

19.3 PROPOSAL, COMMENT, AND NEGOTIATION

Minnesota statutes and rules specifically govern the use of the rulemaking without a hearing process.¹ The process is initiated when the rulemaking agency publishes a Request for Comments² and undertakes the principal research and drafting of the rules and the SONAR.³ The agency may also conduct preliminary informal negotiation with affected persons, convene an advisory task force, or facilitate a special statutory advisory panel review.⁴ At this point, as a matter of practice, the rulemaking agency works on the text of the draft rules with the revisor's office. This facilitates the revisor's review and certification of the rule that is ultimately adopted.⁵

19.3.1 Notice and Comment

After the agency has developed the rule and the SONAR, the next step under the APA occurs with publication of a notice of its intent to adopt proposed rules without a public hearing.⁶ The notification process involves publishing the notice of proposed rulemaking in the *State Register*⁷ and mailing or e-mailing it to those persons registered with the agency to receive such notices.⁸ The *State Register* must contain the text of the proposed rule. However, the chief administrative law judge (ALJ) may authorize an agency to omit the text of a proposed rule from the notice if publication in the *State Register* would be unduly cumbersome, expensive, or otherwise inexpedient.⁹ The mailed or e-mailed notice must include either a copy of the proposed rule or an easily readable and understandable description of the nature and effect of the rule and a statement that a free copy of the proposed rules is available on request from the agency.¹⁰

¹ See MINN. STAT. §§ 14.22-.28 (2014); MINN. R. 1400.2300-.2310 (2013). Other generally applicable provisions of the APA also affect the adoption of rules without a public hearing. *E.g.*, MINN. STAT. § 14.02, subd. 4 (2014) (defining *rule*). Since such provisions do not uniquely apply to adopting rules without a public hearing and are generally addressed elsewhere, they will not be discussed here.

² MINN. STAT. § 14.101 (2014); MINN. R. 1400.2050, .2510 (2013).

³ See § 17.2.

⁴ See generally ch. 17.

⁵ MINN. STAT. §§ 14.08, .28 (2014).

⁶ *Id.* § 14.22 (2014); MINN. R. 1400.2080 (2013).

⁷ The *State Register* is published by the Minnesota Department of Administration and is the state's official publication for all agency rules, executive orders, and other official notices. MINN. STAT. § 14.46, subd. 1 (2014). The *State Register* is published weekly and is available online at https://www.revisor.mn.gov/state_register/.

⁸ MINN. STAT. §§ 14.14, subd. 1(a), .22, subd. 1 (2014). Each agency maintains its own rulemaking mailing list, which includes all persons registered with the agency to receive these notices. Persons may register to receive notice by submitting their electronic mail address or their name and United States mail address.

⁹ *Id.* § 14.22, subd. 1(b). In addition, the chief ALJ must find that knowledge of the rule is likely to be important to only a small class of persons. The notice must state that a free copy of the entire rule is available upon request to the agency, state in detail the specific subject matter of the omitted rules, cite the statutory authority and provide detail about the proposed rule's purpose and motivation.

¹⁰ *Id.* §§ 14.14, subd. 1 (a), .22, subd. 1(a).

As part of the notice process, each agency must make reasonable efforts to notify persons or classes of person 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.¹¹ Many agencies also publish the notice, proposed rules, the SONAR and other rule documents on the agency's web site. The notice invites public comment on the proposed rule for a thirty-day period, identifies the date on which the comment period ends, and states that a hearing will be held if 25 or more persons submit written requests for a hearing by that date.¹² The notice also notes the possibility of modification of the proposed rules as a result of the comments received.

Persons commenting on the proposed rule are encouraged in the notice to identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed.¹³ Persons requesting a public hearing are required to state their names and addresses, to identify the portion or portions of the rule to which the person objects or a statement that the person opposes the entire rule. Written requests for a public hearing that do not comply with the statutory requirements are invalid and must not be counted by the agency in determining whether a public hearing must be held.¹⁴ Finally, the notice states that if a hearing is not required, the date of submission of the proposed rule to the OAH for review and approval will be mailed to any person requesting notification of this date.¹⁵

19.3.2 Negotiation

If the rulemaking agency receives 25 or more written requests for a public hearing, it must proceed under the "hearing" rulemaking provisions of the APA,¹⁶ including providing notice of the required rulemaking hearing.¹⁷ The agency must, in addition, send notice of the public hearing to all persons who submitted a request for public hearing. If an agency receives 25 or more requests for a public hearing the agency may attempt to negotiate the withdrawal of those hearing request to below 25.¹⁸ If enough requests for a public hearing have been withdrawn to reduce the number of requests below 25, the

¹¹ *Id.* An agency may request prior binding approval of its plan for giving "additional notice" from the OAH. MINN. R. 1400.2060 (2013); *see also* MINN. STAT. § 14.116 (2014) (requiring agencies to send the notice and SONAR to the chairs and ranking minority members of legislative policy and budget committees with jurisdiction over the subject matter, and to the Legislative Coordinating Commissioner. If the notice is mailed within two years of the effective date of the grant of the rulemaking authority, agencies are also required to send the notice and SONAR to all sitting chief authors of the bill granting the authority).

¹² MINN. STAT. § 14.22, subd. 1(a) (2014).

¹³ *Id.* subd. 1(a)(2).

¹⁴ *Id.* § 14.25, subd. 1.

¹⁵ *Id.* § 14.22, subd. 1(a)(7); *see also* MINN. R. 1400.2080 (2013) (listing requirements for additional notice where a public hearing is not required); MINNESOTA RULEMAKING MANUAL: A REFERENCE BOOK FOR THE PRACTITIONER ch. 5, at 36-50 (Patricia Winget et al. eds., 19th ed. 2014), *available at* <http://www.health.state.mn.us/rules/manual/2014manual.pdf> (further discussing the drafting of notice of intent to adopt rules without a hearing).

¹⁶ *See* MINN. STAT. §§ 14.14-.20, .25, subd. 1 (2014); *see also* ch. 20.

¹⁷ MINN. STAT. § 14.25, subd. 1 (2014); MINN. R. 1400.2200-.2240 (2013). However, if under MINN. STAT. § 14.22, subd. 2 (2014), an agency published a "dual notice," the notice of hearing and hearing date have already been published and the agency may proceed to hearing without publishing a new notice of hearing.

¹⁸ *See* MINN. STAT. §§ 14.25, subd. 2 (2014) (addressing withdrawal of hearing requests).

agency must give written notice of the fact to all persons who have requested the public hearing. The notice must explain why the hearing requests are being withdrawn, and must include a description of any action the agency has taken or will take that affected or may have affected the decision to withdraw the request. The notice must also explain that persons may submit written comments about the withdrawal to the agency within five working days.¹⁹ If the hearing requests have been reduced to below 25 and the agency has complied with the necessary notice requirements, the agency may adopt the rule and submit it to the OAH for review. Even if sufficient requests are withdrawn, a hearing may not be cancelled by an agency within three working days of the hearing.²⁰ As part of the legal review, the ALJ will review the notice and any written comments to determine whether the withdrawal of the hearing requests is consistent with the purposes of the APA.²¹

The alternative procedure of allowing the agencies to obtain the withdrawal of hearing requests instead of proceeding directly to a hearing allows the agency to negotiate with the public after the publication of the proposed rule in the *State Register*. This procedure can be helpful to all parties involved in the process. For example, members of the public may request a public hearing so they have the opportunity to introduce a new proposal or a change to the proposed rule. Upon receiving the requests for a hearing, the agency may agree that the new proposal or rule change is a good idea and should be included in the adopted rule. Through a process of negotiation, the agency is able to obtain the withdrawal of the hearing request by agreeing to incorporate the new proposal or change into the adopted rule. Thus all parties benefit by having an improved rule and avoiding the time and expense of going to a public hearing. However, all modifications to a rule will still be subject to a review by the ALJ to determine if the modified rule is “substantially different” from the rule as proposed in the notice of intent to adopt rules or notice of hearing.²² And, the rights of persons not involved in the negotiations are protected by the procedure described in the prior paragraph. If, in spite of negotiations, sufficient written requests for a hearing remain, a rulemaking hearing will be conducted.²³

The agency's SONAR, as well as other statutorily required analyses, is of particular interest in determining the impact of the proposed rules or attempting to negotiate with the rulemaking agency. Before the date of the notice of intent to adopt a rule without a hearing, the agency must have made its SONAR available to the public.²⁴ Other special analyses may also be required to be made available by the agency at this point. These special analyses, which are more fully discussed in chapter 17, may be required or allowed to be included in the SONAR. The special analyses often relate to the projected costs of compliance with the proposed rule.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* The ALJ should consider the APA purposes of public accountability of administrative agencies, public access to governmental information, and public participation in the formulation of administrative rules. *See id.* § 14.001(2), (4)-(5).

²² *Id.* § 14.05, subd. 2; MINN. R. 1400.2100(C) (2013). An agency may adopt a substantially different rule if it complies with the procedure in MINN. R. 1400.2110 (2013).

²³ MINN. R. 1400.2100(H) (2013); *see* MINN. STAT. § 14.25, subd. 1 (2014) (requiring the hearing to be conducted in accordance with §§ 14.14-.20).

²⁴ MINN. STAT. §§ 14.131, .23 (2014); MINN. R. 1400.2070 (2013) (describing the minimum general content of the SONAR).

19.3.3 Dual Notice Rulemaking

An agency may publish a “dual notice” which notifies the public of the proposed adoption of rules without a hearing notice of a contingent rulemaking hearing. The dual notice must include a statement that the agency intends to cancel the hearing if 25 or more persons do not request one. If a hearing is required, there must be at least ten days between the last day to request a hearing and the day of hearing.²⁵ The OAH has adopted rules for the form and content of the dual notice.²⁶ This dual notice allows the agency to schedule the hearing earlier than logistics would permit if the agency initially published a notice of intent to adopt rules without a hearing and received 25 requests for a hearing pursuant to that notice.²⁷ If the agency has published a dual notice and receives 25 requests for a hearing (and is unable to negotiate their withdrawal), it then proceeds to the already scheduled hearing date. If fewer than 25 requests are received, the agency can proceed without a hearing. The dual notice provides a telephone number to call to check as to whether or not the hearing will be held. Many agencies also provide information on their web pages about whether the hearing will be held.²⁸

²⁵ MINN. STAT. § 14.22, subd. 2 (2014).

²⁶ MINN. R. 1400.2540 (2013).

²⁷ See MINN. STAT. § 14.14, subd. 1(a) (2014). If the agency initially filed a notice of intent to adopt rules without a hearing and then received more than 25 requests for a hearing, the agency is required to publish and send a second notice (the notice of hearing), reserve a location for the hearing, and obtain the approval of notice by an ALJ to conduct the hearing. With a dual notice, these steps are already arranged when the notice is published. The process for requesting approval of notice by an ALJ is prescribed in MINN. R. 1400.2080, subp. 5 (2013).

²⁸ Further discussion on adopting rules using a dual notice can be found in chapter 6 of MINNESOTA RULEMAKING MANUAL, *supra* note 15, at 51-68.