

RISK: Health, Safety & Environment (1990-2002)

Volume 1

Number 2 *RISK: Issues in Health & Safety*


Article 6

March 1990

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Legislative Oversight of Administrative Rulemaking in New Hampshire

Scott F. Eaton*

Introduction

There are more than 100 rulemaking agencies in New Hampshire. Originally enacted in 1973, its Administrative Procedure Act (the Act),¹ governs not only administrative rulemaking process, but also adjudicative hearings.

Since August 1983, state administrative rulemaking in New Hampshire has been subject to legislative oversight by the ten-member Joint Legislative Committee on Administrative Rules (JLCAR). As part of the rulemaking process under the Act, the Committee reviews each month in a legislative hearing format all proposed agency rules. The JLCAR therefore provides an additional degree of public scrutiny and participation in rulemaking, including public health and safety issues, beyond the public notice, comment, and hearing process in the executive branch.

The Committee may not veto proposed rules but may make preliminary objections requiring an agency response and may file final objections shifting the burden of proof as to the validity of a rule to the agency which adopted it. The JLCAR may also hold additional public hearings on any proposed or adopted rule to solicit public comment and

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¹ Codified in N.H. Rev. Stat. Ann. § 541-A.

agency testimony.

Although the state has fewer resources than the federal government relative to dissemination of information on proposed or adopted rules, the JLCAR provides a relatively effective opportunity for the public, either directly or through its elected officials, to scrutinize and present its views on those detailed or technical matters for which the legislature has delegated rulemaking authority to administrative agencies. The public may thereby affect not only administrative but also legislative action in these areas. However, before considering the JCLAR, it will be useful to briefly consider the state rulemaking process and the administrative functions of the New Hampshire legislature in rulemaking generally.

II. Scope of the Rulemaking Process

A. Agency

An "agency" subject to the Act is "any state board, commission, department, institution, officer, or any other state official or group, other than the legislature and the courts, authorized by law to make rules or to determine contested cases."²

B. Rule

A "rule" is:³

each regulation, standard or other statement of general applicability adopted by an agency to (a) implement, interpret, or make specific a statute enforced or administered by such agency or (b) prescribe or interpret an agency policy, procedure or practice requirement binding on persons outside the agency, whether members of the general public or personnel of other agencies.

The Act specifically excludes internal memoranda, informational

² N.H. Rev. Stat. Ann. § 541-A:1 (II) (Supp. 1989).

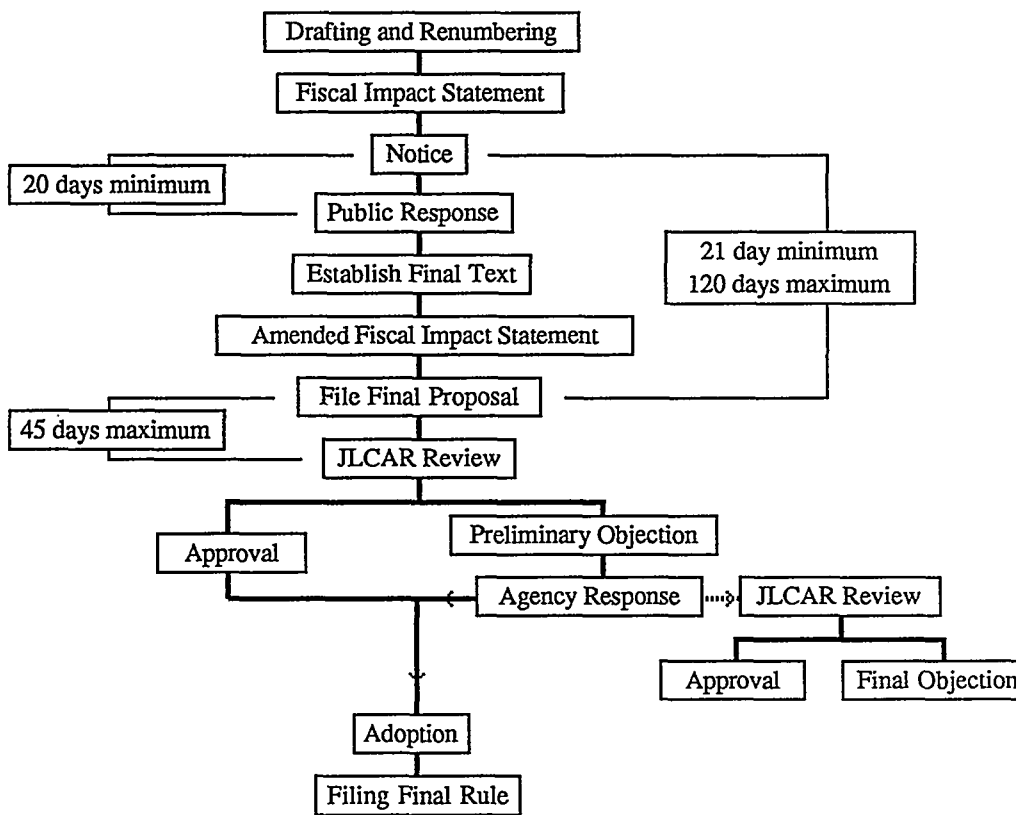
³ N.H. Rev. Stat. Ann. § 541-A:1 (XIII) (Supp. 1989).

pamphlets, etc. from the definition of a rule as long as they do not affect private rights, change the substance of rules, or do not affect the substance or interpretation of a statute or rule.⁴

C. Three Types of Rules

Figure 1

Summary of Procedure for Adoption of Rules
Other than Interim or Emergency Rules



⁴ *Id.*

The formal, permanent rulemaking process is summarized in Figure 1.⁵ The sequence is shown, including the role of the JLCAR. The functions of the state legislature relative to rulemaking in general, and the formal process in particular, will be discussed in reference to this sequence.

Rules under the Act are adopted pursuant to either a "permanent" rulemaking process whereupon they have a six-year effective life;⁶ an "interim" rulemaking process where the rules are effective for only 120 days;⁷ or an "emergency" rulemaking process where the rules also are effective for only 120 days.⁸

III. Administrative Functions of the State Legislature in Rulemaking

A. *The Rulemaking Manual*

The Office of Legislative Services (OLS) is a staff office of the New Hampshire legislature with responsibility for drafting and research relative to proposed legislation. Through its Division of Administrative Rules (Division), however, the OLS writes and publishes the New Hampshire Rulemaking Manual, which contains the uniform system of drafting and numbering developed by the Director of the OLS and which agencies must follow in writing rules.⁹ The Manual also explains the uniform loose leaf format in which the Director is obligated to publish rules.¹⁰ The Manual also includes a suggested guide for state agencies

⁵ The substance of the flow chart is contained in Eaton, *Administrative Rulemaking in New Hampshire, Administrative Law: A Continuing Legal Education Program*, N. H. B. A. (1988).

⁶ N.H. Rev. Stat. Ann. § 541-A:3-(a-f) (Supp. 1989).

⁷ N.H. Rev. Stat. Ann. § 541-A:3-j (Supp. 1989).

⁸ N.H. Rev. Stat. Ann. § 541-A:3-g (Supp. 1989).

⁹ N.H. Rev. Stat. Ann. § 541-A:3-a (VIII) (Supp. 1989). *See also* N.H. OFFICE OF LEGISLATIVE SERVICES, DIVISION OF ADMINISTRATIVE RULES, N. H. RULEMAKING MANUAL (1989).

on the rulemaking process, the required forms for the process, a copy of the Act, and a copy of the rules of the Committee.

Except for the uniform system of numbering and drafting and the uniform loose leaf format for publishing rules, the advice for agencies in the Manual concerning the rulemaking process is informal and is not binding. As stated in the Manual,¹¹ "the director does not have the authority to provide definitive interpretations of RSA 541-A or to delineate the nature and extent of an agency's rulemaking authority," although the OLS, through the Division, may make interpretations as legislative staff and staff to the Committee. The practical result has often been since agencies in this state do not usually have in-house attorneys to provide legal counsel, that the Division's experience and judgment are relied upon in rulemaking matters. Agencies are reminded, however, that questions pertaining to the interpretation or construction of the Act are more properly addressed by the state's Attorney General in the Department of Justice.

B. The Fiscal Impact Statement

Once the agency has drafted a rule, it must obtain a fiscal impact statement from the Legislative Budget Assistant (LBA), a legislative staff office which also writes fiscal notes for proposed legislation. The agency must supply information on a form the LBA has developed which will address the economic impact of a rule on the state, its citizens, businesses, and political subdivisions. A copy of the form also must be sent to the Division.

After an agency has gone through the public notice and hearing process and established a final proposal, it must obtain an amended fiscal impact statement from the LBA addressing the expected change, if any, to the fiscal impact as a result of changes to the proposed rules.

¹⁰ N.H. Rev. Stat. Ann. § 541-A:5 (I) (Supp 1989).

¹¹ RULEMAKING MANUAL, *supra* note 9, § 102.04.

C. Office for Filing

Once the agency has obtained the fiscal impact statement, it must file the statement and proposed rule along with a completed rulemaking notice with the Division for inclusion in the N. H. Rulemaking Register, a weekly publication. It is New Hampshire's counterpart to the Federal Register, but it does not include a full text of the proposed rule or contain the text of the adopted rule.

Besides these documents filed at the start of the formal rulemaking process, there are several other documents related to rulemaking filed with the Division:

1. Final proposals, including an annotated rule showing how the final proposal differs from the original proposal.
2. Proposed interim rules.
3. Agency responses to preliminary objections of the Committee.
4. Adopted rules, whether permanent, interim, or emergency.
5. Declaratory rulings issued by an agency on the specific applicability of a rule.
6. Executive orders.
7. Opinions filed voluntarily by the state Attorney General on rulemaking issues.

No rule, once adopted by an agency, may become effective until it is filed with the Division. Rules are effective upon filing unless a later date is specified in writing to the Director.

D. N. H. Rulemaking Register

As noted above, the Register is published weekly, and it is distributed free of charge to legislators and agencies and to others at a subscription rate. Besides the rulemaking notice, the Register contains:

1. Notices of oral rulemaking hearings held by special

request.

2. Notice of adopted and effective rules.
3. Copies of executive orders.
4. Final objections filed by the Committee.
5. Notice of effective emergency and interim rules.
6. Notices of proposed interim rules.
7. Agency reorganization statements.
8. Notices of special hearings by the Committee.
9. Other related statements or notices related to rulemaking, such as a statement that the Division has received a copy of an opinion from the Attorney General on a rulemaking issue.

E. Official Text of a Rule

Pursuant to the Act, and consistent with the doctrine of separation of powers, the Director, through the Division, may not affect the substance of a rule, but he does have a role in the development of the drafting style and numbering and format for publication. Once an adopted rule is filed with the Division, the Division prepares a proofreading copy for the agency of the rule based on the adopted rule as filed but with editorial corrections for spelling, grammar, punctuation, numbering, etc. The agency then reviews the manuscript to determine that editing has not changed the substance of the rules as adopted. If it has, then the Division deletes these changes from the manuscript. After a correct copy has been received from the agency, the Division will prepare a camera-ready copy for the agency, including source notes which list the effective dates of amendments and changes to the rule and contain document numbers assigned by the Division upon filing. This copy on the Division's data base is the official text in the Director's view. Since an agency must publish its rules, it may then use the camera-ready copy to do so.

This service of editing and preparation of a camera-ready copy is, in fact, a voluntary service performed by the Division. In this state there is

no official publication of all the state's rules, in contrast to legislation, and agencies usually lack the resources to prepare such a text. Pursuant to the Act, the Director may either publish the rules or require the agency to publish them, and may publish supplemental or revised compilations as needed.¹² In order to assure that the agency conforms to the uniform loose leaf format, which includes source notes, the Director has committed the Division to performing the editing and preparation of a copy suitable for publication within the time constraints imposed by other Division business. Publication is then a requirement upon the agency. This interpretation of the Director's authority has in practice led to a close cooperation between the Division and the agencies with rules distributed in a consistent, understandable format. An agency is not required to use the Division's services, but most do so.

The Director may omit a rule from compilation if the publication is "unduly cumbersome, expensive, or otherwise inexpedient", and certain requirements are met.¹³ The Director requires that three copies of a published rule be filed with the Division. Since the Division is the official repository of all adopted rules, the Division prepares certified copies of the text of a currently effective rule upon request by the public and payment of a copying charge.

F. Authority to Refuse a Rule for Filing

The Director has limited authority to actually refuse either a proposed or adopted rule for filing with the Division The Director:¹⁴

1. May require an agency to rewrite a proposed rule to conform to the uniform system of drafting and numbering.
2. May refuse to accept a rule for filing "which contains

¹² *Id.*

¹³ N.H. Rev. Stat. Ann. § 541-A:5 (II) (Supp. 1989).

¹⁴ N.H. Rev. Stat. Ann. §§ 541-A:3-a (VIII), 3-f (II), and 3-j (V), respectively (Supp. 1989).

changes, other than minor editorial changes, that are not specifically authorized in the committee's written objection."

3. Shall refuse to accept for filing an adopted interim rule when it has not been approved by the Committee.

IV. Joint Legislative Committee on Administrative Rules

A. *Origin and Powers*

The JLCAR was created in August, 1983 to oversee executive agency rulemaking.¹⁵ The creation of the Committee followed a decision by the New Hampshire Supreme Court in 1981 relative to proposed legislation which would have required the approval of the appropriate legislative standing committees to all proposed agency rules before those rules could be adopted. The court ruled that the legislature may not delegate its lawmaking power to a smaller body and thereby evade the constitutional requirement of legislative action by a majority of a quorum of both the House and the Senate with provision for the governor's approval.¹⁶ The court stated that a legislative veto was not *per se* unconstitutional,¹⁷ and that it would be permissible for a committee to suspend an agency rule for a temporary period of time when the House and Senate are not in session.¹⁸

¹⁵ N.H. Rev. Stat. Ann. § 541-A:11 (Supp. 1989). The statute governs the composition, meetings, and staffing of the Committee as well as its duties aside from its ongoing review of proposed and adopted rules.

¹⁶ Opinion of the Justices, 121 N.H. 552, 560, 431 A.2d 783, 788 (1981).

¹⁷ *Id.* at 559, 431 A.2d at 788.

¹⁸ *Id.* at 561, 431 A.2d at 788. A concurrent resolution of the N.H. House of Representatives and Senate, Concurrent Resolution Proposing a Constitutional Amendment 21, was adopted in the 1987 session proposing a state constitutional amendment for inclusion on the ballot in November, 1988. Under the proposed amendment, Part Second, Art. 5-c, no administrative rule could have been adopted or become effective if disapproved by the legislature or an appropriate legislative committee in a manner to be prescribed by law. The measure failed to obtain the necessary 2/3 vote in November, 1988 to become part of the constitution. *See also,*

The Committee is composed of five state senators and five representatives, appointed every two years by the Senate President and House Speaker, respectively, but with no more than three senators and three representatives from each party. The Committee must meet year round at least once a month, and a quorum consists of six members.

In its monthly meetings, the Committee reviews final proposed rules and proposed interim rules which have been filed by the agencies with the Division and to which the Committee may make preliminary objections. In 1989 over 200 rulemaking proceedings were conducted. The Committee also reviews responses to preliminary objections it has made in prior meetings to the proposed rules to see if a final objection is in order, or if an interim rule may not be adopted and filed.

The Committee in its monthly meeting may petition an agency to repeal an emergency rule if the emergency is not genuine, and may petition, as any person may, for the adoption, amendment, or repeal of a rule.¹⁹ The Committee may, in addition to its monthly meetings, hold its own hearings on any proposed or adopted rule. It may also petition an agency within fourteen days of publication of a rulemaking notice in the N. H. Rulemaking Register to hold a rulemaking hearing, which the agency must thereafter do with a minimum additional twenty days' notice in the Register.²⁰

The Committee shall also, in addition to the duties above, petition an agency to adopt rules if the agency has rulemaking authority it has not used; review statutory passages granting rulemaking authority and make recommendations before each legislative session to the Senate President and House Speaker as to how such passages should be amended; and make recommendations to the Senate President and the House Speaker

Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

¹⁹ N.H. Rev. Stat. Ann. § 541-A:6 (Supp. 1989).

²⁰ N.H. Rev. Stat. Ann. § 541-A:3-c (I (d)) (Supp. 1989).

as to how legislative oversight of rulemaking might be improved.

Besides its administrative functions enumerated above, the Office of Legislative Services, through the Division, also functions as Committee staff. For this purpose the Division assists the Committee in reviewing all proposed rules, drafting and processing all correspondence, preparing the meeting agenda, and responding to inquires by the public about Committee business.

B. Review of Proposed Rules and Emergency Rules

1. Permanent rules

The Division distributes to the Committee members copies of all proposed permanent rules for which notices are published. The Division's attorney, functioning as the Committee's legal counsel, will review the proposed rules to see if there is any potential basis for a Committee objection or petition and report those comments to the agency and the Department of Justice as soon as possible, preferably before a final proposed rule is filed. Any bases remaining for an objection or petition after the final proposed rule is filed are reported in oral or written testimony to the Committee at its monthly meeting.

After the public comment period has concluded according to the terms of the notice, the agency will prepare a final proposed rule and file it with the Division along with an amended fiscal impact statement obtained from the Legislative Budget Assistant. This final proposal must be accompanied by an annotated rule indicating how the final proposed rule differs from the rule as originally proposed and distributed to the Committee. The Committee members receive copies of the final proposal from the Division but with the annotated version of the rule.

The Committee has 45 days to approve or object to the final proposed rules once they are filed with the Division, or otherwise they are automatically approved. Final proposed rules filed within two weeks of a monthly Committee meeting are placed on the agenda for the following month's meeting.

The Committee may make a preliminary objection to a final proposed rule "if the rule is:²¹

- (a) beyond the authority of the agency;
- (b) contrary to the intent of the legislature;
- (c) determined not to be in the public interest; or
- (d) deemed by the committee to have a substantial economic impact not recognized in the fiscal impact statement."

The Committee has authority to adopt rules governing its operation and organization.²² The Committee has, in these rules, further clarified how it will interpret the statutory bases for objection. For example, a rule may be contrary to legislative intent if it conflicts with a statute or tries to implement a bill which the legislature defeated.

In determining whether a rule is in the public interest, the Committee has chosen to focus largely on the problems of clarity and uniform application of proposed rules which are vague or ambiguously worded or lead to oral rulemaking. In other words, the wisdom of a rule on technical matters has almost always been left to the agency to decide. The Committee, however, has objected to a few rules for not being in the public interest when the Committee determined they were designed for the administrative convenience of the agency to the detriment of the public. The Committee members may, either individually or collectively, also seek legislation on a matter which the Committee believes should more properly be handled by legislation than through a Committee objection. This may include amending the enabling statute granting rulemaking authority and thereby effectively repealing the rule.

The Committee meeting is a public proceeding conducted as a

²¹ N.H. Rev. Stat. Ann. § 541-A:3-e (IV) (Supp. 1989).

²² N.H. Rev. Stat. Ann. § 541-A:11 (II) (Supp. 1989). For the text of the rules, see Appendix V: Rules for the Joint Legislative Committee on Administrative Rules, contained in RULEMAKING MANUAL, *supra* note 9.

legislative hearing, and the Committee is prepared to receive oral and written testimony on any proposed or adopted rule subject to discussion on the Committee's agenda. Agency representatives are always invited to appear to testify on agency rules for which there may be questions. The Committee meeting is not a second rulemaking hearing, since the Committee does not have the authority of the agency to amend or withdraw the rule, nor is it a legislative hearing on a proposed piece of legislation, since the agency proposes the rule and the Committee may not, for example, amend the rule, table it, or report it to the full legislature as inexpedient to legislate as if it were a bill.

The Committee may make a preliminary objection to a particular rule only once. Such an objection requires a majority of the votes cast, a quorum being present, and it must be sent to the agency in writing. If the Committee makes a preliminary objection, then the agency must respond in some way in writing prior to the Committee's next regularly scheduled monthly meeting. The agency may amend the rule to cure the defect and adopt the rule, it may adopt the rule without change, or it may withdraw the rule entirely. If the agency does not respond prior to the Committee's next meeting, then the rulemaking proceeding is invalid, but the agency may start the rulemaking process over again with a new rulemaking notice.

The preliminary objection is not a veto of the proposed rule but simply creates the additional step of responding which the agency must take before adopting the rule. The agency shall respond to an objection only once and may not make repeated attempts to satisfy the objection in the same rulemaking proceeding.

After receiving the response, the Committee may accept the response and withdraw the objection, or it may make a final objection by a majority vote of the entire Committee if the agency intends to adopt the rule over the Committee's preliminary objection. Once the Committee files the objection with the Division for publication in the Rulemaking

Register, "to the extent that the objection covers a rule or a portion of a rule" the burden of proof shifts to the agency in any action for judicial review or for enforcement of the rule "to establish that the part objected to is within the authority delegated to the agency, is consistent with the intent of the legislature, and is in the public interest".²³ Properly filed rules are "prime facie evidence of the proper interpretation of the matter that they refer to" except if a final objection is attached, although the rules always are valid and binding and have the force of law.²⁴ If the burden of proof is not met, however, " the court shall declare the whole or portion of the rule objected to invalid."²⁵

Failure by the Committee to object to a proposed rule is not "an implied legislative authorization of a rule's substantive or procedural lawfulness."²⁶ Since the Committee was created, it has made many preliminary objections, approximately 50 each year, while reviewing fifteen to twenty final proposed rules on the average in each meeting. The rules vary in length from single sentences to more than 100 pages. Since 1983, however, the Committee has made only ten final objections, because agencies have generally been very responsive to the Committee's preliminary objections.²⁷

2. *Interim Rules*

The interim rule provisions of the Act were established in 1987 and revised in 1988, to allow an agency to adopt a rule temporarily when the

²³ N.H. Rev. Stat. Ann. § 541-A:3-e (VI) (Supp. 1989).

²⁴ N.H. Rev. Stat. Ann. § 541-A:12 (II) (Supp. 1989).

²⁵ N.H. Rev. Stat. Ann. § 541-A:3-e (VI) (Supp. 1989).

²⁶ *Id.*

²⁷ Five of the final objections are contained not only in the N. H. Rulemaking Reg. but also are reprinted in Eaton, *supra* note 5, at Appendix E. The sixth final objection is contained in the Reg. for December 9, 1988; the seventh, in the Reg. for February 10, 1989; the eighth, in the Reg. for November 24, 1989; and the ninth and tenth are in the Reg. for Feb. 23, 1990.

content of the rule and the speed with which it must be adopted are largely outside of the agency's control. For example, rules designed to conform to a new or amended statute, a controlling court decision, or a federal requirement mandating adoption sooner than the Act allows for permanent rules may be adopted as interim rules. Proposed interim rules, however, are still subject to Committee review.

An agency must give notice in a newspaper or the Rulemaking Register of an intent to file a proposed interim rule at least seven days before filing it with the Division. The Committee must consider the rule at its first regularly scheduled meeting following the filing or at a special meeting, but if the rule is filed within seven days of the meeting, at least six Committee members must vote to consider it.

Once filed, proposed interim rules are distributed by the Division to Committee members. An interim rule is reviewed by the Committee and the Committee attorney as if it were a final proposal, absent any review of a fiscal impact statement, which is not required. The rule may also be objected to if there is no genuine basis for an interim rule. Unlike any other rule, however, a proposed interim rule may not be adopted and filed as an interim rule unless the Committee approves it. Since the agency may still adopt the rule through a permanent rulemaking proceeding, this is not a legislative veto of the rule. One route to the adoption of the rule would no longer be available, but the substance of the rule itself may eventually be implemented. After adoption and filing with the Division, the rule will be effective for 120 days, and the interim rule cannot be filed again as an interim rule once it expires.

3. Emergency rules

An agency may adopt an emergency rule and file it with the Division after whatever notice and hearing it finds practicable, so long as the agency finds that an "imminent peril to the public health or safety" requires adoption of the rule with less notice than for a permanent rule.

An agency may not adopt an emergency rule "solely to avoid the time requirements" for permanent rulemaking, and must supply evidence explaining the nature of the emergency.

An emergency rule is effective for 120 days upon filing, but the agency may not adopt the same emergency rule when it expires. Although the emergency rule is not subject to Committee objection, copies of the emergency rule are given to Committee members by the Division. The Committee may petition the agency to repeal the rule if it determines that the evidence supplied by the agency does not show that the rule is necessary to prevent an imminent peril to public health or safety. An emergency rule may be repealed by the agency simply by filing a statement to that effect with the Division.

V. EFFECTS OF LEGISLATIVE OVERSIGHT ²⁸

A. *Improved Rules*

The administrative functions of the Division relative to rulemaking do not provide the direct oversight by members of the legislature which the Committee provides. However, since the Division is a legislative staff office, its administration of the filing process and the implementation of the uniform system of drafting and numbering and the uniform loose leaf format for publishing rules has given the legislature a substantive role in establishing a consistent and accessible body of rules.

The rules themselves are clearer and more uniformly applicable due to the comments from the Committee's attorney and to the Committee's preliminary objections. Moreover, potentially serious problems of rulemaking authority or conflict with statutes have been minimized by identifying questions for agency consideration. The rules have now

²⁸ For an excellent, though more theoretical discussion, of the effects of a legislative oversight committee, the reader is referred to A. BONFIELD, STATE ADMINISTRATIVE RULEMAKING, 481 (1986 and Supp. 1989).

been subject to a legal scrutiny which they usually had not been prior to the Committee's creation and the establishment of the Committee attorney, since the agencies in this state do not usually have in-house attorneys to review the rules.

The following examples illustrate the kinds of issues which the Committee or the Committee's attorney have addressed:

1. The state agency responsible for collecting unemployment compensation payments from employers implemented a new law requiring a special levy against those employers, usually building contractors, who did not contribute an equitable amount to the unemployment compensation fund due to the seasonal nature of their business. By law the levy would be an average of the previous three-years' "negative balances" in the fund. The agency began to collect the payments based upon an emergency rule filed, when the Act still permitted emergency rules, if there were a finding of imminent peril to the public welfare. In the Committee meeting on the final proposed permanent rule, however, public testimony indicated that the law was being applied in an unconstitutionally retroactive manner by the rule. The state Attorney General's Office reviewed the matter and agreed with the testimony, whereupon the agency withdrew the proposed rule and refunded the more than \$100,000 collected.

2. The state agency responsible for licensing pesticide and herbicide applicators proposed a rule exempting certain janitorial service contractors, who spray for mildew in restaurants, from the statutory requirement of licensing. When the Committee's attorney indicated that there appeared to be no authority to exempt the contractors by rule from this

licensing requirement, the agency withdrew the rule and subsequently sought legislation to establish the exemption.

3. The Committee once reviewed a rule by the state's fish and game department proposing to prohibit fishing for two months in a river on which the state's sole fish weir remained. The weir owner testified before the Committee that the prohibited period was his main fishing opportunity and that the rule would cause him to go out of business. The rulemaking notice stated that no commercial fishermen would be affected and it did not explain the prohibition period. The weir owner also testified that as a result of the notice he did not attend the scheduled rulemaking hearing because he accepted the notice on its face. Moreover, legislation a few years earlier similarly restricting fish weirs had been repealed expressly so as to allow the weirs to operate. The Committee objected that the rule was contrary to legislative intent by violating the notice provisions of the Act and trying to implement a measure which the legislature had defeated. The Committee made a final objection when the agency indicated it would adopt the rule over the Committee objection.

4. The state public health agency was granted new authority to license asbestos contractors, managers, and workers by rule, but the Committee attorney noted that the proposed rules on worker safety left it ambiguous whether the owners, managers, or workers were responsible for complying with the requirements. The agency corrected the ambiguity before submitting the final proposal.

5. The state board responsible for licensing master plumbers and journeymen had required for years in the

existing rules that apprentices also be licensed. When re-adopting the rules with amendments, the agency received the Committee attorney's comment that there was no specific authority to license apprentices., i.e to require board permission to practice as an apprentice.²⁹ The agency amended the rules to require simply a registration procedure. The board felt that in practical terms this was all it had been doing in any case.

6. The state environmental agency newly charged with the responsibility to permit underground gasoline storage tanks proposed rules in this area, including a rule forbidding the transfer of the real estate containing the tank if it were subject to enforcement action. When the Committee attorney noted that there appeared to be no authority for this requirement, the agency's legal counsel in the state Attorney General's office agreed that it might be a taking of property without compensation, and the suspect rule was deleted before the final proposal was submitted.

B. Public Scrutiny

Due to Committee review, elected officials can see in monthly meetings or special hearings how their delegation of rulemaking authority has worked in practice and can hear the public's complaints and concerns about proposed or adopted rules. Even if the Committee has no basis to object to a rule, it may still petition an agency to adopt, amend, or repeal a rule or request the agency to withdraw a proposed rule. A petition from the Committee may produce a different result than a petition from the general public. The Committee may also always seek legislation.

²⁹ See N.H. Rev. Stat. Ann. § 541-A:1 (VI) (Supp. 1989) defining a "license", and N.H. Rev. Stat. Ann. § 541-A:12 (III (b)) (Supp. 1989) requiring that an agency shall not by rule require licenses unless authorized by statute.

When appearing before the Committee, agency representatives at least must respond to questions about why the agency is taking the action proposed in the rule. Although the Committee's powers are limited, the public is at least granted a second public forum besides the rulemaking hearing to air their grievances. Since the forum is before elected and not appointed officials, the response to negative public testimony may be a more sympathetic one, and the unfavorable publicity generated about a rule by the subsequent discussion in front of a legislative committee may cause the agency to decide not to proceed further. For example, the state agency responsible for distributing Medicare and Medicaid funds proposed a rule whose effect would have been to shift certain health costs relative to nursing homes from the state to the counties, who operated several homes. This apparently conflicted with a state constitutional provision preventing the imposition of new, modified, or expanded programs on local political subdivisions without either state funding or local approval of the cost. Public testimony on this issue in the Committee meeting on the final proposed rule caused the agency to withdraw the rule.

The opportunity for legislative inquiry presented by Committee review can be a tool to analyze public issues, including technical risk, although review to date has been much more narrowly focused. Proposed rules on asbestos and hydrochloride air pollution have gone before the Committee, for example, and the agencies have explained the purpose and rationale behind the rules. The Committee has not in the past substituted its technical judgment for that of the agency, unless a problem comes within a basis for objection, for the Committee has chosen in its own rules to interpret the public interest relative to rulemaking in a way that the members can confidently apply their expertise. That has not, however, prevented questions and concerns being raised on technical issues for later investigation in the legislative

process.

C. Cooperation Between the Executive and Legislative Branches

Since the Committee staff and the Division are the same, the legislature in general and the Committee in particular can keep a close check on the progress of rulemaking from its beginning. The Division's dual role of administrative functions and Committee staff encourages cooperation between the legislature and the executive branch, particularly in identifying potential problems early in the process, such as an incorrect or inadequate rulemaking notice.

When the Committee was created, some agencies at first did not understand the role of the Committee. Prior to 1983 agencies had usually appeared before legislative committees on rulemaking issues only during the process of considering legislation, and even then the representatives often were from the upper echelons of agency management. Once rulemaking authority was delegated, the agencies were not subject to further legislative scrutiny on rulemaking except in indirect ways, such as in the budget review process and the "sunset review" process where agencies had to be re-authorized by the legislature on a periodic basis.³⁰

Some agencies were initially defensive when questioned, for example, about the clarity and uniform application of rules and apparent conflict with the statutes because they seemed to believe that their motives, honesty, and competence were being questioned. The agencies often would simply defend the purpose of a rule because their only familiarity with legislative scrutiny was on broad issues of policy and purpose set by the legislature in the original enabling legislation. At other times the agencies presumed they were being unfairly compelled to justify a specific technical requirement after already considering public input and applying their own judgment. In other words, some agencies

³⁰ N.H. Rev. Stat. Ann. § 17-F and N.H. Rev. Stat. Ann. § 17-G (Supp. 1987) (repealed 1987).

felt that they had been told by the legislature to regulate and that the task was now being encumbered by a tedious and unnecessary oversight review.

The statutory bases for objection could have been used by a Committee to overturn a proposed rule simply on political grounds or because of the prejudices or personal feelings of members and not on objective judgment on authority, legislative intent, or public interest. In practice, however, this has not happened, since the Committee has kept within the parameters explained by their rules when making objections.

Thankfully the initial hostility due to misunderstanding has largely subsided, and Committee review has encouraged cooperation between the agencies on one hand and the Committee with its staff on the other. This is especially important where the legislature, although the third largest legislative body in the English-speaking world, is composed of part-time legislators and meets six months each year. Constituents may have greater access to a legislator than an agency head, but the agency is in a position to more rapidly respond to a request for a change in a requirement as it appears in a rule. Agencies want to complete the rulemaking process and avoid a Committee objection, and thus the maintenance of good relations with the Committee by addressing its concerns on proposed or adopted rules is important. The agencies have come to expect Committee staff comments on the proposed rules so that they can amend the rule before submitting the final proposal. Since agencies understand that the Committee will largely leave the technical details of rules to the agency's judgment unless the details come within a criterion to object, they usually no longer feel that their expertise or motives are being doubted. In fact, agencies have come to realize that the Committee's preliminary objection may be used to rectify a problem, which the agency itself may have discovered, by amending a proposed rule without having to proceed through the rulemaking process again.

Agencies have also understood that, as legislators, the Committee members could always have the last word on rulemaking through legislative changes to the statutes governing an agency, but they also know that the Committee members may serve as sponsors of legislation the agencies would like. The provisions in the Act allowing for interim rules were enacted in response to agency input, for example.

To the extent that the agencies seek advice from their legal counsel in the state Department of Justice, formerly the Attorney General's Office, a conflict in legal interpretation by the Committee's attorney and an agency's attorney is rare. When close questions of authority or legislative intent based on statutory interpretation have arisen with conflicting legal opinions, the Committee has usually declined to object.

The Committee attorney has also been careful to reiterate to agencies that he does not function as their counsel but only as counsel to the Committee, and that his comments are not Committee objections unless the Committee decides that they should be. The Committee does not necessarily object simply because the attorney believes that a basis exists, especially on the issues of clarity and uniform application of rules which are subject to individual judgment. The agency may often avoid an objection by explaining why the rule was written in a particular way and how it satisfies any Committee concerns despite apparent potential bases for objection. Nevertheless agencies have often come to rely upon the Committee attorney's interpretations or identification of issues when drafting the final proposal, if not because they believe his view is correct, then because they wish to undergo Committee review with as little trouble as possible.

Differences of opinion will continue to exist between the Committee and the agencies, however. The Committee is concerned that rules be as clear and unambiguous as possible so that they may be uniformly applied and not require oral rulemaking to explain inconsistencies or to

eliminate questions about requirements. Committee power is often the power to persuade, and it may not always be effective. Agencies often oppose the narrowing of language to explain, for example, what "good cause" or "in the commissioner's discretion" mean when waivers of rules are involved, because they feel it denies them the flexibility in addressing unforeseen situations, and, not the least, that it means rulemaking will have to be undertaken more often.

VI. Conclusion

Legislative oversight of rulemaking in New Hampshire has provided a relatively effective opportunity for the public, either directly or through elected officials, to scrutinize and present its views on rules designed to implement the policy objectives set by the legislature and which may include scientific or technical matters. Legislative oversight through review by the Joint Legislative Committee on Administrative Rules has been beneficial to the public, legislature, and agencies. The public receives a second forum to present its concerns on detailed issues which may have been considered only in general terms during the legislative process. The legislators can see how their directives through delegation of rulemaking authority are being carried out and can register their objection to rules which appear to be contrary to authority, legislative intent, and public interest. They may seek further legislation to address the concerns given in written and oral testimony to the Committee. The agencies have an opportunity to explain what they are doing and why and cultivate legislative support for measures they desire. The state in general therefore benefits from rules which are clear, more uniform and less subject to later legal challenge on issues of authority and legislative intent than would otherwise be the case if Committee review did not exist.