The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

Thomas S. Burack, Commissioner

April 5, 2011

The Honorable Carol McGuire, Chairman
House Executive Departments and Administration Committee
Legislative Office Building, Room 306
Concord, New Hampshire 03301

Re: SB 161, relative to procedures for adoption of agency rules under the administrative procedures act.

Dear Chairman McGuire and members of the Committee:

Thank you for the opportunity to testify on SB 161, relative to procedures for adoption of agency rules under the administrative procedures act. The Department of Environmental Services supports this bill, as amended by the Senate.

Last year, the "Lean Rulemaking - Phase I" project was initiated under the sponsorship of Representative Norelli. The project sponsor and participants recognized that the current process for promulgating rules is inefficient; that certain statutory rulemaking requirements place undue burdens and costs on agencies, OLS, JLCAR and other stakeholders; and that there are barriers to meaningful public participation in the process. The Director of Legislative Services, staff from the OLS Administrative Rules office, and staff from the Departments of Environmental Services, Health and Human Services, and Safety worked together over the summer and fall of 2010 to identify specific issues that contribute to these problems and to brainstorm ways to make the process more efficient while also supporting and encouraging public participation. Some of the solutions can be implemented administratively, but many require statutory change. SB 161, as amended by the Senate, would implement those changes. A chart is attached that explains each section of the bill.

We believe strongly in using continuous process improvement tools and philosophies such as Lean to bring greater efficiencies to the operation of New Hampshire state government, and believe that SB 161, as amended by the Senate, is a significant step forward. Accordingly, we urge the Committee to move this bill forward as a demonstration of a joint commitment by the legislative and executive branches to making government more efficient and responsive to the citizens we serve.

Respectfully Submitted,

Thomas S. Burack
Commissioner

Enclosure

cc: Senator Merrill
Senator Stiles
Senator Carson
Representative P. Schmidt
Representative Norelli
Representative Pilotte
Representative B. Patten
Representative C. McGuire

Bill §	541-A §, ¶(s)	Topic and Explanation of amendment	Text (text in gray font shows existing statute not included in bill; text in black font shows language from SB 161as amended by the Senate)
1	6, I(f)	Notice of rulemaking proceedings Amendment establishes clear expectations re: description of rulemaking, which will make it easier for people reading the notice to understand what is being proposed. Possible additional amendment (change "being adopted" to "new") would clarify the requirement for new rules (since even existing rules are "being adopted" if they are in the rulemaking process).	**541-A:6 Notice of Rulemaking Proceedings. –** I. The agency shall give at least 20 days' notice of [the] public hearing and ... notice of the [deadline] for the submission of written testimony .... The notice ...shall include: (a) The name and address of the agency. (b) The statutory authority for the rule. (c) [Type of action - adopt, amend, repeal, readopt, or readopt with amendment] (d) The rule number and title. (e) [Dates of public hearing and deadline for submitting written comments] (f) ***If existing rules are being amended, readopted, or readopted with amendment,*** a concise summary [~~explaining the effect~~] of the [~~rule~~] ***existing rules and any proposed amendments, and if the proposed rules are [~~being adopted~~] new, a concise summary of the proposed rules.*** (g) A listing of people, enterprises, and government agencies affected by the rule. (h) [Name, address, telephone number of agency contact] (i) The fiscal impact statement completed by the legislative budget assistant. (j) A statement, with adequate details and supporting data, that the proposed rule does not violate the New Hampshire constitution, part I, article 28-a.
2	6, II	Notice of rulemaking proceedings Amendment clarifies the grounds on which the Director of Legislative Services may refuse to publish a rulemaking notice filed by an agency.	II. The director of legislative services may refuse to publish a notice if the director determines that there is significant noncompliance with the requirements of paragraph I. ***In this paragraph, "significant noncompliance" means one or more errors of such magnitude that a reasonable person would not be able to discern what rules are the subject of the rulemaking proceeding and/or what the agency is proposing to do. The term includes the absence of elements required by paragraph I.***
	6, III	Notice of rulemaking proceedings Amendment clarifies what constitutes adequate notice to occupational licensees; allows the JLCAR to identify additional (specific) methods.	III. The agency shall send notice to the director of legislative services, to all persons regulated by the proposed rules who hold occupational licenses issued by the agency, and to all persons who have made timely request for advance notice of rulemaking proceedings. Upon request the agency shall send notice to the president of the senate, to the speaker of the house of representatives, to the chairperson of the fiscal committee, and to the chairpersons of the legislative committees having jurisdiction over the subject matter. Notice shall be made not less than 20 days before the first agency public hearing required by RSA 541-A:11, ***I***. Notice to occupational licensees shall be by U.S. Mail, electronically, agency bulletin or newsletter, public notice advertisement in a publication of daily statewide circulation, or in such other manner ***that is reasonably calculated to inform such licensees of the proposed rulemaking. The committee may identify additional methods of notifying occupational licensees that are*** deemed sufficient [~~by the committee~~].

Bill §	541-A §, ¶(s)	Topic and Explanation of amendment	Text (text in gray font shows existing statute not included in bill; text in black font shows language from SB 161as amended by the Senate)
3	9, I-a & I-b [new]	Publication of rulemaking notices in *Rulemaking Register* I-a: allows Director of Legislative Services to correct rulemaking notices filed for publication, with notice to the agency so that changes which affect substance are not made inadvertently. I-b: specifies that the date of publication is the date the Register is available on the GCIS web site to support electronic publication.	I-a. Prior to publication and with prior notice to the agency, the director of legislative services may correct typographical, spelling, and punctuation errors, as well as unintentional errors in references and citations in a submission, provided the corrections do not affect the substance of the notice. I-b. The date of publication of the rulemaking register shall be the date on which the register is available to the public on the general court information services web site.
4	9, II-III	Publication of *Rulemaking Register* Amendment authorizes the Director of Legislative Services to publish the *Rulemaking Register* electronically and establishes a presumption in favor of distributing electronic copies.	II. The rulemaking register shall be made available upon request to agencies and officials of this state free of charge. The director of legislative services shall send a ***paper or electronic*** copy of the rulemaking register upon request to the clerk of each municipality in the state and upon request to any member of the general court free of charge. ***Municipalities and members of the general court shall be deemed to have requested an electronic copy unless a paper copy is specifically requested. Paper*** copies of the register which are sent to municipalities and to members of the general court shall be sent by first-class mail. III. ***Paper copies of*** the register shall also be made available upon request to other persons at prices fixed by the director of legislative services to cover mailing and publication costs.
5	10	Filing proposed rule text; establishing and revising text Amendment clarifies that the text of the proposed rules cannot be changed prior to the public hearing, and authorizes agencies to prepare a draft final proposal if it decides to hold an additional hearing on a proposed rule prior to filing the final proposal for review by the JLCAR.	541-A:10 Filing of Proposed Rule Text***; Establishing and Revising Text.*** ***I.*** At the same time the notice required by RSA 541-A:6, I is filed, the agency shall file the text of the proposed rule with the director of legislative services. The text ***of the proposed rules*** as filed ***pursuant to RSA 541-A:3, III*** shall not be changed [~~or established as~~] ***prior to the hearing held pursuant to RSA 541-A:11, I(a).*** ***II. The agency shall not establish*** the text of the final proposal until after the conclusion of the public comment period established pursuant to RSA 541-A:11, ***I(b). If the agency elects to solicit comment pursuant to RSA 541-A:11, I(c), the agency shall prepare a draft final proposal that is annotated to show how the rules as initially proposed are proposed to be changed. In response to comment received, the agency may revise the draft prior to filing the final proposal in accordance with RSA 541-A:12.***

Bill §	541-A §, ¶(s)	Topic and Explanation of amendment	Text (text in gray font shows existing statute not included in bill; text in black font shows language from SB 161as amended by the Senate)
6	11, I	Public hearing and comment period Amendment in new (a) clarifies that requirement applies to regular rules only.	I. ***(a)*** Each agency shall [~~hold~~] ***schedule*** at least one public hearing on all proposed rules ***filed pursuant to RSA 541-A:3,*** and shall afford all interested persons reasonable opportunity to testify and to submit data, views, or arguments in writing or, if practicable for the agency, in electronic format, in accordance with the terms of the notice ***filed pursuant to RSA 541-A:3, I,*** and the provisions of this section. The office of legislative services shall provide oral or written comments on potential bases for committee objection under RSA 541-A:13, IV in a form and manner determined by the director of the office of legislative services. Each agency shall require all materials submitted in writing to be signed by the person who submits them, and the agency shall transfer to hard copy, if practicable for the agency, all materials submitted as diskette, electronic mail, or other electronic format. Copies of the proposed rule shall be available to the public under RSA 91-A and at least 5 days prior to the ***date of the*** hearing.
		Amendment in new (b) reduces the required post-hearing comment period from 10 [calendar] days to 5 business days. (Practical effect is a reduction from 10 to 7 calendar days.) New language at end recognizes that the original deadline for submitting written comment may still meet the time requirement specified.	***(b)*** For rules proposed by a board or commission, a period of at least [~~10~~] ***5 business*** days after the hearing shall be provided for the submission of materials in writing or in electronic format, unless a shorter period is specified in the notice. If a shorter period is specified in the notice, the deadline for the submission of such materials shall not be earlier than the scheduled conclusion of the public hearing. For rules proposed by an agency official, a period of at least [~~10~~] ***5 business*** days after the hearing shall be provided in all instances. If a hearing is continued or postponed as provided in paragraph III or IV of this section, the period for the submission of materials in writing or in electronic format shall be extended ***unless the previously-established deadline meets the applicable requirement specified above.***
		New (c) allows an agency to conduct a hearing on a draft final proposal prior to filing the final proposal for review by the JLCAR (not allowed under existing statute).	***(c) An agency may hold a public hearing or otherwise solicit public comment on a draft final proposed rule prior to filing the final proposed rule pursuant to RSA 541-A:3, V. Notice of such hearing or comment period shall be provided by such means as are deemed appropriate to reach interested persons, which may include publishing a notice in the rulemaking register.***

Bill §	541-A §, ¶(s)	Topic and Explanation of amendment	Text (text in gray font shows existing statute not included in bill; text in black font shows language from SB 161as amended by the Senate)
7	12, II	Final proposal Amendment to (b) would eliminate requirement for agencies filing on paper to file 2 copies of the fixed text final proposed rule. Amendment striking (c) would eliminate the requirement for agencies to file a copy of the RSA authority for the rules (OLS/Admin. Rules staff obtain their own copies from the Internet anyways).	II. The final proposal shall include: (a) A cover sheet listing: (1) The number of the notice and the date the notice appeared in the rulemaking register; (2) The name and address of the agency; (3) The title and number of the rule; and (4) A citation to the statutory authority for the rule. (b) [~~Two copies~~] ***One copy*** of the established text of the final proposed rule. (c) [~~A copy of the full text of the statutory authority for the rule.~~ ~~(d)~~] If required pursuant to RSA 541-A:5, VI, an amended fiscal impact statement from the legislative budget assistant stating that as a result of notice and hearing the rule did change and explaining how this change affects the original fiscal impact statement. [~~(e)~~] ***(d)*** A copy of the fixed text of the final proposed rule annotated clearly to show how the final proposed rule differs from the rule as initially proposed, if the text has changed.
	12, III	Incorporation by reference; incorporating Internet content Amendment clarifies that an incorporation by reference occurs when an agency establishes state-enforceable requirements by citing to a document or Internet content; emphasizes that the material so incorporated must be created by an unrelated third party and not by or for the agency.	III. [~~With the final proposal, the agency shall also file the incorporation by reference statement described by paragraph IV of this section, if the~~] ***An*** agency [~~incorporates into~~] ***may establish requirements in*** its rules [~~any~~] ***by citing to a*** document ***or to Internet content*** prepared by [~~any entity outside the agency~~] ***an unrelated third party. If state-enforceable requirements are so established, the agency shall file an incorporation by reference statement as specified in paragraph IV with the final proposal.*** [~~However, the~~] ***No*** agency shall [~~not~~] incorporate by reference any document ***or Internet content*** prepared by or on behalf of the agency.
	12, IV	Amendment clarifies the requirements for incorporation by reference statements and reflects inclusion of Internet content in ¶ III.	IV. Any [~~required~~] incorporation by reference statement ***required by paragraph III*** shall include a [~~separately signed~~] statement ***signed*** by the adopting authority: (a) Certifying that the text of the [~~matter~~] incorporated ***document or Internet content*** has been reviewed by the agency, with the name of the reviewing official; (b) Explaining how the text of the [~~matter~~] incorporated ***document or Internet content*** can be obtained by the public, and at what cost; (c) Explaining any modifications to the [~~matter~~] incorporated ***document or Internet content***; (d) Discussing the comparative desirability of reproducing the incorporated [~~matter~~] ***document or Internet content*** in full in the text of the rule; and (e) Certifying that the agency has the capability and the intent to enforce the [~~rule~~] ***requirements being incorporated***.

Bill §	541-A §, ¶(s)	Topic and Explanation of amendment	Text (text in gray font shows existing statute not included in bill; text in black font shows language from SB 161as amended by the Senate)
	12, V [new]	Amendment addresses the possibility that undated Internet content may change, but the requirements must be fixed so as to not change without going through rulemaking.	***V. If an agency establishes requirements by incorporating undated Internet content by reference, the agency shall make a read-only copy of the incorporated Internet content no later than the date of filing the incorporation by reference statement, and make the dated copy available to the public.***
8	14-a [new]	Extension of existing rules pending readoption Amendment allows the initiation of a rulemaking proceeding intended to readopt rules to extend the expiration date of rules that would expire prior to the proceeding being completed; deadlines are established to ensure that progress is made on the readoption (similar to RSA 541-A:30, I, for permits).	541-A:14-a Extension of Currently Effective Rules Pending Readoption. I. If an agency files a notice pursuant to RSA 541-A:6 to readopt existing rules, with or without amendments, the currently effective rules in the filing which would otherwise expire prior to the completion of the readoption of the rules by the agency shall continue in effect until the proposed rules are adopted and effective. II. If, after filing a notice pursuant to paragraph I, an agency fails to file a final proposal by the deadline specified in RSA 541-A:12, fails to file a response to objection as specified in RSA 541-A:13, or fails to adopt and file the proposed rule as specified in paragraph III, the existing rules which would otherwise expire prior to the completion of the readoption of the rules by the agency shall expire 30 days after such deadline unless the agency has obtained a waiver of the deadline pursuant to RSA 541-A:40, IV(a). If the agency has obtained a waiver to a deadline, the existing rules shall expire 30 days after the deadline established pursuant to RSA 541-A:40, IV(b) if the required action is not taken. III. If rules are extended pursuant to this section, the agency shall: (a) Adopt the proposed rules no later than 30 days after the date on which the agency is allowed to adopt the rules under RSA 541-A:14, I; and (b) File the rules as required by RSA 541-A:14, III with an effective date that is not more than 60 days from the date of filing, except that an agency may specify an effective date that is more than 60 days from the date of filing if a waiver is obtained pursuant to RSA 541-A:40.
9	16, III	Duration of rules Amendment extends the life of a regular rule from eight years to ten years to allow agencies (and the OLS Administrative Rules office) to focus on rules that need to be changed rather than rules being readopted just because they would otherwise expire; includes cross-reference to new provision re: initiation of rulemaking to readopt rules extends the expiration date of existing rules.	III. A rule shall become effective as of 12:01 a.m. on the day after the filing of the adopted rule or as of 12:01 a.m. on the date specified by the agency pursuant to RSA 541-A:14, IV, ***RSA 541-A:14-a, III,*** or RSA 541-A:19, X, or such other date and time as specified, provided that filing occurs before such effective date and time. ***Except as provided in RSA 541-A:14-a,*** a rule adopted under RSA 541-A:14, IV shall expire after the last day of the [~~eighth~~] ***tenth*** year following its becoming effective, unless sooner amended, readopted, or repealed.

Bill §	541-A §, ¶(s)	Topic and Explanation of amendment	Text (text in gray font shows existing statute not included in bill; text in black font shows language from SB 161as amended by the Senate)
10	17, I	Duration of rules Amendment extends life of regular rules from 8 to 10 years to allow agencies (and OLS/Administrative Rules) to focus on rules needing revisions rather than rules being readopted because they would otherwise expire; includes cross-reference to new provision re: initiation of rulemaking to readopt rules extends the expiration date.	I. No rule shall be effective for a period of longer than [~~8~~] ***10*** years, ***except as extended pursuant to RSA 541-A:14-a,*** but the agency may adopt an identical rule under RSA 541-A:5 through RSA [~~541-A:14~~] ***541-A:14-a***, in conformance with the drafting and procedure manual adopted under RSA 541-A:8.
11	18, I	Emergency rules - financial emergencies Amendment would allow emergency rules to be adopted to avert substantial fiscal harm to the state or its citizens.	I. [~~If an~~] ***An*** agency ***may proceed to adopt an emergency rule if it*** finds ***either*** that an imminent peril to the public health or safety requires adoption of a rule with less notice than is required under RSA 541-A:6 ***or that substantial fiscal harm to the state or its citizens could occur if rules are not adopted with less notice than is required under RSA 541-A:6.*** [~~and states in writing its reasons for that finding, it may proceed to adopt an emergency rule.~~] The rule may be adopted without having been filed in proposed or final proposed form and may be adopted after whatever notice and hearing the agency finds to be practicable under the circumstances. The agency shall make reasonable efforts to ensure that emergency rules are made known to persons who may be affected by them.
12	18, III(e)	Emergency rules - financial emergencies Amendment reflects inclusion of fiscal emergencies in ¶ I (§11).	III. Emergency rules adopted under this section shall include: (a) The name and address of the agency. (b) The statutory authority for the rule. (c) Whether the intended action is an adoption, amendment, or repeal. (d) The rule number and title. (e) A signed and dated statement by the adopting authority explaining the nature of the [~~imminent peril to the public health or safety~~] ***basis for the emergency rule***, including [~~a summary~~] ***an explanation*** of the effect upon the state if the emergency rule were not adopted. (f) A listing of people, enterprises, and government agencies affected by the rule. (g) The name, address, and telephone number of an individual in the agency able to answer questions on the emergency rule.

Bill §	541-A §, ¶(s)	Topic and Explanation of amendment	Text (text in gray font shows existing statute not included in bill; text in black font shows language from SB 161as amended by the Senate)
13	19, I(a)	Interim rules - deadline for proposing Amendment extends the time period in which the rulemaking notice must be filed for an interim rule which implements new or amended state statutes; recognizes that rules sometimes are required in response to laws that are not codified as statutes (*e.g.*, budget changes required by HB 1, HB 2).	I. An agency may adopt as an interim rule any rule which amends an existing rule, repeals an existing rule, or creates a new rule, and which is designed solely to allow the agency to: (a) Conform with a new or amended ***codified*** state statute ***or chaptered session law***, provided, however, that an agency shall not publish notice of a proposed interim rule more than [~~90~~] ***120*** days after the effective date of the new or amended ***codified*** statute ***or chaptered session law***; (b) Conform with a controlling judicial decision; (c) Conform with a federal requirement which must be met sooner than the time periods allowed under RSA 541-A for a rule adopted under the procedures listed in RSA 541-A:3; (d) Continue its rules which would otherwise expire prior to the completion of the readoption of the rules by the agency; or (e) Minimize the time between the expiration of rules and their subsequent readoption... .
14	--	Expedited process for readoption of rules Language requires the Director of OLS to develop expedited process for readopting rules with no changes or minor changes and to report on the process by November 1. As written, suggests that editorial changes have to go through formal rulemaking.	14 Expedited Process for Readoption of Rules. The director of legislative services shall develop an expedited process for readopting rules which contain no changes or contain only minor changes. Minor changes shall include renumbering, updating internal references, references to documents incorporated by reference, date and year changes, typographical or grammatical errors, and other editorial changes. The director shall consult with agency staff as necessary. The director shall provide a report on an expedited process and any proposals for legislation to the chairperson of the joint legislative committee on administrative rules not later than November 1, 2011.
		Possible revisions: ▪ clarify that the Director may determine that other changes also qualify as minor; ▪ delete items that currently are handled as editorial revisions (and so should not go have to go through rulemaking); ▪ more clearly distinguish "updating internal references" from "references to documents incorporated by reference"; and clarify that the expedited process would be for non-editorial changes.	14 Expedited Process for Readoption of Rules. The director of legislative services shall develop an expedited process for readopting rules which contain no changes or contain only minor changes. Minor changes shall include ***but not be limited to*** [~~renumbering,~~] updating internal ***cross-***references, references to documents incorporated by reference, date and year changes, [~~typographical or~~] grammatical errors, and other ***revisions that are not merely*** editorial [~~changes~~]. The director shall consult with agency staff as necessary. The director shall provide a report on an expedited process and any proposals for legislation to the chairperson of the joint legislative committee on administrative rules not later than November 1, 2011.
		OR	**Delete section entirely**

Bill §	541-A §, ¶(s)	Topic and Explanation of amendment	Text (text in gray font shows existing statute not included in bill; text in black font shows language from SB 161as amended by the Senate)
15	40, IV	Suspension of Provisions Amendment to (a) allows time periods (not just "deadlines") to be extended and clarifies that the waivers apply only to rulemaking; new (b) would requires a new deadline for taking the action to be set so that it cannot be postponed indefinitely.	IV. ***(a)*** Notwithstanding any other provision of this chapter, the director of legislative services ***may***, after consultation with the chair and vice-chair of the joint legislative committee on administrative rules, [~~may,~~] ***and*** for good cause shown, waive any deadline ***or otherwise extend any time period*** contained in any provision of this chapter ***which relates to the rulemaking process***. ***(b) If a deadline is waived or a time period is extended, the director shall, after consultation with the chair and vice-chair of the joint legislative committee on administrative rules and the agency whose rules are affected, establish a new deadline by which the required action shall be taken.***
16	--	Applicability of statutory changes Language establishes the point at which the amendments affect pending *vs.* future rulemaking proceedings.	The provisions of this act shall govern the following on or after the effective date of this act: I. All rulemaking initiated by filing a notice of rulemaking under RSA 541-A:6 or RSA 541-A:19-c. II. All emergency rules adopted under RSA 541-A:18. III. All interim rules initiated by filing a proposed interim rule under RSA 541-A:19, II. IV. All expedited repeal of rules under RSA 541-A:19-a. V. All notices submitted to the director of legislative services for publication in the rulemaking register.
17	--	Effective Date The amendments are procedural and do not require a great deal of "lead-in" time -- so an effective date of January 1, 2012 would only delay the implementation of these improvements.	This act shall take effect 60 days after its passage.