

17.1 PUBLIC PARTICIPATION IN THE EARLY STAGES OF RULEMAKING

Public participation can commence much earlier than the rulemaking proceeding. It can, in fact, start when the legislature is fashioning its statutory grant of rulemaking authority to the agency, and it can continue through the rule drafting stage.

17.1.1 The Legislative Grant of Rulemaking Authority

The earliest point for the public to participate in rulemaking is when the legislation authorizing rulemaking is being written. The public can lobby to support or oppose bills that authorize agency rulemaking or to define the scope of the agency's authority in a particular way. The public can also request that the legislature direct that the rules be written or developed with the assistance of an advisory committee, the composition of which is usually defined by the legislature.¹ At the urging of the public or a regulated industry or group, the legislature might specify groups or activities that will be exempt from the rules and may specify certain conditions of the rules.²

The legislature may also require the agency to prepare a rulemaking note.³ Minnesota Statutes, section 3.985 provides that the governor or the chair of a standing committee to which a bill delegating rulemaking authority has been referred may require an agency that is granted rulemaking authority to prepare a rulemaking note on the proposed delegation of authority. The rulemaking note must contain any of the following information requested by the governor or the chair of the standing committee:

- the reasons for the grant of authority;
- the person or groups the rules would impact;
- the estimated cost of the rule for affected persons;
- the estimated cost to the agency of adopting the rules; and
- any areas of controversy anticipated by the agency.

The rulemaking note must be delivered to the governor and to the chair of the standing committee to which the bill delegating the rulemaking authority has been referred.

The legislature has also established a time limit for agencies to complete rulemaking. An agency must publish a notice of intent to adopt rules or a notice of hearing within 18 months of the effective date of the law authorizing or requiring rules to be adopted, amended, or repealed. If the notice is not published within this time, the authority for the rules expires. If the specific authority for the rule expires, the agency must seek new legislative authority. The agency cannot use other law in existence as additional authority to adopt, amend, or

¹ Advisory committees are established e.g., under MINN. STAT. § 162.152 (2014) to assist the commissioner of transportation in adopting rules related to the location, construction, and maintenance of the county state-aid highway and municipal state-aid street systems. The statute specifies the composition of the committees. *See also* MINN. STAT. § 240.18 (2014), which authorizes the Minnesota Racing Commission to adopt rules governing the distribution of the Minnesota Breeder's Fund and to establish an advisory committee to advise it.

² *See, e.g.*, MINN. STAT. § 174.30, subd. 1 (2014), which lists certain transportation providers to whom the rules authorized by that section do not apply.

³ This procedure is rarely used.

repeal the rules.⁴

17.1.2 Petitions To Adopt, Suspend, Amend, or Repeal Rules

If an agency possessing statutory rulemaking authority fails to exercise it or delays in exercising it, the Administrative Procedure Act (APA) provides a formal means for the public to ask the agency to take action.

The APA allows any person to request an agency to take action to adopt a rule or to suspend, amend, or repeal a current rule. Minnesota Statutes, section 14.09 provides:

Any person may petition an agency requesting the adoption, amendment, or repeal of any rule. The petition shall be specific as to what action is requested and the need for the action. Upon receiving a petition an agency shall have 60 days in which to make a specific and detailed reply in writing as to its planned disposition of the request and the reasons for its planned disposition of the request. If the agency states its intention to hold a public hearing on the subject of the request, it shall proceed according to sections 14.05 to 14.28. The chief administrative law judge shall prescribe by rule the form for all petitions under this section and may prescribe further procedures for their submission, consideration, and disposition.

Thus, the petition must be in the form prescribed by the chief administrative law judge. The content and form for the petition is found in the rules of the Office of Administrative Hearings (OAH)⁵ and requires the petitioner to specify proposed wording for the requested new rule. The agency must respond to the petitioner in writing within sixty days. The agency must respond specifically to all issues raised in the petition and state the action it intends to take.⁶

There are no reported Minnesota cases construing section 14.09. It is similar in its provision, however, to section 318 of the 2010 Revised Model State APA.⁷

The federal APA also contains provisions similar to section 14.09.⁸ In cases interpreting the federal act, the courts, in evaluating agency refusal to promulgate rules, have afforded considerable deference to agency expertise and discretion. The federal courts, however, have not allowed federal agencies to reject the filing of a petition in a peremptory fashion when the petition is neither deficient in form nor a substantive nullity. The agency must undertake reflective consideration and analysis that will ensure that the petition was

⁴ MINN. STAT. § 14.125 (2014). Subsequent amendments or repeals of the adopted rule may be made without additional legislative authorization. This statute applies to laws authorizing or requiring rulemaking that are finally enacted after January 1, 1996.

⁵ MINN. R. 1400.2040, .2500 (2013).

⁶ *Id.* 1400.2040; *see also* MINN. STAT. § 14.09 (2014) (agency to make specific and detailed reply in regard to its planned disposition of request and the reasons for its planned disposition of the request).

⁷ Petition For Adoption of Rule, which states:

Any person may petition an agency to adopt a rule. An agency shall prescribe by rule the form of the petition and the procedure for its submission, consideration, and disposition. No later than [60] days after submission of a petition, the agency shall: (1) deny the petition in a record and state its reasons for the denial; or (2) initiate rulemaking.

§ 318.

⁸ *E.g.*, 5 U.S.C. § 553(e) (2012) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”).

thoroughly considered on the merits.⁹ The extent to which a federal agency must support its rejection of a petition with reasons and facts is unclear. The agency need not exactly meet each issue raised by the petitioner or supply all the details the petitioner may want.¹⁰ It is “sufficient if it appears from the whole case and the reasons stated” that the agency action is “supported by reason.”¹¹ The federal courts have not considered the availability of the right to petition an agency to be a substitute for, or an alternative to, agency compliance with mandatory notice and comment requirements.¹²

A person may also request an agency adopt rules to supersede the principles of law or policy used as the basis for an agency’s decision in a contested case matter and which the agency intends to rely on as precedents in future cases.¹³ If such a request is made, the agency, as soon as feasible and to the extent practicable, must adopt rules to supersede the law or policy established in a case-by-case decision.

Another type of rulemaking petition is available for use by political subdivisions. A city, county, or sanitary district may submit a petition to a state agency seeking the amendment or repeal of a rule or a specified portion of a rule.¹⁴ The petition must demonstrate that either significant new evidence exists relating to the need and reasonableness of the rule or that less costly or intrusive methods are now available to accomplish the purpose of the rule. If the agency declines to grant the petition, an

⁹ See, e.g., *Nat’l Org. for the Reform of Marijuana Laws v. Ingersoll*, 497 F.2d 654, 657–61 (D.C. Cir. 1974) (finding petitioner requested initiation of rulemaking proceeding to reclassify marijuana under Controlled Substances Act; finding director declined to accept petition for filing on ground that he was not authorized to institute requested proceedings; noting that other petitions for drug reclassification had been accepted for consideration, said that executive officials should have considered petition on its merits instead of rejecting filing in peremptory fashion; and remanding, therefore, to the agency for findings that would “sharpen and clarify” issues); see also 1 RICHARD PIERCE, *ADMINISTRATIVE LAW TREATISE* § 6.10 (5th ed. 2010).

¹⁰ For example, in *Nader v. FAA*, 440 F.2d 292 (D.C. Cir. 1971), the Federal Aviation Administration declined to issue emergency order banning smoking on commercial aircraft. Under the statute in question, the FAA administrator was empowered to exercise emergency power only when safety was involved. The court found that the administrator had power to determine what was reasonable in terms of regulation and in exercise of emergency power, and because the administrator had evaluated hazards posed by smoking and had determined that no emergency ban was required, the court refused to find his determination unreasonable. The administrator’s refusal to adopt emergency regulation was upheld, because the refusal was based on technical and historical considerations. *Id.* at 293-95.

¹¹ *Nader*, 440 F.2d at 294; see *Schuck v. Butz*, 500 F.2d 810, 812 (D.C. Cir. 1974) (suggesting, in dicta, that agency would develop some sort of “record” in deciding to reject petition). In *Schuck*, appellant filed a petition asking the secretary of agriculture to ban nitrites in meat. The court found that the relief sought was available only through a rulemaking proceeding. It said:

Should appellants file a petition for rulemaking, new data from the Department’s studies and the additional information appellants claim to have recently obtained will place the Department in a better position now to determine whether a rule making proceeding is desirable and, if it decides that rule making is not warranted, to develop a record relevant to such a decision.

500 F.2d at 812.

¹² *Joseph v. U.S. Civil Serv. Comm’n*, 554 F.2d 1140, 1146 n.10 (D.C. Cir. 1977); *Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013, 1020 (3d Cir. 1972).

¹³ MINN. STAT. § 14.06(b) (2014). This section does not apply to the Public Utilities Commission. *Id.*

¹⁴ *Id.* § 14.091.

administrative law judge reviews it. The administrative law judge may conduct a hearing on the petition at which the agency must establish the continued need for and reasonableness of the rule. Any resulting rule change by the agency or in another manner determined by the administrative law judge can be adopted under the expedited rule process in section 14.389.¹⁵

An alternative to a petition to change the rule is the statutory variance under Minnesota Statute, sections 14.055-056. A petitioner has to request a variance from a rule as it applies to the petitioner's circumstances. Granting the petition is mandatory if the agency finds that applying the rule to the petitioner's circumstances would not serve any of the rule's purposes. The agency has discretion to grant the variance if the agency finds that: the rule creates a hardship for a petitioner; a variance to the rule is in the public interest; and the variance would not prejudice the rights of any person or entity. The agency must make reasonable efforts to provide notice of the petition to anyone affected. The agency may attach conditions to the variance if the agency determines conditions are needed to protect public health, safety, or the environment, and the variance has prospective effect only. If the agency fails to act on the petition within 60 days, the petition is deemed approved. The agency is authorized to charge the petitioner a variance fee.

17.1.3 Informal Consultation with Agency Staff

Any person who is interested in or concerned about a rule being adopted, amended, or repealed may contact the agency directly and informally. Each agency must maintain a current public rulemaking docket.¹⁶ The rulemaking docket must contain a listing of the precise subject matter of each possible proposed rule currently under active consideration within the agency for proposal and each pending rulemaking proceeding. A rulemaking is "pending" after publication of the request for comments, notice of intent to adopt, or notice of hearing until completion of the rulemaking, either by withdrawal of the rule or by the rule becoming effective.

Agencies generally welcome comments from all groups and viewpoints. A contact person is usually appointed to answer questions and meet with people. This is usually an employee who is involved in the policy decisions that must be made and in writing the rule. Contacting the agency as early as possible is important so the agency can benefit from different views before the rule is written. Many regulated professions or industries maintain continual contact with the agencies that regulate them and thus find it easy to make informal contacts and discuss rulemaking issues.

When developing rules, agencies have the flexibility to engage with members of the public by matching their method of discourse to the nature of the rules involved. Agencies consider citizens' views as expressed informally through comments and discussions, or, more formally, via an advisory committee.¹⁷

Agencies build consensus on as many issues as possible by sitting down with interested parties and attempting to resolve differences of opinion about the requirements or standards of a rule. As a practical matter, this sort of activity occurs constantly as agency

¹⁵ Note that the hearing provision under MINN. STAT. § 14.389, subd. 5 (2014) applies.

¹⁶ MINN. STAT. § 14.366(a) (2014).

¹⁷ *Id.* § 14.101, subd. 2.

representatives meet with representatives of interest groups, lobbyists, or other government personnel, all of whom extend the reach of these discussions by communicating with their respective constituents. Agencies use the APA to resolve conflicts by encouraging parties who will be affected by the rule and who hold competing views to participate and clearly define issues. The agencies gather the disparate parties and answer questions as they attempt to achieve the desired consensus. An agency thus can manage controversy by appointing a formal advisory committee to address conflict in a more structured setting. The agency, however, retains the authority to make decisions and the responsibility to write the rules. The APA does not directly address this collaborative process

17.1.4 Agency Request for Comments

Agencies are required to publish a request for comments, in which they announce their intention to adopt, amend, or repeal rules. With this publication agencies formally solicit public comments and advice as they embark on rule writing. Minnesota Statutes, section 14.101, subds. 1 and 3 state:

Subdivision 1. Required notice. In addition to seeking information by other methods designed to reach persons or classes of persons who might be affected by the proposal, an agency, at least 60 days before publication of a notice of intent to adopt or a notice of hearing, shall solicit comments from the public on the subject matter of a possible rulemaking proposal under active consideration within the agency by causing notice to be published in the State Register. The notice must include a description of the subject matter of the proposal and the types of groups and individuals likely to be affected, and must indicate where, when, and how persons may comment on the proposal and whether and how drafts of any proposal may be obtained from the agency.

This notice must be published within 60 days of the effective date of any new or amendatory law requiring rules to be adopted, amended, or repealed.

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Subdivision 3. Effect of good faith compliance. If an agency has made a good faith effort to comply with this section, a rule may not be invalidated on the grounds that the contents of this notice are insufficient or inaccurate.

These provisions require an agency to publish a request for comments within 60 days of the effective date of any new statutory grant of rulemaking and at least 60 days before publication of a notice of intent to adopt or a notice of hearing.¹⁸ An agency may engage in ongoing communication about regulatory matters with regulated persons and also with members of the public who are clients or recipients of services provided by a regulated industry or business. This communication occurs daily on a variety of subjects and requires no notice to the public. When an agency decides to consider adopting rules or is directed by the legislature to adopt rules, however, then the agency must publish the request for

¹⁸ *Id.*, subd. 1; *see also In re Gambling Control Bd. Draft Rules*, OAH-82-0800-31018, 2014 WL 1650962, at *1 (Minn. Off. Admin. Hrgs. April 9, 2014) (finding the Board did not publish its Request for Comments within 60 days of the granting of new rulemaking authority required by MINN. STAT. § 14.101 but ruling that this omission was a harmless error because it did not deprive interested parties of an opportunity to participate in the rulemaking process).

comments.¹⁹ The chief administrative law judge must reduce the 60-day period between the request for comments and the notice of intent to adopt to 30 days for good cause shown.²⁰

If the agency is going to establish an advisory committee, it will often announce that intention in the request for comments and ask for interested persons to contact the agency to participate.

Anyone may register to receive notice of all that agency's rulemaking notices by asking the agency to put his or her name and address on the official mailing list.²¹ However, sometimes people who are not registered on the agency's official list testify at legislative hearings, call an agency staff person for information, or otherwise come to the attention of agency program personnel. Agencies usually attempt to involve all such interested persons in the rulemaking proceeding. Furthermore, as explained in Section 17.2.2 below, agencies also build lists of people interested in a specific rulemaking project to reach as part of an additional notice plan.

17.1.5 Advisory Committees

Although usually not required, an agency will often establish an advisory committee composed of the regulated industry, members of the public, and the agency.²² The advisory committee's goal is to advise the agency in the development of the rule, which the members do by providing pertinent information and research. Although the committee has the power of persuasion and information, the agency sets the policy and makes the final decision.²³ In addition, an advisory committee can be helpful to the agency in identifying costs and benefits, affected parties, alternative options, and other necessary regulatory factors that are required under Minn. Stat., section 14.131.²⁴

Sometimes the legislature requires an advisory committee. Also, the legislature may require that other agencies, the federal government,²⁵ or an advisory committee²⁶ be consulted before the rule is officially proposed for adoption. Sometimes the legislature requires that an advisory council be composed²⁷ of members of certain groups or representatives from certain regions; for example, regional development commissions or counties. One may ask to participate as a member of an advisory committee that is working with the agency to develop rules.

¹⁹ See also D. ORREN & P. WINGET, MINNESOTA RULEMAKING MANUAL, ch. 2 (2014) for additional information on preparation of the Request for Comments.

²⁰ MINN. STAT. § 14.101, subd. 4 (2014).

²¹ *Id.* §§ 14.14, subd. 1(a), .22, subd. 1.

²² MINN. STAT. § 14.101, subd. 2 (2014) ("Each agency may also appoint committees to comment, before publication of a notice of intent to adopt or a notice of hearing, on the subject matter of a possible rulemaking under active consideration within the agency.").

²³ D. ORREN & P. WINGET, MINNESOTA RULEMAKING MANUAL, ch. 3 (2014).

²⁴ *Id.*, at ch. 4.

²⁵ Sometimes the legislature requires that the agency promulgating a rule consult other agencies, or the federal government. See, e.g., MINN. STAT. § 144.09 (2014) (requiring cooperation with federal authorities).

²⁶ See, e.g., *id.* § 162.152, subd. 1 (requiring commissioner to act with advice of a committee).

²⁷ See, e.g., *id.* § 214.13, subd. 4 (requiring five of seven members on the council to be registered or licensed in the corresponding field of the matter under consideration).

