OPINION NO. 79-070

Syllabus:

1. A "substantive revision" to a proposed rule within the meaning of R.C. 119.03(H) is any change which alters the meaning of the rule by changing that which is prohibited, controlled, regulated, or required by the rule; by changing the scope of the rule; or by changing any aspect of the rule which would alter the impact or application of the rule.

2. The "final" text of a proposed rule must be filed pursuant to R.C. 119.03(H), prior to the adoption of the rule, when the final text is substantively different from the "proposed" text, even if such substantive differences are consistent with the public notice and are based on the record of a public hearing.

To: James F. McAvoy, Director, Ohio Environmental Protection Agency, Columbus, Ohio
By: William J. Brown, Attorney General, October 30, 1979

I have before me your request for my opinion concerning the proper application of R.C. 119.03(H), relating to the review of agency rule-making by the legislature. Specifically, you ask the following questions:

1. What constitutes "substantive revisions" to the text of a proposed rule?

2. Does the final text of a rule have to be filed pursuant to the section [R.C. 119.03(H)], prior to adoption of the rule, when the final text is substantively different from the proposed text and such substantive differences are consistent with the public notice and are based on the record of the public hearing?

These questions relate to the proper procedure to be followed in the promulgation of rules by administrative agencies pursuant to recently amended R.C. 119.03. Generally speaking, the recent amendments require state agencies to, inter alia, file two copies of the full text of any proposed rule with the Clerk of the Senate prior to the adoption of the rule. The legislature may then review the rule and, upon making certain findings, invalidate the proposed rule if it should so desire.

Your second question, which I will answer first, poses the question whether the "final" text of a proposed rule must be filed with the Clerk of the Senate, if that text is substantively different from the "proposed" text, and such substantive differences are consistent with the public notice and are based on the record of a public hearing. I assume that the "proposed" text which you mention is the original text of the proposed rule which has already been filed with the Clerk of the Senate pursuant to R.C. 119.03(H), and that, based on a public hearing, substantive changes have now been made in this original text of the proposed rule.

The legislature has specifically dealt with the question which you have posed. R.C. 119.03(H) states, in pertinent part:

> . . .If the agency makes a substantive revision in the text of a proposed rule, amendment, or rescission after it is filed with the clerk of the senate, the agency shall promptly file two copies of the

> full text of the proposed rule, amendment, or rescission in its revised form with the clerk of the senate. . . .

This section clearly requires that, when an agency has made any substantive revision in the text of a proposed rule which has been filed with the Clerk of the Senate, the agency must file copies of the revised version of the text of the proposed rule with the clerk. Consequently, it is clear that the "final" text of a proposed rule which is substantively different from the "proposed" text must be filed with the Clerk of the Senate pursuant to R.C. 119.03(H).

Your question about the filing requirement is asked specifically in reference to substantive changes which are consistent with the public notice and are based on the record of a public hearing. I have carefully examined the relevant statutes, and I find no basis upon which to conclude that such substantive changes are not required to be filed with the Clerk of the Senate in accordance with R.C. 119.03(H). That section states that if a "substantive revision" is made to the text of a proposed rule, then the revised text must be filed with the Clerk of the Senate. No distinction is made between "substantive revisions" which are consistent with the public notice and are based on the record of a public hearing, and those which are not. Consequently, all "substantive revisions," regardless of type, require the filing of the revised text with the Clerk of the Senate.

Your first question is simply stated but is not so simply answered. The question is what type of change constitutes a "substantive revision" to the text of a proposed rule.

At no point in the statute is the phrase "substantive revision" or either of the constituent words thereof defined. Such a definition, of course, would have been controlling. In the case law, the word "revision" generally means a change or an amendment, see Train v. N.R.D.C., Inc., 421 U.S. 60, 89 (1976), and the word "substantive" usually means that body of law which creates, defines, and regulates the rights of parties, and is used in contradistinction to the word "procedural." Krause v. State, 31 Ohio St. 2d 132, 145 (1972).

It would be improper, however, to blindly apply these or any other definitions to the language of the statute. It is fundamental that the meaning of language in a statute will vary according to the context in which it is used and the intent of the legislature in enacting the statute. It is with these factors in mind that the meaning of the phrase "substantive revision" must be determined. Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, 967 (S.D. N.Y. 1965).

The legislature amended R.C. 119.03 in order that it would have the opportunity to review agency rules so that is could determine whether an agency exceeded its rule-making authority, or whether a proposed rule conflicted with another rule or with legislative intent. R.C. 119.03(I). There is no indication that the legislature intended to review or has the authority to review for any other reason. The definition which is adopted should be consistent with this legislative purpose.

It is apparent that the matters for which the legislature will review relate to the substance of the rule, i.e., that which the rule will prohibit, regulate, control, or require. Obviously, only a matter of substance, as opposed to form, could affect the question whether a rule is beyond an agency's authority to promulgate, or is in conflict with another rule or with legislative intent. Consequently, a "substantive revision" to a proposed rule would be any change which alters the meaning of the rule by changing that which is prohibited, regulated, controlled, or required; by changing the scope of the rule; or by changing any other aspect of the rule which would alter the impact or application of the rule. A "substantive revision" does not refer to any change which merely affects the form of the rule, i.e., which merely reorganizes, restructures, restates, clarifies, or in any other way alters the form of the rule without altering the meaning or impact of the rule. This construction of R.C. 119.03(H) requires the filing of any change which may affect that for which the legislature wishes to review, but does not require the filing of any change which

will not affect such matters, and is thus consistent with the legislative intent in requiring the filing of revised texts of proposed rules.

It is, however, worth noting that there are no prohibitions against filing an amended rule which technically need not be filed. In case of doubt, it may be wise to file copies of the revised text in accordance with R.C. 119.03(H) to forestall the possibility of the rule being held invalid on procedural grounds in the event that a particular change is indeed held to be a "substantive revision."

Accordingly, it is my opinion, and you are hereby advised, that:

1. A "substantive revision" to a proposed rule within the meaning of R.C. 119.03(H) is any change which alters the meaning of the rule by changing that which is prohibited, controlled, regulated, or required by the rule; by changing the scope of the rule; or by changing any aspect of the rule which would alter the impact or application of the rule; and

2. The "final" text of a proposed rule must be filed pursuant to R.C. 119.03(H), prior to the adoption of the rule, when the final text is substantively different from the "proposed" text, even if such substantive differences are consistent with the public notice and are based on the record of a public hearing.