

## 17.2 DRAFTING THE SONAR

The agency possesses the responsibility for drafting the rules<sup>1</sup> and the necessary supporting documentation. This supporting documentation includes a document equal in its importance to the rules themselves—the statement of need and reasonableness. (SONAR)

Most agencies assign staff with program responsibilities to draft rules. For example, if the agency must write rules to administer a grant program, a staff person familiar with the subject matter will be assigned the task. In the department of human services, rule drafting is centralized in the rulemaking unit. This allows some staff to work full time on rules to become proficient drafters who are well versed in the APA's intricacies.

### 17.2.1 The Statement of Need and Reasonableness

The agency must justify every rule in a written document called a statement of need and reasonableness (SONAR). Specifically, the APA requires an agency to “prepare, review, and make available for public review a statement of the need for and reasonableness of the rule.”<sup>2</sup> The SONAR must conform to rules of the Office of Administrative Hearings (OAH).<sup>3</sup>

The SONAR must cite the agency's grant of statutory authority to adopt the rule. Also, the SONAR must contain a summary of all the evidence and argument that the agency is relying on to justify both the need for and the reasonableness of the proposed rule.<sup>4</sup> The SONAR explains why the agency believes a rule is needed on a particular subject. It also explains why the rule the agency has proposed is a reasonable way to meet that need. Usually, each rule part and subpart is separately justified, and alternative solutions that were considered and rejected are discussed. The SONAR summarizes the factual and policy basis for the rule. A general description of the statute being implemented or restating the proposed rule is not sufficient. It also must show citations to statutes, case law, and economic, scientific, or other manuals or books that the agency relies on or will use at the hearing; a list of witnesses; and a summary of the witnesses' testimony.

### 17.2.2 Regulatory Analysis Required to be Included in the Statement of Need and Reasonableness

In addition to demonstrating the general need for and reasonableness of the rule, the agency must include certain specific information, based on its regulatory analysis.<sup>5</sup> To the extent the agency, through reasonable effort, can ascertain this information, the agency must address the following factors:

1. classes of persons who will be affected,

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<sup>1</sup> The APA requires that the agency prepares the rules before publishing its notice of intent to adopt rules, since the rules must be published with the notice of intent to adopt rules. *See* MINN. STAT. §§ 14.14, subd. 1a, .22, subd. 1 (2014) (requiring notice of proposed rule, which notice “must include either a copy of the proposed rule or an easily readable and understandable description of its nature and effect”).

<sup>2</sup> *Id.* § 14.131; *see also id.* § 14.23 (“[T]he agency shall prepare a statement of need and reasonableness, which must be available to the public.”).

<sup>3</sup> *Id.* § 14.131; *see* MINN. R. 1400.2070 (2013).

<sup>4</sup> MINN. R. 1400.2070 (2013).

<sup>5</sup> *Id.*, subp. 2.

2. probable costs of implementing and enforcing the proposed rule,
3. less costly and less intrusive and alternative methods of regulation,
4. alternative ways to achieve the agency's goals and why these methods were rejected in favor of those chosen,
5. probable costs of complying with the proposed rule,
6. costs of not adopting the proposed rule
7. differences between the proposed rules and federal regulations, and
8. the cumulative effect of the proposed rule with related federal and state regulations.<sup>6</sup>

The agency must also describe the agency's efforts to provide additional notification to persons who might be affected by the proposed rules.<sup>7</sup>

#### *17.2.2(1) Classes of Persons Affected By Proposed Rule*

This analysis requires that the agency describe the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule. The agency should have initially identified the types of groups and individuals likely to be affected in the request for comment.<sup>8</sup> By the time the SONAR is completed, however, and during the course of the rule development, the agency might have identified other entities or individuals as affected parties. The agency brings the list of groups and individuals up to date in the SONAR under this analysis.<sup>9</sup>

#### *17.2.2(2) Probable Costs to Agencies*

The agency must discuss probable costs. This three-prong analysis must describe 1) the cost to the agency proposing the rule, 2) the cost to other state agencies, and 3) whether the proposed rules will have any effect on state revenues. Often, when an agency implements a new program there are start-up costs. If an agency is only amending a set of existing rules, however, there might not be additional costs to the agency. Or the costs to the agency might be reduced because a program's operating procedures have been streamlined. Such fiscal effects are described in the SONAR.<sup>10</sup>

#### *17.2.2(3) Less Costly or Less Intrusive Methods*

An agency must also discuss less costly methods or less intrusive methods for achieving the proposed rule's purpose exist. Much of this information will be discussed during rule development. The agency's advisory committee or the agency program staff will develop and analyze the various options for achieving the purpose of the rule.

Often an agency will choose a particular method because it is more cost-effective or less intrusive, either to the agency or to the regulated parties. An agency may also choose,

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<sup>6</sup> MINN. STAT. § 14.131 (2014).

<sup>7</sup> *Id.* § 14.22, subd. 1; *see also id.* § 14.23 (requiring agencies to also describe agency efforts to provide such additional notification).

<sup>8</sup> *Id.* § 14.101, subd. 1.

<sup>9</sup> *Id.* § 14.131(1).

<sup>10</sup> *Id.* (2).

however, not to adopt the least costly method if it will not achieve the best results. By discussing the agency's thought process in the SONAR, the agency will inform the public why an agency chose the particular method that it did.<sup>11</sup>

#### *17.2.2(4) Alternative Methods Seriously Considered*

The agency must describe any alternative methods for achieving the purpose of the proposed rule that it seriously considered and the reasons they were rejected in favor of the proposed rule. This factor is very similar to the less costly or less intrusive factor in Section 17.2.2(3) above. This factor, however, also requires an analysis of why the agency rejected a particular alternative that it had seriously considered. When an agency develops a rule, it often discusses several options about how the agency will achieve a particular purpose. And not all options are chosen. If an agency seriously considered an alternative method but decided not to propose it in the rule, it would discuss the reasons in this analysis.

There are several reasons why an agency might reject an alternative, such as cost or the administrative burden that might be placed on an agency or the regulated parties. By reading the agency's analysis, the public will be able to see the agency's rationale for rejecting an alternative. In addition, the analysis will be valuable for future amendments to the rule. The SONAR will serve as a written history of options and alternatives discussed and the disposition of those alternatives.<sup>12</sup>

#### *17.2.2(5) The Probable Costs of Complying With the Proposed Rule*

This analysis discusses the cost of the proposed rule on the regulated parties. For example, new costs may be imposed for continuing education requirements for licensed professionals or for new filing requirements. This section might also inform regulated persons that there will be no new costs associated with the rule. In fact, if the agency has streamlined the rules or required fewer documents that need to be filed with an agency, there might be a reduction in costs. The agency's analysis will inform the regulated persons of the impact of the costs, so that they can respond with specificity to the proposed rules. Agencies are also required to estimate the portion of the total costs and consequences that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.<sup>13</sup>

#### *17.2.2(6) Costs of Not Adopting the Proposed Rule*

Agencies are also required to estimate the probable costs or consequences of *not* adopting the rule, including the portion of the total costs that will be borne by identifiable categories of affected parties. Examples of affected parties are separate classes of governmental units, businesses, or individuals.<sup>14</sup>

#### *17.2.2(7) Differences From Federal Regulations*

An assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference must be discussed under this factor. At times, an agency will implement a federal program

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<sup>11</sup> *Id.* (3).

<sup>12</sup> *Id.* (4).

<sup>13</sup> *Id.* (5), (6).

<sup>14</sup> *Id.*

where the federal government already has regulations in place. The state will adopt the federal regulation with some modifications that are needed to comply with state law. If there are such differences, the agency must explain those differences in this analysis.<sup>15</sup>

#### *17.2.2(8) Cumulative Effect With Federal and State Regulations*

An agency must assess in its SONAR the cumulative effect of the proposed rule with other federal and state regulations related to the rule's specific purpose.<sup>16</sup> "Cumulative effect" means the impact that results from the incremental impact of the proposed rule in addition to other rules, regardless of what state or federal agency has opted the other rules. Cumulative effects can result from individually minor but collectively significant rules adopted over a period of time.

#### *17.2.2(10) Performance-Based Rules*

Agencies must describe in the SONAR how the agency considered and implemented the legislative policy supporting performance-based regulatory systems in their rules development.<sup>17</sup> The legislative policy requires that agencies develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives. They must also consider maximum flexibility for the regulated party and the agency in meeting the agency's goals.<sup>18</sup>

#### *17.2.2(11) Additional Notification*

This provision requires the agency to explain its efforts to provide "additional notification."<sup>19</sup> This means that the agency must make an active effort during the rule development to identify persons or classes of persons who may be affected by the proposed rule and bring the rulemaking process to their attention. If the agency does not do this, it must explain why these efforts were not made. The agency identifies persons or classes of persons who might be affected by the proposed rule in the Request for Comments and again in the SONAR. Furthermore, the agency must also describe in the SONAR how it provided notice to those persons.

To elaborate, the agency can provide additional notice of the rulemaking at two different stages. The first opportunity is at the beginning of the rulemaking process when the agency publishes the Request for Comments in the *State Register*. In addition, the agency may also notify individuals and entities through separate mailings or electronic communications such as an email subscription service. Other avenues for getting notice out are publications in newsletters or newspapers, or other means of communication. Additional notice beyond publication of the Request for Comments in the *State Register* is optional by the agency at this stage.

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<sup>15</sup> *Id.* (7).

<sup>16</sup> *Id.* (8).

<sup>17</sup> *Id.* § 14.131.

<sup>18</sup> *Id.*; see also *id.* § 14.002; *In re* Amendment to & Repeal of Rules of the Minn. Dep't of Emp't & Econ. Dev., OAH 80-1200-31264, 2014 WL 2156996, at \*3 (Minn. Off. Admin. Hrgs. May 5, 2014) (ruling in favor of agency's rules as to form and legality; finding that "[t]o the extent possible, the proposed rules are expressed in terms of desired results instead of the specific means for achieving those results").

<sup>19</sup> MINN. STAT. § 14.131 (2014).

When the agency, however, is ready to propose a set of rules by publication of the rules in the *State Register*, the agency must give notice of its intention to adopt rules to all persons on its rulemaking list.<sup>20</sup> Each agency may, at its own discretion, also contact persons not on its list who may be affected by the rule being proposed. The agency is also required to make reasonable efforts to notify persons or classes of persons who may be *significantly* affected by the rule being proposed by giving notice of its intention in newsletters, newspapers, or other publications, or through other means of communication.<sup>21</sup> Current practice often entails agencies using electronic subscription services that use email lists compiled specifically for the project in question.

Therefore, beyond publication of its notice of intent to adopt rules in the *State Register*, the agency is required to send notice to persons on the rulemaking list and to make reasonable efforts to notify affected persons through some other means of communication. Each agency is required to maintain a list of all persons who have registered with the agency for the purpose of receiving notice of rule proceedings.<sup>22</sup> The agency must mail these persons a notice of hearing or notice of intent to adopt rules at least 33 days before the end of the comment period or the start of the hearing.<sup>23</sup> The agency must also publish the notice in the *State Register* at least 30 days before the end of the comment period or the start of the hearing.<sup>24</sup>

An agency may ask the Office of Administrative Hearings (OAH) for prior approval of its plan for additional notice of planned rulemaking under section 14.101, or of its plan for additional notice of proposed rules under sections 14.131, 14.14, 14.22, and 14.23.<sup>25</sup> The review and approval is optional by the agency. However, an approved notice plan at this stage is the OAH's final determination that the notice plan is adequate and avoids the possibility of being found defective at a later stage of the process.<sup>26</sup>

Minn. Stat. § 14.116 adds further notification requirements. This section requires that an agency submit by January 15 of each year its rulemaking docket and the official rulemaking record for any rule adopted during the preceding calendar year to the chairs and ranking minority members of the legislative policy and budget committees with jurisdiction of the subject matter of the proposed rules. In addition, the agency must send a copy of the Notice of Intent to Adopt Rules and a copy of the SONAR to these same committee members and to the Legislative Coordinating Commission. If the agency is mailing the notice within two years of the effective date of the law granting the agency authority to adopt the proposed rules, the agency must make reasonable efforts to send a copy of the Notice of Intent to Adopt Rules and a copy of the SONAR to all sitting legislators who were chief house and senate authors of the bill granting the rulemaking authority.

#### 17.2.2(11) *Fiscal Impact on Local Government*

An agency must also consult with the commissioner of management and budget to help evaluate the fiscal impact and fiscal benefits of the proposed rules on units of local

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<sup>20</sup> *Id.* § 14.14, subd. 1(a).

<sup>21</sup> *Id.* §§ 14.14, subd. 1(a), .22, subd. 1(a).

<sup>22</sup> *Id.* § 14.14, subd. 1(a).

<sup>23</sup> MINN. R. 1400.2080, subp. 6 (2013).

<sup>24</sup> MINN. STAT. §§ 14.14, subd. 1(a), .22 (2014).

<sup>25</sup> MINN. R. 1400.2060, subp. 1 (2013).

<sup>26</sup> *Id.*, subp. 4.

government.<sup>27</sup>

#### *17.2.2(12) Mailing to the Legislative Reference Library*

The agency must send a copy of the SONAR to the Legislative Reference Library when it mails the Notice of Hearing to persons on the agency's rulemaking list.<sup>28</sup>

### **17.2.3 Agency-Specific information to Be Included in the Statement of Need and Reasonableness.**

Individual agencies may have special requirements, such as the requirement to analyze the effect of pollution control agency rules on business, commerce, and municipalities.<sup>29</sup>

#### *17.2.3(1) The Effect of Pollution Control Agency Rules*

The pollution control agency (PCA) has extensive and broad authority to adopt rules to regulate: air, noise, and water pollution; solid and hazardous waste storage, processing, and disposal; animal lots; and sewage sludge.<sup>30</sup> The PCA, however, must meet numerous requirements when proposing to adopt rules. The PCA must give due consideration to the operation of business, industry, traffic, and other economic and material factors affecting the feasibility and practicability of proposed action.<sup>31</sup> This includes consideration of the burden on a municipality of any tax that results from PCA action. All the provisions granting the PCA authority to adopt standards or rules addressing various pollutants also require that the PCA consider factors such as physical conditions, zoning, topography, wind direction, population, local transportation, and land use bear on the type of solution proposed.<sup>32</sup>

In some cases, the PCA must evaluate different methods of achieving the goal. For example, the PCA is authorized to adopt rules for generators of hazardous waste and for the identification, labeling, classification, storage, treatment, transportation, and disposal of hazardous waste.<sup>33</sup> In this case, the legislature directed the PCA to consider particular methods of hazardous waste management:

In implementing its hazardous waste rules, the Pollution Control Agency shall give high priority to providing planning and technical assistance to hazardous waste generators. The agency shall assist generators in investigating the availability and feasibility of both interim and long-term hazardous waste management methods. The methods shall include waste reduction, waste separation, waste processing, resource recovery, and temporary storage.<sup>34</sup>

The agency has thus been directed to work with the generators of waste. Rules written to address the hazardous waste problem must address the methods of waste management listed in the statute.

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<sup>27</sup> MINN. STAT. § 14.131 (2014).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* § 116.07, subd. 6.

<sup>30</sup> *See, e.g., id.* § 116.07.

<sup>31</sup> *Id.*, subd. 6.

<sup>32</sup> *Id.*, subds. 1, 2.

<sup>33</sup> *See id.*, subd. 4(g).

<sup>34</sup> *Id.*

This law is an example of rulemaking authority with strings attached. These strings, or requirements of the legislature, guide the agency in its policymaking and also offer the public a means of judging whether the agency is carrying out the instruction of the legislature.

#### **17.2.3(3) Rules that Affect Farming Operations**

If an agency adopts or repeals rules that affect farming operations, the agency must provide a copy of the proposed rules to the commissioner of agriculture for review before publishing the rules in the *State Register*.<sup>35</sup>

In addition, if an agency holds a hearing on a rule that affects farming operations, then at least one hearing must be held in an agricultural area of the state.

#### **17.2.4 Other Required Documentation**

As described below, agencies must make additional determinations during rulemaking. While these are not required additions to the SONAR, including them with the regulatory factors that must be included in the SONAR is good practice.<sup>36</sup>

##### **17.2.4(1) Cost of Complying Exceeds \$25,000**

An agency is required to determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for businesses with fewer than 50 full-time employees or statutory or home rule charter cities with fewer than ten full-time employees. The agency must make this determination before the close of the record, and the ALJ must review and approve or disapprove the agency's determination.<sup>37</sup>

##### **17.2.4(2) Local Ordinance Implementation**

Under Minnesota Statutes, section 14.128, an agency must determine whether a local government will have to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the record or before the agency submits the record to the administrative law judge if there is no hearing. The administrative law judge must review and approve or disapprove the agency's determination. The statute defines "local government" as "a town, county, or home rule charter or statutory city."<sup>38</sup>

If the agency determines that the proposed rule requires the local government to adopt or amend an ordinance or other regulation, or if the administrative law judge disapproves the agency's determination that the rule does not have this effect, the rule's effective date is delayed. The rule will not take effect until either "(1) the next July 1 or January 1 after notice of final adoption is published in the *State Register*; or (2) a later date provided by law or specified in the proposed rule."<sup>39</sup>

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<sup>35</sup> *Id.* § 14.111.

<sup>36</sup> D. ORREN & P. WINGET, MINNESOTA RULEMAKING MANUAL, ch. 4, Developing the Statement of Need and Reasonableness (2014).

<sup>37</sup> MINN. STAT. § 14.127, subd. 2 (2014).

<sup>38</sup> *Id.* § 14.128, subd. 1.

<sup>39</sup> *Id.*, subd. 2.

The statute, however, contains exceptions. First, the delay does not apply to a rule adopted under section 14.388 (exempt rules), 14.389 (expedited rules), or 14.3895 (obsolete rules) or under any other law specifying that the rulemaking procedures of chapter 14 do not apply. It likewise does not apply if the agency has been directed by law to adopt the rule or to commence the rulemaking process. It does not apply if the ALJ approves an agency's determination that the rule has been proposed because of a specific federal statutory or regulatory mandate that requires the rule to take effect before the deferred date. Nor does the delay apply if the governor waives it.<sup>40</sup>

### 17.2.5 Fees

Agencies do not possess the authority to set fees through rule. They may only be set or increased by the legislature. A "fee" is defined as "any charge for goods, services, regulation, or licensure, and ... includes charges for admission to or for use of public facilities owned by the state."<sup>41</sup> The definition contains an exception for "charges for goods or services provided for the direct and primary use of a private individual, business, or other entity."<sup>42</sup> Agencies may reduce fees set by rule before July 1, 2001 without legislative approval or rulemaking.<sup>43</sup>

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<sup>40</sup> *Id.*, subd. 3.

<sup>41</sup> *Id.* § 16A.1283(a).

<sup>42</sup> *Id.* (b)(3).

<sup>43</sup> *Id.* (c).