

Administrative Rule Review Handbook

Prepared by
*Management Council
Legislative Service Office*

April 2012



Connect With Us

Website: <http://legisweb.state.wy.us>

E-mail: lso@wyoleg.gov



www.twitter.com/wylegislature

TABLE OF CONTENTS

| | Page |
|----------------------------------------------------------------------------------|-------------|
| PART I. AGENCY RULEMAKING AUTHORITY | |
| A. Agency Rulemaking Necessity | |
| B. Delegation of Rulemaking Authority: Requirement of Legislative Limits..... | |
| C. Agency Rules: General Restrictions | |
| PART II. AGENCY RULEMAKING PROCESS | |
| A. Agency Rules: Definitions/Types | |
| B. General Rulemaking Procedures | |
| PART III. LEGISLATIVE RULE REVIEW PROCESS..... | |
| A. In General | |
| B. The LSO Rule Review Process | |
| 1. Requirement for the LSO Review | |
| 2. Scope of the LSO Review of Final Rules | |
| 3. Steps in the LSO Review Process | |
| C. Management Council Review of Agency Rules | |
| 1. Initiation of Management Council Review | |
| 2. Scope of Management Council Review; Referral to Committee..... | |
| 3. Management Council Procedures to Consider Rules | |
| (a) Mail Ballot | |
| (b) Rules Considered at Meetings..... | |
| (c) Emergency Rules | |
| 4. Management Council Action on Rules | |
| (a) Alternatives | |
| (b) Appropriate Motions on Rules | |
| (c) Notice of Council Action to Governor..... | |
| (d) Legislative Orders, etc. | |
| PART IV. EMERGENCY RULES | |
| A. Adoption Procedures | |
| B. The LSO Review of Emergency Rules | |
| C. Management Council Action on Emergency Rules | |

APPENDICES.....A-I

 Limitations on Agency Rulemaking Authority A-II

 Attorney General’s Agency Rulemaking Procedural Guide

 Statutes Governing Agency Rulemaking Process (APA)

 Statutes Governing Legislative Rule Review Process

 Flow Chart: Administrative Rules.....

 Standard Agenda for Consideration of Agency Rules
 at Management Council Meeting

 Joint Rules of the House and Senate

PART I. AGENCY RULEMAKING AUTHORITY

A. Agency Rulemaking Necessity

While some staunch supporters of the “separation of powers” doctrine may object philosophically to the delegation of any measure of “law-making” authority to an Executive Branch agency, it is generally acknowledged that comprehensive regulations required today are too intricate and detailed for direct legislative processes.¹ There exist numerous reasons why delegation of rulemaking authority may be necessary or desirable:

1. The field of law involved is too complex and broad or too narrow and obscure to lend itself to regulation by statute;²
2. The agency has a greater expertise administering the law;³
3. The area of law is one which must be constantly updated (*e.g.*, to ensure compliance with federal requirements) and the Legislature does not meet frequently enough to accomplish the updating;⁴
4. It is difficult to specify at the outset of a new program the precise policies to be followed and there is a need for flexibility to deal with unforeseen problems;⁵
5. The subject matter of the regulatory program is technical or complex requiring detailed knowledge of the regulated industry;⁶
6. Insufficient time exists during the legislative session to develop detailed statutory regulations and the bill sponsors may desire to diminish controversy for the sake of passing the bill.⁷

¹ BERNARD SCHWARTZ, ADMINISTRATIVE LAW 36 (2d ed. 1984).

² *Id.* at 36-37.

³ 3 C. KOCH, ADMINISTRATIVE LAW AND PRACTICE, § 12.13[1] at 172 (2D 1997).

⁴ E. GELLHORN & R. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 10 (3D 1990).

⁵ *Id.* at 11; 2 AM. JUR. 2D *Administrative Law* § 62 (1994).

⁶ *Id.*

⁷ 3 C. KOCH, *supra* note 3, § 12.13[1] at 171-172.

In summary, most legislatures, faces with a lack of time and expertise to draft details, have conceded that delegation of rulemaking authority to agencies is both practical and inevitable in order to implement complex state programs:

Life, long ago, became too complex to be governed without the aid of specialized expertise. No legislative body should be required to prescribe by law the rates to be charged by utilities, the routes to be followed by transportation companies or the engineering specifications to be used in building bridges.⁸

B. Delegation of Rulemaking Authority: Requirement of Legislative Limits

1. *General Rule: Legislative Limits Required.* Over the years, the law relating to delegation of rulemaking authority has moved from the theoretical prohibition against any delegation of legislative power to a rule against unrestricted delegations, *i.e.*, those which are not limited.⁹ The general legal principle of legislative delegation is stated as follows:

It is fundamental law that the legislature can delegate to administrative agency the power to make rules and regulations to implement a statute [A]nd all rulemaking authority delegated to administrative agencies is limited and defined by the statute conferring the power Although the legislature may not delegate purely legislative power, it may declare its will, and, after fixing a primary standard, devolve upon administrative officers, the power to fill in the details by prescribing administrative rules and regulations.¹⁰

2. *Delegation of Rulemaking Authority in Wyoming.* The Wyoming State Legislature does have the power to delegate its inherent authority to make rules and regulations to an administrative agency and uses that power routinely.¹¹ Like other legislative bodies, it can delegate this power to an agency either with very specific

⁸ LEGISLATIVE RULE REVIEW: AN OVERVIEW OF PROCESS AND RESULTS, FLORIDA JOINT ADMINISTRATIVE PROCEDURES COMMITTEE (Report Prepared for NCSL Meeting, Reno, July 24-29, 1988), p.2.

⁹ B. SCHWARTZ, *supra* note 1, at 36.

¹⁰ 2 AM. JUR. 2D *Administrative Law* § 152 (1994).

¹¹ Singer, *Administrative Regulation Review – Act II*, 15 LAND & WATER L. REV. 207, 215 (1980).

restrictions or in broad or general language.¹² A broad delegation of authority is useful to a legislature that faces social or economic problems too complex for a detailed delegation,¹³ or a situation that may change too rapidly for the legislature to revise its delegation.¹⁴

3. *Restrictions on Agency Action in Wyoming.* A Wyoming administrative agency, even on operating under the broadest delegation of authority, does not operate without supervision. The Wyoming Supreme Court can review rules adopted under the Wyoming Administrative Procedure Act (W.S. §§ 16-3-101 to 16-3-115). If the Court believes an agency rule or action is beyond the authority delegated by the Legislature, it will void the rule or reverse the action.¹⁵

When reviewing an agency's authority, the Court uses the "express delegation standard," meaning "an agency enjoys only those powers which the legislature has expressly conferred and the corollary rule of construction that statutes under which an agency purports to exercise a doubtful power must be strictly construed **against** the exercise of that power."¹⁶ Otherwise, an agency would possess the power to legislate by amending the terms of the legislature's delegation.¹⁷ Under this rule, the Court will strike down an agency rule or exercise of power that has not been clearly authorized by the Legislature.¹⁸ Using this standard, the Supreme Court has nullified **a number of** agency actions and rules.¹⁹

With the Supreme Court prohibiting agencies from acting beyond their clear mandate from the Legislature, the actual wording of the delegation for rulemaking

¹² 2 AM. JUR. 2D *Administrative Law* § 56 (1994); *See also In re Bessemer Mountain*, 856 P.2d 450, 454 (Wyo. 1993).

¹³ 2 AM. JUR. 2D *Administrative Law* § 56 (1994).

¹⁴ E. GELLHORN, *supra* note 4, at 28.

¹⁵ *In re LePage*, 18 P.3d 1177, 1180-1181 (Wyo. 2001).

¹⁶ *Appleby v. State ex rel., Wyoming Workers' Compensation Division*, 2002 WY 84, ¶ 16 (quoting *Jackson v. State ex rel., Wyoming Workers' Compensation Division*, 786 P.2d 874, 878 (Wyo. 1990) (emphasis added)).

¹⁷ *In re Workers' Compensation Claim of Cochran*, 993 P.2d 320, 323 (Wyo. 1999).

¹⁸ *State v. Buggy Bath Unlimited*, 18 P.3d 1182, 1186 (Wyo. 2001); *Ahlenius v. Wyoming Bd. of Prof'l Geologists*, 2 p.3d 1058 (Wyo. 2000).

¹⁹ *See Appleby*, *supra* note 16; *LePage*, *supra* note 15; *Buggy Bath Unlimited*, *supra* note 18; *Ahlenius*, *supra* note 18; *US West v. Wyo. PSC*, 15 P.3d 722 (Wyo. 2000); *Cochran*, *supra* note 17; *State v. Bannan Energy Corp.*, 999 P.2d 1306 (Wyo. 2000).

authority is significant. Where the language of the statute extending the delegation is “clear and unambiguous” the Court then uses the “plain and ordinary language of the statute” to review whether the agency is within its mandate.²⁰ For instance, the Wyoming Oil and Gas Conservation Commission is clearly empowered by the Legislature to prevent waste or promote conservation of oil and gas resources in Wyoming and not to collect taxes, which has been delegated by the Legislature to the Department of Revenue.²¹

But, where the language used by the Legislature may reasonably be construed to have more than one meaning, the Court will use a number of methods to determine what authority the Legislature intended to grant when it passed the statute.²² Multiple meaning within an enabling statute are more likely when there is a broad grant of authority rather than a specific “laundry list” of powers.²³ Though the grant of authority may be worded quite broadly, the Court will endeavor to reach a specific understanding of the scope of the agency powers by looking at the statute’s legislative history, including the problem the statute was intended to resolve; “all other prior and contemporaneous facts,” as well as the agency’s own interpretation of those standards.²⁴ If the agency’s action or rule is not in accord with this understanding, or the Court feels that doubt exists whether the power was granted to the agency, the Court will revoke the rule or reverse the agency action.²⁵

²⁰ Appleby, *supra* note 16; Ahlenius, *supra* note 18.

²¹ See Kerr-McGee Corp. v. Wyoming Oil & Gas Conservation Comm., 903 P.2d 537 (Wyo. 1995).

²² Allied-Signal Inc. v. Wyoming State Bd. of Equalization, 813 P.2d 214, 219-220 (Wyo. 1991).

²³ See 1 R. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.2 (4th ed. 2002)(for issues surrounding interpreting broad grants of authority from Congress).

²⁴ Petroleum Inc. v. State Bd. of Equalization, 983 P.2d 1237, 1240 (Wyo. 1999) (quoting Carter v. Thompson Realty Co., 58 Wyo. 279, 131 P.2d 297, 299 (1942)). See also Pinther v. State, 866 P.2d 1300, 1302 (Wyo. 1994) (quoting Doidge v. State Board of Charities and Reform, 789 P.2d 880, 884 (Wyo. 1990) (citing Croxton v. Board of County Commissioners of Natrona County, 644 P.2d 780 (Wyo. 1982)).

²⁵ See Appleby v. State of Wyoming *ex rel.*, Wyoming Workers’ Safety & Compensation Division, 2002 WY 84 (Wyo. 2002).

Additionally, the Court may set aside an agency rule or action for other reasons, including a violation of substantive constitutional rights or procedural safeguards, such as public notice and opportunity for interested parties to comment on proposed rules.²⁶

In addition to this judicial review, the Legislative and Executive Branches of government review and restrict an agency's rulemaking powers. Executive Branch agencies are directly supervised by the Governor, who also must approve rules before they go into effect, as required by W.S. § 16-3-103(d). The Legislature may always invoke or amend its delegation by statute. Legislative review as discussed below also serves as a check against abuse of agency discretion.²⁷

C. Agency Rules: General Restrictions

1. *General Restrictions.* W.S. §§ 16-3-103(d) and 28-9-104(c) establish the following general standards for agency rules:

(a) The rule must be **constitutional**. Examples of acting outside constitutional authority might include:

- (i) Taking of property without compensation;
- (ii) Denying equal protection;
- (iii) Allowing revocation of a license without due process notice and hearing;
- (iv) Allowing unlawful searches or seizures;
- (v) Infringing on free speech.

(b) The rule must not exceed **statutory authority**, not conflict with, extend or modify statutory provisions or specific statutory standards.

²⁶ 1 C. KOCH, ADMINISTRATIVE LAW AND PRACTICE, § 4.32[1] & [9], § 4.33, § 4.40 (2D 1997). *See also* Wyoming Coalition v. Wyoming Game & Fish Comm., 875 P.2d 729, 722-734 (Wyo. 1994); Jackson v. State *ex rel.* Wyoming Workers' Compensation Division, 786 P.2d 874, 878 (Wyo. 1990).

²⁷ BACKGROUND REPORT ON REVIEW OF EXISTING RULES, JOINT COMMITTEE ON ADMINISTRATIVE RULES, Illinois General Assembly, May 1979, at 33.

(c) The rule must be adopted in compliance with the **procedural requirements** if the Wyoming Administrative Procedure Act (W.S. §§ 16-3-101 through 16-3-115) and other applicable statutes (*see* W.S. § 28-9-101 *et seq.*).

(d) The rule must conform with **legislative intent**. Except in cases of ambiguity, it is presumed legislative intent is stated in, or directly ascertainable from, the language of the statute itself, *i.e.*, legislative intent normally becomes an issue only when the plain meaning of a statute is unclear, ambiguous or contradictory.²⁸ Determining legislative intent may involve:

- (i) Application of standard rules of statutory construction;
- (ii) Review of legislative history, including: committee records, floor debate, and House and Senate action as reflected in the Journal Digests.

2. *Examples of Specific Restrictions.* In applying general constitutional and statutory restrictions to particular fact situations, courts have developed a number of generally accepted limitations on agency rulemaking. A brief listing of examples of such commonly accepted restrictions is provided in the Appendix at page A-II.

²⁸ 2 AM. JUR. 2D *Administrative Law* § 525 (1994).

PART II. AGENCY RULEMAKING PROCESS

A. Agency Rules: Definitions/Types

1. *Rules Subject to Administrative Rule Review Process*

(a) “Rule” is broadly defined by the Administrative Procedure Act (APA) to include “each agency statement of general applicability that implements, interprets and prescribes law [or] policy . . . or describes the organization, procedures or practice requirements of any agency.” W.S. § 16-3-101(b)(ix).

(b) “Rules” include creation of new rules and the amendment or repeal of existing rules. *Id.*

(c) There are seven exclusions from the general definition of “rule” (*i.e.*, the following do **not** require formal rulemaking procedures and are **not** subject to the rule review process) listed by W.S. § 16-3-101(b)(ix):

(i) Statements concerning internal agency management which do not affect private rights;

(ii) Decisions by an agency denying a petition submitted to the agency to commence rulemaking under W.S. § 16-3-106;

(iii) Intra-agency memoranda;

(iv) Contested case decisions;

(v) Rules concerning the use of public roads or facilities indicated by signs;

(vi) City or town ordinances;

(vii) ~~Rules regarding layoffs due to~~ [Designations of agency divisions for the purposes of](#) reductions in force under W.S. § 9-2-1022(h)(i);

(viii) General permits issued by the Department of Environmental Quality authorizing a category of emissions.²⁹

2. *Types of Rules*

(a) The term “rule” is used in various instances:

(i) “Rules,” W.S. § 16-3-101(b)(ix);

(ii) “Rules of practice,” W.S. § 16-3-102(a)(i) and (c);

(iii) “Interpretative rules or statements of general policy,” W.S. § 16-3-103(a) introductory paragraph;

(iv) “Substantive rules,” W.S. § 16-3-103(a)(ii)(A);

(v) “Emergency rules,” W.S. § 16-3-103(b);

(vi) “Administrative rules,” W.S. § 28-9-102(a_(i)).

(b) For purposes of administrative rule reviews, rules are generally classified into three categories:

(i) “INTERPRETIVE:” A rules which interprets and applies vague or conflicting statutes or otherwise enunciates discretionary agency policy. These rules do not have the force and effect of law but describe how an agency will interpret existing law subject to subsequent modification. [W.S. § 16-3-103\(a\)](#). (**NOTE:** Interpretative rules are not subject to APA notice and hearing requirements but must be filed with the Wyoming Secretary of State to be effective.)

(ii) “PROCEDURAL:” A rule which specifies procedures. This type of rule is similar to rules of practice, but is somewhat broader since procedural rules can include procedures related to licensing, applications for benefits, etc., which might not be considered rules of practice. Procedural rules are “substantive” and require notice and opportunity for a hearing.

²⁹ [See Wyo. Dep’t. of Environmental Quality v. Wyo. Outdoor Council, 2012 WY 135, ¶ 25, 286 P.3d 1045, 1051-1052 \(Wyo. 2012\)](#).

(iii) “LEGISLATIVE:” A rule which establishes new provisions of law. Clearly a type of “substantive” rule, these rules generally require express statutory authority for their adoption and have the force and effect of law. Legislative rules require notice and opportunity for hearing. (**NOTE:** Rules are rarely purely “interpretative” but are sometimes only legislative or procedural. More often, rules are a combination of types.)

(c) Emergency rules are unique in that they are excluded for APA procedures relating to public notice and opportunity for hearing, but are effective for not more than 120 days. The Governor must specifically concur with the agency’s finding that an emergency exists for the rule to be effective. The agency may adopt identical or substantially similar emergency rules, but the total period may not exceed 240 days. W.S. § 16-3-103(b).

B. General Rulemaking Procedures

1. *Statutory Provisions.* Statutory guidelines for the administrative rulemaking process are contained in W.S. §§ 16-3-101 through 16-3-106 (Appendix A-VII through A-XIII) and W.S. §§ 28-9-101 through 28-0 108 (Appendix A-XIII through A-XVI).

2. *Summary of Procedural Steps.* The procedural guide (Appendix A-IV through A-VI), prepared by the Attorney General’s Office for use by all State agencies, provides a brief step-by-step description of the procedures agencies must follow in promulgating administrative rules.

3. *Flow Chart.* The [Administrative Rules](#) Flow Chart (Appendix A-XVII) diagrams the stages of the agency rulemaking process and the relationship of the Management Council’s rule review function.

C. Emergency Rules

1. *Adoption Procedures*

- ❖ The agency, with the Governor's concurrence, determines an emergency exists. W.S. § 16-3-104(b)(ii).
- ❖ Rules are promulgated without notice or a public comment period. [W.S. § 16-3-140\(b\)](#).
- ❖ Rules are effective for a period of 120 days from the date filed with the Secretary of State and the Legislative Service Office (LSO). W.S. §§ 16-3-103(b) [and 16-3-104\(b\)\(ii\)](#).
- ❖ Identical or substantially similar emergency rules may be adopted, but the total period cannot exceed 240 days. W.S. § 16-3-103(b).

2. For further discussion of Emergency Rules, see pages _____ of this manual.

PART III. LEGISLATIVE RULE REVIEW PROCESS

A. In General

The goal of the legislative rule review process is to ensure agency compliance with both statutory authority and legislative intent.³⁰

As shown by the Flow Chart, Appendix A-XVII, the legislative rule review process in Wyoming consists of four basic steps:

1. The LSO review and reports to Management Council. W.S. § 28-9-104(a).
2. Management Council reviews the rules. W.S. § 28-9-102.
3. Management Council approves the rules or recommends to the Governor amendment or rescission of the rules. W.S. § 28-9-106(a).
4. Management Council takes action: legislative order, etc. W.S. § 28-9-107.

The initial steps in the rule review process may be viewed as “merely advisory,” *i.e.*, the Management Council cannot **prevent** objectionable rules from being filed and implemented. However, the rule review process has, nevertheless, proved valuable:

1. Existence of monitoring has resulted in more careful drafting of rules by Executive Branch agencies.³¹
2. In many cases, agencies voluntarily comply with the LSO and Management Council recommendations.³²
3. The Governor frequently recommends amendment of the rules as suggested by Management Council³³ and has exercised the “partial veto” authority granted under W.S. § 16-3-103(d) to excise portions of rules which are not within the scope of statutory authority or legislative intent, or have not been adopted in compliance with the procedural requirements of the APA.

³⁰ Rich Jones, *Legislative Review of Regulations: How Well Is It Working?* STATE LEGISLATURES (September 1982).

³¹ *Id.*; Singer, *Administrative Regulation Review – Act II*, 15 LAND & WATER L. REV. 207, 221-222 (1980).

³² Singer, *Id.*

³³ *Id.* at 223-224.

B. The LSO Rule Review Process

1. Requirement for the LSO Review

(a) W.S. §§ 28-9-108 and 16-3-103 provide no rule (except an emergency rule) shall be filed with the Secretary of State unless first submitted to the LSO for review.

(b) W.S. § 28-9-103(b) provides that agencies shall submit rules to the LSO for review within 10 days **after final adoption**.

NOTE: Agencies are sometimes confused as to why the LSO does not perform a rule review on proposed rules when first notified, pursuant to W.S. § 16-3-103(a), of the agency's intended rulemaking. While it is understandable agencies would prefer to learn of the LSO's objections before the agency takes final action to adopt the rules, the LSO does not, ordinarily, review proposed rules for several reasons:

- ❖ W.S. §§ 28-9-103(b) and 28-9-104(a) specifically direct the LSO to review rules only after final adoption;
- ❖ There is a distinct possibility rules will be significantly changed between the time they are initially proposed and finally adopted and the LSO does not have sufficient staff resources to review each set of agency rules more than once;
- ❖ The legitimate role of the LSO and the Management Council in the rulemaking process is one of oversight and not drafting; it is clearly the function of the Attorney General, not the LSO, to provide advice to agencies in promulgating rules. W.S. § 16-3-104(d); and
- ❖ It could create conflict of interest problems for the LSO staff to review rules which they had assisted in drafting.³⁴

The LSO has agreed with the Governor's Office and the Attorney General to provide an informal review of proposed rules in limited instances when requested by the

³⁴ Singer, *supra* note 30, at 227 note 99 (1980)

Attorney General and when the rules are likely to be controversial or raise significant legal issues. In order to avoid an unmanageable number of requests for this preliminary review or to be too involved in the drafting process, the LSO's policy is the request must identify specific portions of the rules for which a preliminary review is sought. A request of the LSO to "identify any problems" with the rules is not sufficient.

2. *Scope of the LSO Review of Final Rules*

(a) The LSO rule reviews are limited to determining:

(i) Whether the agency has been granted **necessary authority** to promulgate the rule. For example, express statutory authority is generally required for the promulgation of substantive rules.³⁵ (**NOTE:** The agency may have the best of motives, but pristine motives do not expand statutory authority. The fact the agency is solving a problem that needs to be solved does not remedy a lack of statutory authority.³⁶)

(ii) **PROCEDURAL COMPLIANCE.** The APA generally requires "substantial compliance" with procedural steps (*see* W.S. § 16-3-103(c)). However, a number of provisions state that rules may not be filed if specified procedural steps are not met: *e.g.*, W.S. § 16-3-104(a) ("State agencies shall file each rule within seventy-five (75) days of the date of agency action adopting the rule or it is not effective."); W.S. § 28-9-108 ("No rule shall be filed with the secretary of state . . . except an emergency regulation adopted as provided by W.S. § 16-3-103(b), unless the rule has been submitted to the legislative service office for review in accordance with this act."). Procedural compliance review includes:

(A) Notice and filing requirements:

(I) Forty-five (45) days notice of intended rulemaking action given to interest persons, the Attorney General, [the Secretary of State](#),

³⁵ State Dep't of Revenue v. Pacificorp, 872 P.2d 1163, 1166 (Wyo. 1994); Buggy Bath, *supra* note 18, at 1185-1186.

³⁶ Tri County Telephone Ass'n, Inc. v. Wyoming Public Service Comm., 11 P.3d 938, 943 (Wyo. 2000).

and the LSO, W.S. § 16-3-103(a)(i), with a 45-day period for public comment. The general notice requirements are specified in W.S. § 16-3-103(a)(i)(A) through (H). **For LSO purposes, it is important to recognize the additional notice requirements for new rules. Under the Secretary of State’s Rules on Rules, a new rule generally is the first non-emergency rule promulgated in response to legislation which addresses the entire enactment or any portion of the enactment that any prior non-emergency rule has not addressed. Thus, even if an agency is only amending an existing rule, if that amendment is the first response to legislation, it is considered a new rule. A “new rule” does not include rules adopted in response to a federal mandate.** Additional notice requirements also apply for licensing boards under Title 33 and are found in W.S. § 16-3-103(e).

(II) A statement the agency has complied with the requirement that it identify and evaluate whether the rules may result in a taking of private property. W.S. § 16-3-103(a)(i)(H).

(III) Opportunity for public hearing, if applicable.
W.S. § 16-3-103(a)(ii).

(IV) Rules submitted to the LSO for review within 10 days of adoption. W.S. § 28-9-103(b).

(V) Rules filed with the Secretary of State within 75 days of adoption. W.S. § 16-3-104(a).

(B) Submission by the agency of a brief statement of principal reasons for adoption of the rule.³⁷

(C) any other specific statutory requirement, *e.g.*, in some cases the Legislature has directed two agencies to jointly adopt rules.

³⁷ Tri-State Generation v. Environmental Quality Council, 590 P.2d 1324, 1331 (Wyo. 1979) (to enable a reviewing court if the agency considered relevant factors or the decision is rational).

(iii) That the rule meets all **constitutional and statutory requirements, restrictions and standards**. W.S. § 28-9-104(c)(iii) (See discussion of limitations on agency rulemaking at pages _____ and Appendices A-II to A-III of this manual.)

(iv) That the rule is **within the scope** of statutory authority and legislative intent:

(A) Determination of the scope of statutory authority overlaps somewhat with the review required to determine whether the rule “[m]eets all constitutional and statutory requirements, restrictions and standards.” W.S. § 28-9-104(c)(iii). Here, however, the focus is generally on the statutory authority granting rulemaking authority to the agency and whether the rules appear to have a reasonable relationship to the purpose of the legislative act or program which is being carried out by the agency.

(B) “Legislative intent” is ordinarily presumed to be ascertainable from the language of the statute itself. If the plain meaning of the statute is unclear, determination of legislative intent may involve application of standard rules of statutory construction, or a review of legislative history including committee records, floor debate and House and Senate action on bills. Although not recognized by the courts as appropriate indication of legislative intent for statutory interpretation,³⁸ for rule review purposes, insight into legislative intent may also be derived from comments of legislative sponsors and committees submitted to the Management Council pursuant to W.S. § 28-9-~~103(d)~~[104\(a\)](#).³⁹

(v) BASIC REASONABLENESS OF THE RULE. As noted in subsection (b) below, it is not the function of the LSO to substitute its judgment for that of the agency. However, reasonableness of a rule may be questioned in the LSO rule

³⁸ Independent Producers Mktg. Corp. v. Cobb, 721 P.2d 1106, 1108 (Wyo. 1986).

³⁹ [Kennedy Oil v. Dep’t of Revenue, 2008 WY 154, ¶¶ 21-22, 205P.3d 999, 1006 \(Wyo. 2008\)](#).

review if it appears the rule is so arbitrary, capricious or irrational as to be subject to court challenge.

(vi) That if the rule ~~involves a federal mandate~~ is adopted to comply with federal law, then the agency should supply information regarding whether the rule is required by federal law, the citation to federal law and whether the rule meets or exceeds federal requirements. W.S. § 16-3-103(a)(i)IF).

(vii) That the rule meets minimum substantive state statutory requirements or exceeds minimum substantive state statutory requirements. If the rule change exceeds minimum substantive state statutory requirements, the agency should include a statement explaining the reason why. W.S. § 16-3-103(a)(i)(G). Presumably, this requirement would apply to a situation where the Legislature has given agency a threshold minimum requirement along with discretion to raise that threshold, *e.g.*, a DEQ quality standard.

(viii) While not specifically within the scope of the LSO review process, **technical errors** (incorrect statutory citations, confusing language, spelling errors, etc.) discovered during the course of a rule review are generally brought to the attention of the agency.

(b) Perhaps a majority of administrative rules involve philosophical or policy determinations rather than legal and constitutional questions. Such issues are **not within the scope** of the LSO review and the LSO staff will not attempt to “second guess” the agency or substitute their judgment for the agency’s in cases in which the rule is not clearly improper.

3. *Steps in the LSO Review Process*

(a) As depicted in the Flow Chart, Appendix A-XVII, the steps in the LSO rule review process are:

(i) Upon receipt of the proposed rules and the 45-day notice of intended agency rulemaking required by W.S. § 16-3-103(a), the LSO logs the rules and,

in the case of new rules, provides notification to legislative sponsors and committees as required by W.S. § 28-9-103(d). As noted in the discussion at page ____ of this manual, the LSO does not normally review the proposed rules at this early stage.

(ii) W.S. § 28-9-103(b) requires that within 10 days after final agency action adopting, amending or repealing rules, the rules shall be submitted to the LSO for review. Upon receipt, the final rules are logged and assigned to the LSO staff for review. If questions arise or potential problems are discovered during review, the LSO contacts the agency through an Assistant Attorney General assigned to the agency. Sometimes the LSO contacts the agency contact person for clarification. The LSO staff objections often are resolved at this stage.

(iii) Following review, the LSO prepares a rule review report to Management Council indicating a finding of compliance with statutory authority and legislative intent or raising questions for Management Council consideration. Pursuant to W.S. § 28-9-104(a), the rule review report for new rules will include any comments submitted by the primary sponsor of the legislation authorizing the rules, the chairman of the interim or standing committee which sponsored or acted upon the legislation, and any other legislator submitting comments. Rules which have not been questioned are assigned to Management Council's tentative "consent list." Rules which have been questioned in an LSO rule review report are presented individually to Management Council. Copies of the LSO rule review report are provided to the agency, the Attorney General's Office and the Governor's Office.

(iv) Except when the Legislature is in session, the LSO is required to complete its rule review within 15 days after receipt of the agency's final rule. If the Legislature is in session at the time the report would otherwise be due, then the LSO is required to provide its report to the Council within 10 days after the adjournment of the session. W.S. § 28-9-104(a)(ii).

(v) The Governor's Office may or may not delay approval and filing of final agency rules pending receipt of the LSO rule review report and the Management Council action described below.

(b) **EMERGENCY RULES.** See discussion at pages _____ of this manual.

C. Management Council Review of Agency Rules

1. Initiation of Management Council Review

(a) Management Council normally reviews rules following regular adoption by the agency and preparation of a rule review report by the LSO staff. The Council may also review any agency rule:

- (i) At the Council's own initiative, W.S. § 28-9-102(a);
- (ii) At the request of any legislator, W.S. § 28-9-104(b); or
- (iii) At the request of a legislative committee. *Id.*

2. Scope of Management Council Review; Referral to Committee

(a) As discussed in more detail in the section of the manual dealing with the scope of the LSO rule reviews (see pages _____), W.S. § 28-9-104 authorizes Management Council to review agency rules to determine whether the rule:

- (i) Appears to be within the intent and scope of the legislative enactment delegating the authority to adopt the rule;
- (ii) Has been adopted in accordance with all applicable statutory requirements of law; and
- (iii) Meets all constitutional and statutory requirements, restrictions and standards.

(b) While individual members of the Management Council may have strong opinions concerning the wisdom of an agency's policy embodied in its rules, it is

beyond the scope of the Council’s review function to substitute its judgment for that of the agency, except in cases where the agency’s action is clearly improper or beyond legislative intent or authority. W.S. § 28-9-102(a). It should be noted that under the rules review process a vote by the Management Council to “approve” rules does not necessarily indicate the Council members agree with the substance or policy of the rules but only that the Council has found the rules meets the statutory criteria listed in subsection (a) above.

(c) Though seldom exercised, Management Council does have the authority to refer rules to a standing or interim committee for assistance in performing the rule review. W.S. § 28-9-105(b).

3. *Management Council Procedures to Consider Rules*

(a) **MAIL BALLOT.** In order to reduce the time from agency action adopting a rule to Management Council Review, the Council adopted in 1995 a mail ballot procedure. The LSO mails to the Management Council on a weekly basis all rule review reports since the last mailing of rules to the Council.

(i) **CONSENT LIST.** If the LSO staff has identified no significant problems with an agency’s proposed rules, the rules are placed on the Council’s tentative “consent list.” For rules on the consent list, Council members have 10 days from the mailing to remove a rule from the list for consideration at the next Council meeting. All rules on the consent list which are not removed are deemed approved. **NOTE:** The LSO has agreed with the Attorney General that on those occasions in which a problem is found with an existing provision of a rule not being amended (*i.e.*, although not amended the language was included because other amendments were very extensive), the rules will be placed on the consent list by the LSO with a recommendation the Council request the Governor to direct the agency to commence new rulemaking to solve the problem discovered.

(ii) **RULES NOT ON THE CONSENT LIST.** If the LSO staff has identified a significant problem with the rule (either procedural or substantive), ~~that rules review report is included separately in the reports mailed to the Council. Council members may vote to:~~ Council is asked to vote to:

- (A) Adopt the LSO recommendation;
- (B) Approve the rule as submitted;
- (C) Postpone consideration of the rule until the next Council meeting.

If a majority of the Council votes to adopt the LSO recommendation, a letter is sent to the Governor on behalf of the Council asking the Governor to line-item veto part of the rule or to direct the agency to rescind the rule or amend it to address the concerns raised in the report. If a majority votes to approve the rule as submitted, it is approved. If a majority votes to postpone consideration or if a majority fails to vote for either of the first two options, the rule review report is considered at the next Council meeting as discussed below.

(b) **RULES CONSIDERED AT MEETINGS.** Rules are considered at council meetings as a result of the mail balloting discussed above, or if the rule was received by the LSO before the next Council meeting, but not in time to make mailing to the Council feasible. Thus, few rules will be on the consent list at this point. For those which are, a member of the Council may direct that a rule be removed from the list if the member has questions concerning the rule or wishes the rule to be voted on separately. Otherwise, consent list rules are voted on as a single “package.” For all other rules to be discussed at the Council meeting, a member of the LSO staff will have contacted the agency to request an agency representative attend to answer questions concerning the rule. If a consent list rule is removed at the Council meeting, the LSO staff will attempt to contact the agency for the same purposes. The standard agenda for consideration of rules at a Council meeting is found in the Appendix, pages A-XVIII to A-XIX.

(c) **EMERGENCY RULES.** Emergency rules are presented to the Management Council for information purposes only and the Council will ordinarily take no formal action on emergency rules. If the LSO rule review report on an emergency rule questions the legality of the rule or if a Council member requests further information on the rule, a representative of the agency of the Attorney General’s Office may be requested to attend the meeting to discuss the rule. (For further information on emergency rules, see pages _____ of this manual.)

4. *Management Council Action on Rules*

(a) **ALTERNATIVES: APPROVAL OR RECOMMENDATION FOR AMENDMENT.** W.S. § 28-9-106(a) provides in part that, following its review, the Management Council shall: “submit its **approval** or its **recommendations** for amendment or rescission to the governor and to the agency which submitted the rule.” (emphasis added) The initial response of the Management Council to objectionable rules is advisory in that the Council is not authorized by statute to “disapprove” rules or to “send them back to the agency,” or otherwise prevent the rules from being filed with the Secretary of State or implemented by the agency. However, as noted in the introduction to Part III of this manual (see page ___), the Management Council’s recommendations, while advisory, are commonly accepted by agency either voluntarily, because the recommendations encompass legitimate points of concern, or due to possible use of other options available to the Legislature (see subsection (d) below).

(b) **APPROPRIATE MOTIONS ON RULES.** In light of W.S. § 28-9-106(a), it would appear there are three appropriate motions relating to any particular rule:

(i) **MOTION TO LAY BACK OR TABLE** consideration of the rules to a later time in order to obtain additional information. (**NOTE:** This does not prevent the agency from filing or enforcing the rules.)

(ii) **MOTION TO APPROVE** the rules as written.

(iii) MOTION TO RECOMMEND the Governor direct the agency to rescind the rules or to amend the rules, or if appropriate, to exercise his line-item veto authority to address the concerns raised in the LSO rule review report or as otherwise specified by the Management Council. (**NOTE:** This does not prevent the agency from filing or enforcing the rules unless the Governor **does not approve the rule or vetoes a specific provision.**)

A motion to “disapprove” a rule is confusing and would not appear to be appropriate under the statute.

(c) **NOTICE OF COUNCIL ACTION TO GOVERNOR; RESPONSE.** W.S. § 28-9-106(a) provides the Management Council will report its approval of rules or its recommendations for amendment or rescission to the agency and to the Governor. While no time is specified by statute for this transmittal to the Governor, the Governor is required to wait to approve a rule only for 40 days after submission of the final rules to the LSO, or for the Council recommendation, whichever is sooner. W.S. §§ 16-3-103(a)(d). [In addition, agencies must file rules with the Secretary of State within 75 days of their adoption or the rule will not be effective. W.S. § 16-3-104\(a\).](#)

W.S. § 28-9-106(b) requires that within 15 days after receiving the Council’s recommendations, the Governor shall:

(i) Order the rule be amended or rescinded in accordance with the Council’s recommendation; or

(ii) File with the Council in writing his objections to the Council’s recommendations.

(d) **SUBSEQUENT COUNCIL ALTERNATIVES ON RULES: LEGISLATIVE ORDERS, ETC.**

(i) Annually, at the last Management Council meeting of the year, the LSO staff prepares a report for the Management Council listing:

(A) Those rules concerning with the Council submitted recommendations to the Governor for amendment or rescission; and

(B) The Governor's response (or failure to respond) to the Council's recommendations.

(ii) If the Council is not satisfied with the Governor's response and determines the issue involved is significant and should be pursued, the following options are available:

(A) ***Legislative Order***

(I) W.S. § 28-9-107 provides at the next succeeding legislative session following review, the Management Council may sponsor legislation in the form of a legislative order to prohibit the implementation or enforcement of the rule. The legislative order must be adopted by a majority vote in each house. (W.S. § 28-0-107(c).

(II) Procedures for handling legislative orders are contained in House and Senate Joint Rule 12-1 **[check this]**, Appendix A-XX, and include presentation to the Governor for approval or veto.

(III) If the legislative order is finally enacted, the rule is null and void and shall not be implemented or enforced. W.S. § 28-9-107(c).

(B) ***Introduction of General Legislation*** to amend or clarify the authorizing statute or to directly prohibit or supersede the controversial provision adopted by the agency.

(C) ***Indirect Sanctions***, e.g., budget modifications.

PART IV. EMERGENCY RULES

A. Adoption Procedures; Effectiveness of Rules

(a) Emergency rules are promulgated when an agency determines an emergency exists which requires immediate adoption of rules without the normal 45-day notice and opportunity for hearing. W.S. § 16-3-103(b).

(b) The Governor must endorse the rules and concur in the finding that an emergency exists. *Id.*

(c) The rules become effective immediately upon being filed with the Secretary of State and with the LSO. W.S. § 16-3-104(b)(ii).

(d) The “first set” of emergency rules remains effective for no longer than 120 days from the date filed. Identical or substantially similar emergency rules may be adopted, but the total period shall not exceed 240 days. W.S. § 16-3-103(b).

(e) During the effective period of the emergency rules, the agency may begin regular rulemaking procedures (45-day notice, opportunity for hearing, etc.) to adopt permanent rules. *Id.*

B. The LSO Review of Emergency Rules

While it appears emergency rules must be **filed** with the LSO to be effective, *see* W.S. § 16-3-104(b)(ii), the statutes do not specifically require the rules be **reviewed** by the LSO. W.S. § 28-9-108. Nevertheless, to ensure all rules receive some type of review, the LSO staff performs an abbreviated review of emergency rules and reports its findings to the Management Council with copies to the agency, Governor and Attorney General. Problems in emergency rules which are identified in the LSO review are typically corrected by the agency if the emergency rules are subsequently adopted as permanent agency rules through the regular rulemaking process.

C. Management Council Action on Emergency Rules

(a) Copies of emergency rules are distributed to the Management Council primarily for **informational** purposes:

(i) The rules become effective on the date filed, with or without Management Council approval.

(ii) The Management Council has no statutory authority to disapprove emergency rules or to prevent them from being filed or implemented.

(iii) Because of the limited effective period of emergency rules, they normally expire by their own terms before formal action could be taken by the Council to nullify the rules (*i.e.*, by legislative order).

(b) In limited cases, emergency rules may be brought up for discussion at a Management Council meeting if:

(i) The LSO rule review has identified serious problems;

(ii) The rules are highly controversial; and/or

(iii) Council members have questions on the rules or wish to express concerns to the agency.

However, Management Council is **not required to take any formal action** on emergency rules.

APPENDICES

| | |
|------------------------------------------------------------------------------------------|------------|
| APPENDICES | A-I |
| Limitations on Agency Rulemaking Authority | A-II |
| Attorney General’s Agency Rulemaking Procedural Guide | |
| Statutes Governing Agency Rulemaking Process (APA) | |
| Statutes Governing Legislative Rule Review Process | |
| Flow Chart: Administrative Rules..... | |
| Standard Agenda for Consideration of Agency Rules at Management Council Meeting | |
| Joint Rules of the House and Senate | |

LIMITATIONS ON AGENCY RULEMAKING AUTHORITY

An agency cannot:

- a. Add to or delete from a list created by statute. 2 AM. JUR. 2D *Administrative Law* § 152 (1994).
- b. Supplement or alter a statute under the guise of “interpretation” if the statute is plain. 2 AM. JUR. 2D *Administrative Law* § 64, § 78, § 152 (1994); *See In re LePage*, 18 P.3d 1177 (Wyo. 2001).
- c. Make or change statutory definitions to add new elements. *Id.*; *See State v. Buggy Bath Unlimited*, 18 P.3d 1182 (Wyo. 2001).
- d. Require certificates or licenses without specific statutory authority. 51 AM. JUR. 2D *Licenses and Permits* § 9, § 10, § 11, § 56 (2000); *See also Ford v. Board of County Comm’rs of Converse County*, 924 P.2d 91 (Wyo. 1996).
- e. Adopt additional, non-statutory qualifications for licensing. *Ahlenius v. Wyoming Bd. of Prof’l Geologists*, 2 P.3d 1058 (Wyo. 2000). *See also Arizona State Board of Funeral Directors and Embalmers v. Penman*, 492 P.2d 694, 695 (Az. 1972).
- f. Enlarge the causes for which a license may be revoked or suspended. *Disciplinary Matter of Billings*, 30 P.3d 557, 569 (Wyo. 2001); 2 AM. JUR. 2D *Administrative Law* § 253 (1994).
- g. Create a criminal offense or any liability not sanctioned by legislation. 2 AM. JUR. 2D *Administrative Law* § 60 (1994). *See P.S.C. of Wyo. v. Grimshaw*, 49 Wyo. 158, 53 P.2d 1 (1935); *Sorenson v. State*, 604 P.2d 1031 (Wyo. 1979); *Williams v. State*, 692 P.2d 233, 235 (Wyo. 1984).
- h. Create penalties for violation of rules created by the agency. 2 AM. JUR. 2D *Administrative Law* § 243 (1994); *See Billis v. State*, 800 P.2d 401, 421 (Wyo. 1990).
- i. Create a tax exemption. 2AM. JUR. 2D § 152 (1994); *See also State v. Pacificorp*, 872 P.2d 1163 (Wyo. 1994) (agency attempt to limit tax exemption).
- j. Create and levy taxes. 2 AM. JUR. 2D *Administrative Law* § 66 (1994). *See also Rocky Mtn. Oil v. Bd. of Equalization*, 749 P.2d 221, 239 (Wyo. 1987) *reh’g denied*, 749 P.2d 245; *Town of Pine Bluffs v. State Bd. of Equalization*, 79 Wyo. 262, 333 P.2d 700 (1958).
- k. Declare illegal that which a statute says is legal. 2 AM. JUR 2D *Administrative Law* § 60 (1994). *See also Ballard v. Wyoming Pari-Mutuel Comm. of Wyoming*, 750 P.2d 286 (Wyo. 1998).

- l. Destroy or condition rights conferred by the Legislature. 2 AM. JUR. 2D *Administrative Law* § 152 (1994); *See* Jackson v. State *ex rel.* Wyoming Workers' Compensation Division, 786 P.2d 874 (Wyo. 1990).
- m. Lay down a general regulation which predetermines cases with the regulation in disregard of particular circumstances. Marathon Oil Co. v. Pan American Petroleum Corp., 473 P.2d 575, 577 (Wyo. 1970).
- n. Add or change requirements or add qualifications not set in statute. 2 AM. JUR. 2D *Administrative Law* § 152 (1994). *See* Kerr-McGee v. Wyo. Oil & Gas Conservation Comm., 903 P.2d 537 (Wyo. 1995).
- o. Adopt future amendments to laws or regulations, *e.g.*, those of the United States or its departments. Brinegar v. Clark, 371 P.2d 62, 65 (Wyo. 1962); *See* W.S. § 16-3-103(h)(ii).
- p. Fail to adopt rules when mandated by state legislature. *In re* Bessemer Mountain, 856 P.2d 450 (Wyo. 1993).
- q. Modify, dilute or change in any way the statutory provisions from which an agency derives its authority. Platte Development Co. v. E.Q.C., 966 P.2d 972 (Wyo. 1998).

**ATTORNEY GENERAL'S AGENCY RULEMAKING
PROCEDURAL GUIDE**

[AG's Office will give us an update to insert here]

| | |
|---------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>the Secretary of State is the Registrar of Rules</p> | <p>the secretary of state. “Registrar of rules” for local agency rules means the county clerk of the county in which the rule is to be effective;</p> |
| <p>Rule Defined</p> | <p>(ix) “Rule” means each agency statement of general applicability that implements, interprets and prescribes law, policy or ordinances of cities and towns, or describes the organization, procedures, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:</p> |
| <p>Excluded from definition of rule</p> | <p>(A) Statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public; or</p> |
| <p></p> | <p>(B) Rulings issued pursuant to W.S. 16-3-106; or</p> |
| <p></p> | <p>(C) Intraagency memoranda; or</p> |
| <p></p> | <p>(D) Agency decisions and findings in contested cases; or</p> |
| <p></p> | <p>(E) Rules concerning the use of public roads or facilities which are indicated to the public by means of signs and signals; or</p> |
| <p></p> | <p>(F) Ordinances of cities and towns; or</p> |
| <p>Excludes general permits</p> | <p>(G) Designations under W.S. 9-2-1022(h)(i); or</p> |
| <p></p> | <p>(H) A general permit.</p> |
| <p></p> | <p>(x) “State agency” means any agency with statewide responsibilities;</p> |
| <p></p> | <p>(xi) “General permit” means a permit issued by the department of environmental quality which authorizes a category or categories of discharges or emissions;</p> |
| <p></p> | <p>(xii) “This act” means W.S. 16-3-101 through 16-3-115.</p> |
| <p></p> | <p>16-3-102. General rulemaking requirements; assistance of</p> |

| | |
|------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Agencies to adopt rules of practice</p> | <p>attorney general.</p> <p>(a) In addition to other rulemaking requirements imposed by law, each agency shall:</p> <p>(i) Adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available in connection with contested cases;</p> <p>(ii) Make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted or used by the agency in the discharge of its functions;</p> <p>(iii) Make available for public inspection all final orders, decisions and opinions.</p> |
| <p>Rules not effective until filed</p> | <p>(b) No agency rule, order or decision is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been filed with the registrar of rules and made available for public inspection as required by this act. This subsection does not apply to orders or decisions in favor of any person or party with actual knowledge of the rule, order or decision.</p> |
| <p>Attorney General to assist agencies in drafting rules of practice</p> | <p>(c) In formulating rules of practice as required by this section, each agency may request the assistance of the attorney general and upon request the attorney general shall assist the agency or agencies in the preparation of rules of practice.</p> |
| <p>45 days notice of intended rulemaking required, including notice to the LSO</p> | <p>16-3-103. Adoption, amendment and repeal of rules; notice; hearing; emergency rules; proceedings to contest; review and approval by governor.</p> <p>(a) Prior to an agency's adoption, amendment or repeal of all rules other than interpretative rules or statements of general policy, the agency shall:</p> <p>(i) Give at least forty-five (45) days notice of its intended action. Notice shall be mailed to all persons making timely requests of the agency for advanced notice of its rulemaking proceedings and to the attorney general, the secretary of state's office as registrar of rules, and the legislative service office if a state agency. The agency shall submit a copy of the proposed rules, in a format conforming to any requirements prescribed</p> |

| | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Citation of authorizing statute required for new rules</p> <p>Notice to include whether rules meet or exceed federal and state minimum requirements</p> <p>Hearing required if</p> | <p>pursuant to subsection (f) of this section, with the notice given to the legislative service office. The notice shall include:</p> <p>(A) The time when, the place where and the manner in which interested persons may present their views on the intended action;</p> <p>(B) A statement of the terms and substance of the proposed rule or a description of the subjects and issues involved;</p> <p>(C) If an amendment or a repeal, the citation to the agency rule to be amended or repealed;</p> <p>(D) If new rules, a statement that they are new rules and a citation of the statute which authorizes adoption of the rules;</p> <p>(E) The place where an interested person may obtain a copy of the proposed rules in a format conforming to any requirements prescribed pursuant to subsection (f) of this section;</p> <p>(F) If the agency asserts that all or a portion of a rule is proposed to be adopted, amended or repealed in order for the state to comply with federal law or regulatory requirements:</p> <p>(I) A statement that the adoption, amendment or repeal of the rule is required by federal law or regulation together with citations to the applicable federal law or regulation; and</p> <p>(II) A statement whether the proposed rule change meets minimum federal requirements or whether the proposed rule change exceeds minimum federal requirements.</p> <p>(G) A statement whether the proposed rule change meets minimum substantive state statutory requirements or whether the proposed rule change exceeds minimum substantive state statutory requirements. If the rule change exceeds minimum substantive state statutory requirements, the agency shall include a statement explaining the reason why the rule exceeds minimum substantive statutory requirements.</p> <p>(ii) Afford all interested persons reasonable opportunity</p> |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

| | |
|-----------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>requested by 25 persons; 45-day public comment period required</p> | <p>to submit data, views or arguments, orally or in writing, provided this period shall consist of at least forty-five (45) days from the later of the dates specified under subparagraph (A) of this paragraph, and provided:</p> <p>(A) In the case of substantive rules, opportunity for oral hearing shall be granted if requested by twenty-five (25) persons, or by a governmental subdivision, or by an association having not less than twenty-five (25) members. No hearing under this subparagraph shall be conducted until at least forty-five (45) days after the later of:</p> <p>(I) The date notice of intended action is given under paragraph (i) of this subsection; or</p> <p>(II) The date notice is published if publication is required by subsection (e) of this section.</p> <p>(B) The agency shall consider fully all written and oral submissions respecting the proposed rule;</p> <p>(C) If prior to final adoption any person objects to the accuracy of a statement made by the agency pursuant to W.S. 16-3-103(a)(i)(F)(I) or (II), the agency shall:</p> |
| <p>Response to persons submitting comments</p> | <p>(I) Provide the objecting person with a written response explaining and substantiating the agency's position by reference to federal law or regulations; and</p> <p>(II) Include with the final rules submitted for review to the governor and legislative service office a concise statement of the objection and the agency's response.</p> <p>(D) Upon adoption of the rule, the agency, if requested to do so by an interested person, either prior to adoption or within thirty (30) days thereafter, shall issue a concise statement of the principal reasons for overruling the consideration urged against its adoption.</p> <p>(b) When an agency finds that an emergency requires the agency to proceed without notice or opportunity for hearing required by subsection (a) of this section, it may adopt emergency rules. An emergency rule is effective when filed. A state agency emergency rule shall bear the endorsement of the governor's</p> |

| | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Emergency Rules</p> <ul style="list-style-type: none"> ◦ Concurrence by Governor ◦ Effective for 120 days (may be extended to a total of 240 days) | <p>concurrence on the finding of emergency before the registrar of rules accepts the rule for filing. The rule so adopted shall be effective for no longer than one hundred twenty (120) days but the adoption of an identical rule under W.S. 16-3-103(a) or of an emergency rule under this subsection is not precluded. In no case shall identical or substantially similar emergency rules be effective for a total period of more than two hundred forty (240) days. A local agency may proceed with the emergency rule when notice of the emergency is filed with the local registrar of rules.</p> |
| <p>Substantial compliance required</p> <p>Contest of adoption procedures within 2 years</p> | <p>(c) No rule is valid unless submitted, filed and adopted in substantial compliance with this section. A proceeding to contest any rule on the ground of noncompliance with the procedural requirements of this section must be commenced within two (2) years from the effective date of the rule.</p> |
| <p>Rules to be approved by the Governor</p> | <p>(d) No state agency rule or any amendment, repeal, modification or revision of the rule may be filed with the registrar of rules unless the rule has been submitted to the governor for review and the governor has approved and signed the rule. Except in the case of emergency rules and rules adopted by the game and fish commission fixing general hunting or fishing regulations, season or bag limits or establishing hunting areas, the governor shall not approve any rule until the date of receipt of the legislative management council's recommendation under W.S. 28-9-106(a) or until forty (40) days after the rule is filed with the legislative service office pursuant to W.S. 28-9-103(b), whichever is sooner.</p> |
| <p>Governor's line-item veto power</p> | <p>During the process of approving rules, the governor may disapprove any portion of a rule not conforming to paragraphs (d)(i), (ii) or (iii) of this section by clearly indicating the portion of the rule disapproved and the basis for the disapproval. Only those portions of a rule approved by the governor shall be filed with the registrar of rules as provided by W.S. 16-3-104(a). Any portion of a rule disapproved by the governor shall be returned to the agency and shall be null and void and shall not be filed, implemented or enforced. The governor shall report his disapproval of any rule or portion thereof to the management council within fifteen (15) days.</p> |
| <p>Governor report to Management Council</p> | <p>The governor shall not approve any rule or any amendment, repeal, modification or revision of the rule unless it:</p> |
| <p>Required findings for Governor's approval of rules</p> | <p>(i) Is within the scope of the statutory authority delegated to the adopting agency;</p> |

| | |
|-------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Notice of filing to persons sent notice of adoption</p> | <p>mail a notice that the rule has been filed to each person who was sent a notice under W.S. 16-3-103(a)(i). The notice shall contain a citation to the rule and the date it was filed. Failure to send the notice required under this subsection does not affect the effectiveness of the rule.</p> |
| <p>Emergency rules must be filed with the LSO</p> | <p>(b) Each rule and any amendment or repeal adopted after June 1, 1982 is effective after filing in accordance with subsection (a) of this section and W.S. 28-9-108 except:</p> <p>(i) If a later date is required by statute or specified in the rule, the later date is the effective date;</p> <p>(ii) Where the agency finds that an emergency exists and the finding is concurred in by the governor, a rule or amendment or repeal may be effective immediately upon filing with the registrar of rules and if a state agency, also with the legislative service office. Existing rules remain in effect unless amended or repealed, subject to this section or W.S. 28-9-105 or 28-9-106.</p> |
| <p>Rules to meet manner and form required by registrar</p> | <p>(c) Rules shall be prepared in the manner and form prescribed by the state registrar of rules. The registrar of rules may refuse to accept for filing any rule that does not conform to the prescribed form.</p> |
| <p>Attorney General to advise agencies</p> | <p>(d) The attorney general shall furnish advice and assistance to all state agencies in the preparation of their regulations, and in revising, codifying and editing existing or new regulations.</p> |
| <p>16-3-105. Compilation and indexing of rules; charges for copies; authentication by registrar.</p> | <p>(a) The registrar of state agency rules shall compile, index and publish the rules adopted by each agency and remaining in effect. The compilation shall be supplemented or revised at least once every two (2) years.</p> <p>(b) The registrar of state agency rules may make a reasonable charge for any rules published except those furnished to state officers, agencies, members of the legislature or the legislative service office and others in the employment of the state and its political subdivisions requiring the rules in the performance of</p> |

| | |
|-----------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Petition to agency to promulgate rules</p> | <p>their duties. The registrar of local agency rules may make a reasonable charge for copies of any rule on file.</p> <p>(c) The registrar’s authenticated file stamp on a rule or publication of a rule shall raise a rebuttable presumption that the rule was adopted and filed in compliance with all requirements necessary to make it effective.</p> <p>(d) The registrar of state agency rules shall annually compile and publish an index of all state agency rules filed with the registrar as of December 31 of each year. The index shall list the effective date of each set of rules or the effective date of each set of amendments to an agency's rules. Copies of the index shall be distributed as provided by W.S. 16-3-105(b).</p> <p>16-3-106. Petition for promulgation, amendment or repeal of rules.</p> <p>Any interested person may petition an agency requesting the promulgation, amendment or repeal of any rule and may accompany his petition with relevant data, views and arguments. Each agency may prescribe by rule the form of the petition and the procedure for its submission, consideration and disposition. Upon submission of a petition, the agency as soon as practicable either shall deny the petition in writing (stating its reasons for the denials) or initiate rulemaking proceedings in accordance with W.S. 16-3-103. The action of the agency in denying a petition is final and not subject to review.</p> |
|-----------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

ADMINISTRATIVE REGULATION REVIEW

| | |
|--------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Management Council Review</p> <p>Agency defined</p> | <p>28-9-101. Definitions.</p> <p>(a) As used in this act:</p> <p>(i) “Agency” means any authority, bureau, board, commission, department, division, officer or employee of the state, excluding the state legislature and the judiciary;</p> <p>(ii) “Council” means the legislative management council or any committee thereof;</p> <p>(iii) “Rule” means the same as defined in W.S. 16-3-101(b)(ix);</p> |
|--------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

| | |
|------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Scope of Council's review</p> | <p>(iv) "This act" means W.S. 28-9-101 through 28-9-108.</p> <p>28-9-102. Powers and duties.</p> <p>(a) The council may:</p> <p>(i) Examine the administrative rules and regulations of any agency to determine if they properly implement legislative intent, are within the scope of delegated authority, and are lawfully adopted;</p> <p>(ii) Require any agency and any officer or employee thereof to give full cooperation and assistance to the committee or its staff in assembling and furnishing requested information; and</p> <p>(iii) Hold public hearings.</p> |
| <p>Rules to be submitted to the LSO for review within 10 days</p> | <p>28-9-103. Submission of rules for review; notice to legislators.</p> <p>(a) Repealed by Laws 1988, ch. 66, § 2.</p> <p>(b) An agency shall submit copies of adopted, amended or repealed rules to the legislative service office for review pursuant to W.S. 28-9-104 within ten (10) days after the date of the agency's final action adopting, amending or repealing those rules.</p> <p>(c) Repealed by Laws 1988, ch. 66, § 2.</p> |
| <p>Notice of new rules to be sent to legislative sponsor and committees</p> | <p>(d) Upon receipt of an agency's notice to adopt new rules pursuant to W.S. 16-3-103(a)(i), the legislative service office shall give notice to the primary sponsor of the legislation, to members of the interim or standing committee which sponsored or acted upon the legislation authorizing the new rules and to any other legislator requesting notification. The notice given by the legislative service office shall state a copy of the rules will be sent if requested. Notice under this subsection is not required for persons not currently serving in the legislature.</p> <p>28-9-104. Review procedure; time for review; criteria for review.</p> <p>(a) The legislative service office shall review rules submitted under W.S. 28-9-103(b) and report its findings to the council. The</p> |

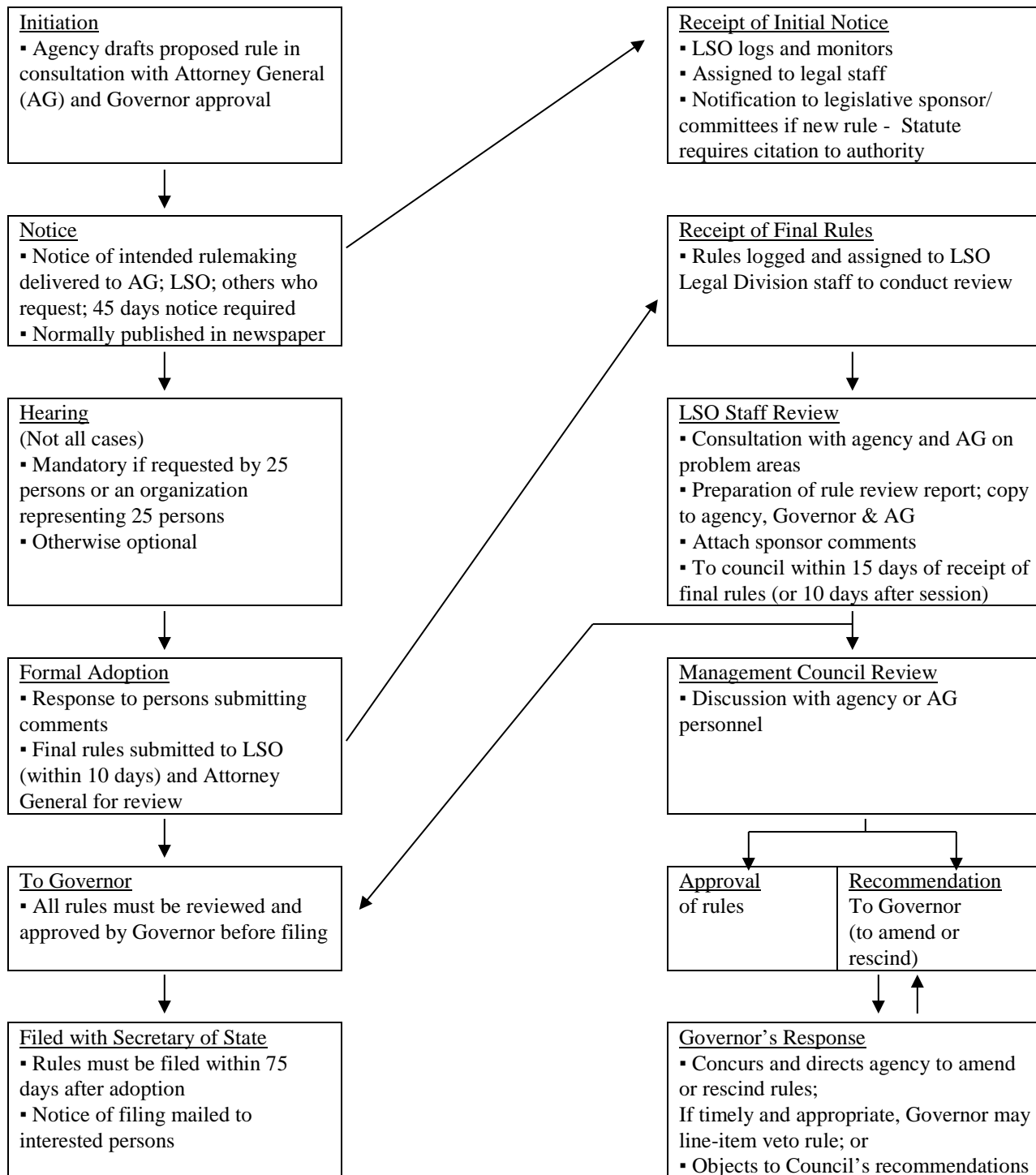
| | |
|------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>The LSO staff report to the Council – Report to include sponsor and committee comments</p> | <p>legislative service office shall review new rules and include therein any comments from the primary sponsor of the legislation, the chairman of the interim or standing committee which sponsored or acted upon the legislation authorizing the new rules and any other legislator submitting comments, and shall report their findings to the council. The report required under this subsection shall be submitted to the council:</p> |
| <p>The LSO report submitted to Council within 15 days (or within 10 days after session)</p> | <p>(i) Within fifteen (15) days after the rules were submitted under W.S. 28-9-103(b); or</p> <p>(ii) If the legislature is in session at the time the report would otherwise be due under paragraph (i) of this subsection, then within ten (10) days after the adjournment of the session.</p> <p>(b) The council may review any rule of an agency when requested to do so by a member of the legislature or any legislative committee.</p> |
| <p>Scope of Council’s review</p> | <p>(c) When reviewing a rule of an agency, the council shall determine whether the rule:</p> <p>(i) Appears to be within the intent and scope of the legislative enactment delegating the authority to adopt the rule;</p> <p>(ii) Has been adopted in accordance with all applicable and statutory requirements of law; and</p> <p>(iii) Meets all constitutional and statutory requirements, restrictions and standards.</p> <p>28-9-105. Review procedure; recommendations.</p> <p>(a) Repealed by Laws 1988, ch. 66, § 2.</p> |
| <p>Council may refer rules to committee to assist in review</p> | <p>(b) The management council may refer the review report to the legislative interim or standing committee which sponsored or handled the legislation which is the authority relied on for the rule being reviewed. If the legislation was not sponsored by a legislative committee, the review report may be referred to the joint interim committee which corresponds to the standing committee that handled the legislation in the house in which the legislation was introduced. The standing or interim committee to which the review report is referred may make recommendations to</p> |

| | |
|------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Governor’s response within 15 days of Council recommendation</p> | <p>and assist the council in preparing recommendations to the agency which adopted or proposed the rule being reviewed.</p> <p>28-9-106. Council recommendations to the agency; time.</p> <p>(a) The council shall submit its approval or its recommendations for amendment or rescission to the governor and to the agency which submitted the rule.</p> <p>(b) The governor, within fifteen (15) days after receiving any council recommendation, shall either order that the rule be amended or rescinded in accordance with the council’s recommendation or file with the council in writing his objections to the recommendation.</p> |
| <p>Legislative order</p> | <p>28-9-107. Legislative orders; action required; implementation and enforcement of rules.</p> <p>(a) If the council determines that a rule submitted for review under W.S. 28-9-103(b) does not satisfy one (1) or more of the criteria of W.S. 28-9-104(c), the council may introduce legislation in the next succeeding legislative session following the review to obtain a legislative order to prohibit the implementation or enforcement of the rule.</p> <p>(b) Repealed by Laws 1988, ch. 66, § 2.</p> <p>(c) If the legislature, each house voting separately, approves a legislative order to prohibit the implementation or enforcement of any rule, the rule is null and void and shall not be implemented or enforced. If the legislature fails to approve a legislative order prohibiting the implementation or enforcement of a rule, the rule may be implemented or enforced, as the case may be, after compliance with all other applicable provisions of law.</p> |
| <p>No rule to be filed unless submitted for the LSO review – NOTE: unlike APA’s substantial compliance</p> | <p>28-9-108. Submitting rules to legislative service office required.</p> <p>No rule shall be filed with the secretary of state pursuant to the Wyoming Administrative Procedure Act, except an emergency regulation adopted as provided by W.S. 16-3-103(b), unless the rule has been submitted to the legislative service office for review as provided by this act.</p> |

FLOW CHART ADMINISTRATIVE RULES

RULE MAKING PROCESS

RULE REVIEW PROCESS



Legislative Order
 ▪ Legislation introduced at following session to nullify rules
 ▪ Must pass both houses; subject to veto

**STANDARD AGENDA
FOR CONSIDERATION OF AGENCY RULES
AT MANAGEMENT COUNCIL MEETING**

1. Consent List:

- (a) Provide the Council members opportunity to request specified rules be removed from the Consent List.
- (b) Direct Legislative Service Office staff to contact the agency and Attorney General to send representatives to discuss rules removed from Consent List. (Set a specific time for consideration of these rules – at least one-half hour later.)
- (c) Vote on remainder of Consent List.
- (d) Announce to audience that action on Consent List has been completed and anyone who is in attendance in regard to those rules may leave.
- (e) Take action on rules removed from Consent List at the designated time.

2. Emergency Rules:

- (a) Management Council does not need to consider or take action on emergency rules unless a Council member wishes more information on a particular rule.
- (b) If there are questions on any emergency rule, direct the LSO staff to contact the agency and Attorney General to send a representative to discuss the rule at a specified time (allow a least one-half hour).
- (c) If there are not questions by Council members, announce to the audience the Management Council will take no formal action on the emergency rules and anyone who is in attendance in regard to emergency rules may leave.

3. RULES FOR REGULAR REVIEW BY MANAGEMENT COUNCIL:

- (a) These are rules which have been questioned in the LSO rule reviews or removed from the Consent List pursuant to the ballot and are normally dealt with in the order listed. Advise the audience if the order of consideration is going to be changed.
- (b) Ask members of the audience to identify who is present to discuss particular rules.

- (c) Discussion of rules: Explanation of rule review report by the LSO staff; comments by agency representatives.
- (d) Alternative Motions on Rules:
- *Motion to lay back* or postpone consideration of the rules to a later time in order to obtain additional information.
 - *Motion to approve* rules as written.
 - *Motion to recommend* the Governor use his line-item veto authority, if appropriate, or direct the agency to rescind the rules or to amend the rules to address the concerns raised in the LSO rule review, or as otherwise specified by the Management Council.

JOINT RULES OF THE HOUSE AND SENATE

12. ADMINISTRATIVE RULE ORDERS

- 12-1 On or before the final day for bill introduction each house shall schedule Committee of the Whole action on administrative rule reports and proposed legislative orders disapproving specified administrative rules, together with expressions of legislative intent, received from the Legislative Management Council as required by W.S. 28-9-107. Members of the Management Council in each house shall present the recommendations contained in the reports. The proposed orders are subject to debate, amendment, three readings and roll call votes in each house and conference committees in the same manner as bills except that it shall be referred directly to the Committee of the Whole and that there shall be no requirement for a two-thirds affirmative vote for introduction during the Budget Session. Recommendations receiving the approval of each house shall be denoted Legislative Orders, signed by the Speaker of the House and President of the Senate, entered in the Journal and presented to the Governor as prescribed by Article 3, Section 41, Wyoming Constitution.