           (c) The notice ~~shall~~ must be published and mailed at least 30 days in advance of the agency's  
23 intended action. In addition to publishing and mailing the notice under subsection (2)(a) of this section, the  
24 agency shall post the notice of the state electronic bulletin board or other electronic communications  
25 system available to the public.

26           (3) If ~~any~~ a statute provides for a ~~different~~ different method of publication different from that provided in  
27 subsection (2), the affected agency shall comply with the statute in addition to the requirements contained  
28 ~~herein in this section~~. However, ~~in no case may~~ the notice period may not be less than 30 days or more  
29 than 6 months.

30           (4) Prior to the adoption, amendment, or repeal of any rule, the agency shall afford interested

1 persons at least 20 days' notice of a hearing and 28 days from the day of notice to submit data, views,  
 2 or arguments, orally or in writing. In the case of substantive rules, the notice of proposed rulemaking must  
 3 state that opportunity for oral hearing ~~shall~~ must be granted if requested by either 10% or 25, whichever  
 4 is less, of the persons who will be directly affected by the proposed rule, by a governmental subdivision  
 5 or agency, by the administrative code committee, or by an association having not less than 25 members  
 6 who will be directly affected. If the proposed rulemaking involves matters of significant interest to the  
 7 public, the agency shall schedule an oral hearing.

8 (5) An agency may continue a hearing date for cause. In the discretion of the agency, contested  
 9 case procedures need not be followed in hearings held pursuant to this section. If a hearing is otherwise  
 10 required by statute, nothing ~~herein~~ in this section alters that requirement.

11 (6) If an agency fails to publish a notice of adoption within the time required by 2-4-305(7) and  
 12 the agency again proposes the same rule for adoption, amendment, or repeal, the proposal must be  
 13 considered a new proposal for purposes of compliance with this chapter.

14 (7) At the commencement of any hearing on the intended action, the person designated by the  
 15 agency to preside at the hearing shall:

16 (a) read aloud the "Notice of Function of Administrative Code Committee" appearing in the register;  
 17 and

18 (b) inform the persons at the hearing of the provisions of subsection (2)(a) and provide them an  
 19 opportunity to place their names on the list."

20

21 **Section 3.** Section 2-4-303, MCA, is amended to read:

22 **"2-4-303. Emergency or temporary rules.** (1) If an agency finds that an imminent peril to the public  
 23 health, safety, or welfare requires adoption of a rule upon fewer than 30 days' notice and states in writing  
 24 its reasons for that finding, it may proceed upon special notice filed with the committee, without prior  
 25 notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an  
 26 emergency rule. The rule may be effective for a period not longer than 120 days, after which a new  
 27 emergency rule with the same or substantially the same text may not be adopted, but the adoption of an  
 28 identical rule under 2-4-302 is not precluded. Because the exercise of emergency rulemaking power  
 29 precludes the people's constitutional right to prior notice and participation in the operations of their  
 30 government, it constitutes the exercise of extraordinary power requiring extraordinary safeguards against

1 abuse. An emergency rule may be adopted only in circumstances that truly and clearly constitute an  
 2 existing imminent peril to the public health, safety, or welfare that cannot be averted or remedied by any  
 3 other administrative act. The sufficiency of the reasons for a finding of imminent peril to the public health,  
 4 safety, or welfare is subject to immediate judicial review upon petition by any person UPON PETITION BY  
 5 ANY PERSON. THE MATTER MUST BE SET FOR HEARING AT THE EARLIEST POSSIBLE TIME AND TAKES  
 6 PRECEDENCE OVER ALL OTHER MATTERS EXCEPT OLDER MATTERS OF THE SAME CHARACTER. The  
 7 sufficiency of the reasons justifying a finding of imminent peril and the necessity for emergency rulemaking  
 8 must be compelling and, as written in the rule adoption notice, must stand on their own merits for purposes  
 9 of judicial review. The dissemination of emergency rules required by 2-4-306 must be strictly observed and  
 10 liberally accomplished.

11 (2) A statute enacted or amended to be effective prior to October 1 of the year of enactment or  
 12 amendment may be implemented by a temporary administrative rule, adopted before October 1 of that year,  
 13 upon any abbreviated notice or hearing that the agency finds practicable, but the rule may not be filed with  
 14 the secretary of state until at least 30 days have passed since publication of the notice of proposal to adopt  
 15 the rule. The temporary rule is effective until October 1 of the year of adoption. The adoption of an identical  
 16 rule under 2-4-302 is not precluded during the period that the temporary rule is effective.”

17

18 ~~Section 12. Section 2-4-305, MCA, is amended to read:~~

19 ~~"2-4-305. **Requisites for validity— authority and statement of reasons.** (1) The agency shall fully~~  
 20 ~~consider fully written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency~~  
 21 ~~shall issue a concise CONCISE statement of the principal reasons for and against its adoption,~~  
 22 ~~comprehensively incorporating in the statement the reasons for overruling the considerations urged against~~  
 23 ~~its adoption. If substantial differences exist between the rule as proposed and as adopted and the~~  
 24 ~~differences have not been described or set forth in the adopted rule as that rule is printed in the Montana~~  
 25 ~~Administrative Register register, the differences must be described in the statement of reasons for and~~  
 26 ~~against agency action. When written or oral submissions have not been received, an agency may omit the~~  
 27 ~~statement of reasons.~~

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

1 language.

2 ~~(3) Each proposed and adopted rule must include a citation to the specific grant of rulemaking~~  
 3 ~~authority pursuant to which the rule or any part of the rule is adopted. In addition, each proposed and~~  
 4 ~~adopted rule must include a citation to the specific section or sections in the Montana Code Annotated that~~  
 5 ~~the rule purports to implement.~~

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

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

12 ~~(6) Whenever by the express or implied terms of any statute a state agency has authority to adopt~~  
 13 ~~rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, a rule~~  
 14 ~~adopted is not valid or effective unless it is:~~

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

16 ~~(b) reasonably necessary to effectuate the purpose of the statute. Subject to the provisions of~~  
 17 ~~subsection (8), reasonable necessity must be demonstrated in the agency's notice of proposed rulemaking~~  
 18 ~~and in the written and oral data, views, comments, or testimony submitted by the public or the agency and~~  
 19 ~~considered by the agency.~~

20 ~~(7) A rule is not valid unless notice of it is given and it is adopted, in substantial compliance with~~  
 21 ~~2-4-302 or 2-4-303 and this section, and unless 2-4-306 is complied with and notice of adoption of the~~  
 22 ~~rule is published within 6 months of the publishing of notice of the proposed rule. If an amended or~~  
 23 ~~supplemental notice of either proposed or final rulemaking, or both, is published concerning the same rule,~~  
 24 ~~the 6-month limit must be determined with reference to the latest notice in all cases.~~

25 ~~(8) An agency may use an amended proposal notice or the adoption notice to correct deficiencies~~  
 26 ~~in statements of reasonable necessity, in citations of authority for rules, and in citations of sections~~  
 27 ~~implemented by rules. An agency may use an amended proposal notice, but not the adoption notice, to~~  
 28 ~~correct deficiencies in a statement of reasonable necessity."~~

29

30 **SECTION 4. SECTION 2-4-305, MCA, IS AMENDED TO READ:**

1           **"2-4-305. Requisites for validity -- authority and statement of reasons.** (1) The agency shall fully  
2 consider ~~fully~~ written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency  
3 shall issue a concise statement of the principal reasons for and against its adoption, incorporating in the  
4 statement the reasons for overruling the considerations urged against its adoption. If substantial differences  
5 exist between the rule as proposed and as adopted and the differences have not been described or set forth  
6 in the adopted rule as that rule is printed in the ~~Montana Administrative Register~~ register, the differences  
7 must be described in the statement of reasons for and against agency action. When written or oral  
8 submissions have not been received, an agency may omit the statement of reasons.

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

13           (3) Each proposed and adopted rule must include a citation to the specific grant of rulemaking  
14 authority pursuant to which the rule or any part of the rule is adopted. In addition, each proposed and  
15 adopted rule must include a citation to the specific section or sections in the Montana Code Annotated that  
16 the rule purports to implement.

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

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

23           (6) Whenever by the express or implied terms of any statute a state agency has authority to adopt  
24 rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, a rule  
25 adopted is not valid or effective unless it is:

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

27           (b) reasonably necessary to effectuate the purpose of the statute. Subject to the provisions of  
28 subsection (8), reasonable necessity must be demonstrated in the agency's notice of proposed rulemaking  
29 and in the written and oral data, views, comments, or testimony submitted by the public or the agency and  
30 considered by the agency.



1 (7) A rule is not valid unless notice of it is given and it is adopted in substantial compliance with  
 2 2-4-302, ~~or 2-4-303,~~ or 2-4-306 and this section and unless notice of adoption of the rule is published  
 3 within 6 months of the publishing of notice of the proposed rule. If an amended or supplemental notice of  
 4 either proposed or final rulemaking, or both, is published concerning the same rule, the 6-month limit must  
 5 be determined with reference to the latest notice in all cases.

6 (8) An agency may use an amended proposal notice or the adoption notice to correct deficiencies  
 7 in ~~statements of reasonable necessity,~~ in citations of authority for rules, and in citations of sections  
 8 implemented by rules. An agency may use an amended proposal notice, but, except for clerical corrections,  
 9 may not use the adoption notice to correct deficiencies in a statement of reasonable necessity."

10

11 **Section 5.** Section 2-4-306, MCA, is amended to read:

12 **"2-4-306. Filing, format, and effective date -- dissemination of emergency rules.** (1) Each agency  
 13 shall file with the secretary of state a copy of each rule adopted by it.

14 (2) The secretary of state may prescribe a format, style, and arrangement for notices and rules  
 15 ~~which that~~ are filed pursuant to this chapter and may refuse to accept the filing of any notice or rule that  
 16 is not in compliance ~~therewith~~ with this chapter. ~~He~~ The secretary of state shall keep and maintain a  
 17 permanent register of all notices and rules filed, including superseded and repealed rules, which ~~shall~~ must  
 18 be open to public inspection and shall provide copies of any notice or rule upon request of any person.  
 19 Unless otherwise provided by statute, the secretary of state may require the payment of the cost of  
 20 providing ~~each~~ copies.

21 (3) In the event that the administrative code committee has conducted a poll of the legislature in  
 22 accordance with 2-4-403 or the revenue oversight committee has conducted a poll in accordance with  
 23 5-18-109, the results of the poll ~~shall~~ must be published with the rule.

24 (4) Each rule ~~shall become~~ becomes effective after publication in the register as provided in  
 25 2-4-312, except that:

26 (a) if a later date is required by statute or specified in the rule, the later date ~~shall be~~ is the effective  
 27 date;

28 (b) subject to applicable constitutional or statutory provisions:

29 (i) a temporary rule is effective immediately upon filing with the secretary of state or at a stated  
 30 date following publication in the register; and

1           (ii) an emergency rule ~~shall become~~ becomes effective ~~immediately upon filing with the secretary~~  
2 ~~of state or~~ at a stated date following publication in the register or immediately upon filing with the secretary  
3 of state if the agency finds that this effective date is necessary because of imminent peril to the public  
4 health, safety, or welfare. The agency's finding and a brief statement of reasons ~~therefor shall~~ for the  
5 finding must be filed with the rule. The agency shall, in addition to the required publication in the register,  
6 take appropriate and extraordinary measures to make emergency rules known to every person who may  
7 be affected by them."

8

-END-