

Environmental Improvement and Energy Resources Authority

Rulemaking Policy

Adopted March 30, 2016

This policy sets forth the EIERA rule making process and other matters related to rulemaking.

The EIERA Rulemaking process will consist of three stages:

1. Rule Development;
2. Proposed Rulemaking; and
3. Final Order of Rulemaking.

Other items covered include:

4. Emergency Rules
5. Periodic Review
6. Records Retention

Many of the steps involved in developing rules are required by law (Chapter 536 RSMo., attached as Exhibit A) and were established to make the rules effective (right requirements, right results) and enforceable (understandable and accountable). It is critical that rulemaking criteria and deadlines be met, as failure to comply with the statutory content or timing requirements could, in some cases, automatically void a rulemaking. The EIERA, in its discretion, may choose to waive any steps which are not required by law.

If there is a significant need or interest in creating, modifying or rescinding a rule, the director shall coordinate and oversee the process set forth below and ensure that it is followed or the reasons for deviation are documented for later presentation to the Board. The goals of this process are to:

- Ensure compliance with state law;
- Achieve and maintain high quality rulemakings;
- Provide a consistent and transparent process; and
- Offer sufficient opportunity for public review and input before the other phases of rulemaking.

This policy may not contain the detailed requirements found in law, regulation or executive order; therefore, the director must consult these legal sources, the EIERA's General Counsel, as well as the resources provided by the Secretary of State to ensure that all requirements are met.

The Rulemaking Process:

1. Rule Development:

Rule development may commence with or without direction from the Board; however, it is the expectation of the Board that before significant staff resources are utilized the director will provide the Board a summary of the potential rulemaking including the need, potential impacts, expected support or opposition and a tentative timeframe for the Rule Development phase. The director should also coordinate with the Governor's Office and MDNR as needed. At an appropriate point during rule development, staff may wish to post information on the Rule Development portion of EIERA's website.

During the Rule Development phase, the staff shall:

- A. Review the then-current rulemaking statutes (Chapter 536 RSMo.), rules, applicable Executive Orders (Current Executive Orders are attached as Exhibit B) and rulemaking information contained on the Secretary of State's website to ensure that the process meets existing requirements. Given their familiarity with the rulemaking process, MDNR's Office of General Counsel can also be an excellent resource to help explain or clarify the rulemaking requirements.
- B. Work with stakeholders (including private and public entities, other agencies, boards or commissions as applicable) that may be impacted by the rulemaking action to gather information and input that may aid in developing and refining draft rule text.
- C. Maintain a summary of significant or unanticipated concerns identified during the stakeholder engagement process.
- D. Determine whether there is substantial evidence that the rule is necessary to carry out the purposes of the authorizing statute in accordance with 536.016 RSMo. This is called a Finding of Necessity. At a minimum, the evidence relied upon should ensure that the rulemaking is based upon reasonably available empirical data, which may include documentation of observations or experiences explaining, demonstrating or proving the necessity for the proposed rulemaking. It should also include an analysis of the effectiveness and cost of the rule both to the state and to any private person or public entity affected by the proposed rulemaking.

The following are examples of what may be considered in determining whether there is substantial evidence to support a proposed rulemaking:

- a. Letters, memos, and other correspondence relating to, describing, or discussing the problem addressed by the rulemaking;
- b. Any case studies, files, records, papers, articles, journals or other written materials relating to the problem addressed by the rulemaking;

- c. Documentation, based upon the experiences and expertise of Authority staff, industry members or any other interested person, of an existing problem not addressed, or inadequately addressed, under the existing regulations;
 - d. Documentation of an omission, inconsistency or errors in the existing regulations;
 - e. Any information or correspondence requesting, supporting or requiring the proposed rulemaking from federal agencies, other state agencies, stakeholders, citizens, elected officials, EIERA staff or other interested parties;
 - f. Information developed during any stakeholder meetings;
 - g. Federal or state legal requirements; and
 - h. Any other relevant data considered by the EIERA and supporting the need for the rulemaking.
- E. Draft rule text with input from the EIERA's General Counsel. Currently there is a rulemaking manual online at www.SOS.MO.Gov/adrules/faq that contains information regarding rule formatting, numbering and other drafting requirements. It is advisable that rule text be vetted with stakeholders prior to its submittal to the Board;
- F. If the rule sets environmental standards or conditions, coordinate with MDNR's Office of General Counsel to determine whether a Regulatory Impact Report (RIR) must be prepared and the best means to meet the RIR requirements found in 640.015 RSMo. It is unlikely that EIERA rules will necessitate an RIR; however the determination should be made early in the process so it is available for review by stakeholders and other agencies during their review described below.
- G. Determine the economic impact on small businesses pursuant to Executive Order 96-18 (Included as part of Exhibit B), Sections 536.300-.328 RSMo., 4 CSR 262-1.010 and 4 CSR 262-1.020 (Attached as Exhibit C).
- H. Perform a takings analysis (536.017 RSMo.).
- I. Determine the costs associated with the rule (536.200 and 536.205 RSMo), prepare a fiscal note and an Affidavit for Public Entity Costs (These and other forms can be found in Exhibit D).
- J. Coordinate with MDNR's Office of General Counsel to meet the interagency review requirements found in Executive Order 02-05 (Included as part of Exhibit B). This process typically takes at least 30 days and allows review by the Missouri Departments of Economic Development, Agriculture, Health and Senior Services and Natural Resources and a member of the Governor's Office staff.
- K. Prepare a rulemaking packet for consideration by the Board. The rulemaking packet shall include:
 - a. A summary of the rulemaking, need and potential impacts;
 - b. A tentative rulemaking schedule including public hearing dates if they are to be held;

- c. A draft of the rule text;
- d. Finding of necessity;
- e. A summary of stakeholder engagement including entities involved, the type and nature of the engagement, significant or unexpected concerns and whether those concerns were addressed in the rule text for consideration;
- f. Regulatory Impact Report (if applicable);
- g. Small Business Impact Statement (if applicable) The form can be found at www.sbrfb.ded.mo.gov/info/htm;
- h. Fiscal Note and Affidavit of Public Entity Costs (if applicable). Forms can be found in Exhibit D; and
- i. Any items or steps in the Rule Development process which were omitted and the reason therefore.

At a meeting of the EI ERA, the Board may act upon the rulemaking packet. If the Board approves the rule, staff will proceed with the Proposed Rulemaking phase of the process as directed.

Generally, the Board could take any action it deems appropriate with respect to the rule including, but not limited to:

- A. Approve or reject the rule or contents of the rule package in whole or in part;
- B. Approve alternative rule language and instruct staff to revise other documents as needed based upon new language;
- C. Instruct staff to provide alternative rule language, with or without stakeholder involvement, for future Board consideration; or
- D. Waive any provisions of this policy which are not required by law.

The Board should also review and revise needed its Delegation of Authority for the rulemaking process or adopt one if none exists. The Delegation of Authority sets forth those with signature authority for the remaining steps in the rulemaking process. Signature authority may be given to Board members, the Director, select staff or a combination thereof. A Delegation of Authority form is contained in Exhibit D.

2. Proposed Rulemaking:

The steps and timeframes in this stage of the process are largely prescribed by statute with limited discretion available to the Authority or staff.

- A. Prepare/Finalize Documents:
Upon Board approval and direction to move forward with the rulemaking, staff shall prepare or finalize the following for filing with the Secretary of State, the Office of Administration, Joint Committee on Administrative Rules (JCAR) and the Small Business Regulatory Fairness Board (if applicable) and posting on the EI ERA website. Most forms required are a part of Attachment D. Revised and new forms required can be found on the Secretary of State's website.

- a. Rule Transmittal Sheet;
 - b. Draft of proposed rule text (with input from the EI ERA’s General Counsel) in a form meeting all requirements of the Secretary of State’s Office ;
 - c. Regulatory Impact Report (if required);
 - d. Small Business Impact Statement (if applicable);
 - e. Signed Finding of Necessity;
 - f. Cover Letter to Secretary of State;
 - g. Cover Letter to Office of Administration;
 - h. Cover Letter to the joint Committee on Administrative Rules;
 - i. Cover Letter to the Small Business Regulatory Fairness Board (if applicable);
 - j. Affidavit for Public Entity Costs;
 - k. Fiscal Notes –Public and Private (if applicable);
 - l. Takings Analysis; and
 - m. Summary of the rulemaking action.
- B. File Notice of Proposed Rulemaking:
- Compliant with Chapter 536, RSMo., Proposed Rulemakings are to be filed concurrently with the Secretary of State , JCAR and when applicable, the Small Business Regulatory Fairness Board. A copy of the Proposed Rulemaking is also provided to the Governor’s Office and the Office of Administration’s General Counsel.

The Proposed Rulemaking will be published in the Missouri Register by the Secretary of State. Missouri Register filing deadlines are published on the Secretary of State’s website and on the inside cover of the Register. The Proposed Rulemaking will be published approximately one month after the applicable filing deadline. As described below, publication of the Proposed Rulemaking starts the public comment period.

Applicable documents must be signed in accordance with the Board approved Delegation of Authority.

The Proposed Rulemaking package for the Secretary of State should include the following:

- a. Rule Transmittal Sheet;
- b. Signed Cover Letter to Secretary of State;
- c. Signed Cover Letter to Office of Administration;
- d. Signed Cover Letter to the joint Committee on Administrative Rules;
- e. Signed Cover Letter to the Small Business Regulatory Fairness Board (if applicable);
- f. Signed Affidavit for Public Entity Costs;
- g. Draft of proposed rule text;
- h. Fiscal Notes –Public and Private (if applicable);
- i. Regulatory Impact Report (if required);
- j. Small Business Impact Statement (if applicable); and
- k. Signed Finding of Necessity.

Staff must post the Proposed Rule text, the Summary of Rulemaking Action, and a direct hyperlink to the full text of the proposed rule in the Missouri Register on the EI ERA's Rules In Progress webpage within one day of the rule being published in the Missouri Register as required by 536.016 RSMo.

C. Public Comment Period:

Public engagement plays an important role in the development of a rulemaking and must be considered when establishing the rulemaking schedule. All rulemakings must be filed with notice of a thirty day public comment period that begins the day after the notice of the Proposed Rulemaking is published.

If a public hearing is to be held, the time and place of the hearing (which must be held at least thirty days after the publication of the notice) must be included in the notice. The EI ERA must accept public comments for at least seven days after the day of any public hearing. Should a public hearing be held, staff must ensure it is held in an appropriate location and that provisions are made to memorialize testimony.

D. Response to Public Comment on Proposed Rule:

If comments are received during the public comment period, staff shall prepare draft responses for the Board's approval.

If needed, staff (with input from the EI ERA's General Counsel) shall revise the Proposed Rule text.

E. Adoption of Responses and Rule Text:

Staff will present all comments, proposed responses to those comments and final (potentially revised) rule text, to the Board for consideration.

At a meeting of the EI ERA, the Board may act upon the responses and text. If the Board approves the responses and text, staff will proceed with the Final Order of Rulemaking phase of the process as directed.

Timing of Board action is critical at this point. If the rule is to become effective, final text (as approved by the Board) and other documents must be filed with JCAR no later than 59 days after the close of the public comment period or date of the public hearing. The period for filing a Final Order of Rulemaking is statutorily prescribed and cannot be extended. Board meeting(s) for consideration of responses and rule text must be scheduled to meet this deadline.

Generally, the Board could:

- A. Approve or reject the rule text or response to comments in whole or in part;

- B. Approve alternative rule language or responses and instruct staff to revise other documents (e.g. fiscal notes) as needed based upon new rule text;
- C. Instruct staff to provide alternative rule language or responses for future Board consideration;
or
- D. Take any other action or no action.

3. Final Order of Rulemaking

Upon adoption, an Order of Rulemaking packet is to be prepared by staff. Again, this stage is defined by statute. The package should include:

- A. Rule Transmittal Sheet;
- B. Signed Cover Letter to Secretary of State;
- C. Signed Cover Letter to Office of Administration;
- D. Signed Cover Letter to the Joint Committee on Administrative Rules;
- E. Signed Cover Letter to the Small Business Regulatory Fairness Board (if applicable);
- F. Signed Affidavit for Revised Fiscal Note (if applicable);
- G. Revised Fiscal Note (if applicable);
- H. Order of Rulemaking Text; and
- I. Summary of Comments and Response to Comments.

The Order of Rulemaking is filed first with JCAR. It must be filed with JCAR no later than 59 days after the close of the public comment period or public hearing date. It must then be filed with the Secretary of State no sooner than 30 days after filing with JCAR and no more than 90 days following the close of the public comment period.

Once filed with the Secretary of State, the Final Order of Rulemaking will be published in the Missouri Register and Code of State Regulations. The rule will become effective 30 days after it is published in the Code of State Regulations unless a later date has been established by the EI ERA.

Staff should review what is published and if it differs from what was filed, notify the Secretary of State immediately.

Compliant with 536.200, RSMo, the EI ERA will publish a notice in the Missouri Register if the cost of a rulemaking for public entities is more than 10 percent greater than the originally published estimate after the first full fiscal year after implementation of the rule, amendment or rescission.

Other Matters:

4. Emergency Rules

In rare instances, the EI ERA may promulgate an emergency rule to address an issue more quickly than could be accomplished by following the normal rulemaking process. The Emergency Rule process does not require interagency review, public comment period, or fiscal notes. Emergency rules can become effective as early as ten days after filing with the SOS; however, they remain effective for no more than 180 days. If it is necessary for a regulation to remain in effect for longer than 180 days, staff should promulgate a regular rulemaking package in parallel to the Emergency Rulemaking. Emergency rulemaking is addressed in 536.025 RSMo.

5. Periodic Review

536.175 RSMo. provides that agencies shall review administrative rules every five years. The EI ERA's first review is scheduled commence July 1, 2016. Staff should coordinate with MDNR's Office of General Counsel well in advance of scheduled review dates to supply the EI ERA contact to receive comments on rules under review.

Staff shall prepare a report containing the results of its periodic review following the requirements of 536.175.4-5 RSMo. and shall coordinate with MDNR's Office of General Counsel to ensure that the report is filed with JCAR and the Small Business Regulatory Fairness Board in a timely manner.

6. Records Retention

Certain records relating to the rulemaking process must be retained in accordance with chapter 536 and the EI ERA's Records Retention Schedule or, if silent, to the State's General Retention Schedule. At this time, the Statute requires that written comment filed pursuant to section 536.021 and written records of hearings be retained at least three years. The current General Records Retention Schedule also has a three year retention period and describes records to be retained as, "Agency's statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of the agency created pursuant to RSMo 536. Includes significant work papers involved in development of final rule or regulation."