Chapter 1. The Development of Administrative Procedure

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1.1 Introduction

Minnesota administrative procedure has developed over many years. Major legislative milestones occurred in 1945, 1957, 1975, and 1995. Legislative interest in this field remains high, due primarily to concerns about state agency rulemaking. This chapter will recount the more important events that have helped shape the practice of administrative law in Minnesota.

The principal focus of this chapter is statutory history relating to administrative rulemaking. Passing reference will be made to contested case statutory changes and to rulemaking affecting the Administrative Procedure Act (APA) by the chief administrative law judge. More detailed information on these activities, and on major judicial actions affecting the practice of administrative law, will be found in later chapters of this book.

1.2 The Origins of the Minnesota Administrative Procedure Act (APA)

Before 1945, Minnesota had virtually no codified procedures relating to executive branch quasi-legislative activities (rulemaking) or quasi-judicial activities (contested cases). Each state agency had its own procedures for implementing rules and enforcing them. In 1945, in response to growing public and legislative attention to executive branch activities, the legislature enacted two bills that together constituted the first preliminary steps toward a comprehensive APA for rulemaking in Minnesota.

Chapter 452 of the 1945 legislation defined those agencies subject to these new rulemaking provisions, characterized affected agency statements (rules and regulations), and gave affected agencies specific authority to enact rules and regulations to “carry[ ] out the duties and powers imposed upon and granted to" them.[1] Under Chapter 452, a public hearing was required before a rule could be adopted, and the agency was required to give thirty days’ notice to "accredited representatives of trade associations or other interested groups who have registered their names with the secretary of state for that purpose."[2] In addition, review by the attorney general was required for "form and legality," since each rule had the effect of law if the specified procedures were followed.[3] Chapter 590 of the 1945 legislation specified that copies of agency rules were to be distributed to clerks of court, the revisor of statutes, the

[1] 1945 Minn. Laws ch. 452, § 2, at 869.
[2] 1945 Minn. Laws ch. 452, § 2, at 870.
[3] *Id*.

secretary of the Minnesota State Bar Association, and each district judge.[4] A "publication board" was established to oversee the implementation of this requirement.[5]

Few changes were made to this fledgling APA between 1945 and 1957. However, in 1957, the legislature enacted chapter 806, the first true codified APA for the state.[6] This act codified a uniform set of procedures to guide both rulemaking and contested case activities by state agencies. Many of the rulemaking provisions in the 1945 legislation were carried over in the 1957 enactment, but this later act was more specific in its definition of covered agencies, requirement for demonstrated need and reasonableness of the rules, and various procedural steps. Chapter 806 served Minnesota government for nearly two decades. Although the years 1957 through 1975 were a high growth period for state government, there were few significant amendments to the APA. The number of agencies subject to the APA increased, but no meaningful changes were made in the substantive procedures established in chapter 806.

1.3 Perceived Inadequacies in the Administrative Procedure Act

By the early 1970s, public and legislative interest in administrative activities of state agencies increased dramatically. This increase in interest corresponded to the transfer of regulatory activity from the federal government to state governments, a trend that accelerated in the 1980s. Complaints arose about the manner in which state agencies applied the APA in rulemaking. Agencies were purportedly adopting "rules" (i.e., statements or standards given the force of law) without following APA procedural requirements. The state house and senate governmental operations committees began to accumulate communications from dissatisfied constituents that provided examples of these activities,[7] including the following:

1. On May 17, 1971, the state department of public welfare adopted a statement of "official policy" governing the performance of prefrontal lobotomies on patients in state hospitals;
2. In November 1973, the state board of education published its "Guidelines for the Collection, Maintenance and Release of Pupil Records," which defined limitations on the accessibility of certain personal files of students;
3. On November 20, 1973, the state college board issued its "Operating Procedure 19" which regulated the consumption of alcoholic beverages in residence halls; and
4. On June 7, 1974, the income tax division of the department of revenue issued a memo to department tax examiners governing the eligibility for rent credits on personal income tax forms.

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[4] 1945 Minn. Laws ch. 590, § 1 at 1154.

[5] 1945 Minn. Laws ch. 590, § 2 at 1154.

[6] 1957 Minn. Laws ch. 806, §§ 1-14, at 1100-1105.

[7] Many of these individual communications, together with a summary report, are on file with the Legislative Reference Library, State Office Building, in St. Paul, Minnesota.

The above state agency pronouncements were not necessarily in conflict with underlying substantive laws. For the most part, the agencies acted on these items after having given some opportunity for public notice and hearing. However, these activities clearly indicated that the dictates of the APA were not being followed. The agencies intended these "memos" and "guidelines" to have the effect of law, and administered them accordingly, without following the precise dictates of the APA.

In defense of these and other agencies, the 1957-based APA was unclear about certain definitions and standards crucial to the application of the act. For example, the act defined *rule* in a circular fashion to mean "every regulation…adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it".[8] In addition, the act was vague about what sort of prehearing notice was required, the procedures to be used in the public hearing, and the impact and applicability of "emergency rules."[9]

Another handicap faced by state agencies was the increasing activism of the legislature during this period. New programs were being initiated more frequently by lawmakers, with implementation and enforcement of the programs delegated to state agencies. Often, the legislature gave substantial responsibility to the agencies to define technical standards and to enforce a wide range of possible violations. Typically, the agencies were not given enough financial resources to carry out their duties, and they naturally looked for implementation techniques that required the least amount of dollars and staff time.

A second area of concern to legislators was the affiliation of "hearing examiners" in the APA rulemaking proceedings. These individuals were charged with conducting the public hearings on the proposed rules and submitting recommendations to each agency head. Invariably, these hearing examiners were employees of the same agency (often the agency head or deputy) that would ultimately adopt the rule. Although there was little, if any, evidence of actual bias on the part of these hearing examiners, the perception of bias existed and was noted in testimony before legislative committees.[10]

Another reason for urging the creation of an independent hearings office was the perceived need for consistency in conducting rulemaking hearings. The individuals who had been serving as hearing examiners rarely performed such duties on a regular basis. They usually had other responsibilities in their agencies and serving as a hearing examiner was a rare event for most of these individuals. It was understandable, therefore, that few agency hearing examiners developed the experience and skills needed to ensure procedural consistency in conducting rulemaking hearings. Advocates of an independent office of hearing examiners noted the increasing popularity of such offices in other states and urged the Minnesota Legislature to create a similar entity.

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[8] 1957 Minn. Laws ch. 806, § 1, at 1101.

[9] 1957 Minn. Laws ch. 806, § 2, at 1102.

[10] The Minnesota State Bar Association was an example of one interest group that sought to correct this perceived bias by recommending the creation of an independent office of administrative hearing examiners. The bar association maintained that the office should be staffed exclusively by individuals having no affiliation with the agency involved in the administrative action.

1.4 The Response of the Legislature in the Mid 1970s

Faced with these concerns, legislators chose to first concentrate on the rulemaking provisions of the APA. After many hours of hearings, especially in the house, and after the preparation of numerous staff reports, the 1974 and 1975 sessions of the Minnesota Legislature enacted the first major revisions of the APA since 1957.

Chapter 344 of the 1974 legislation was a modest beginning for this overhaul effort. The act created the Minnesota *State Register* as the basic "public information" publication for state government.[11] All proposed and adopted rules were required to be published in the *Register* before becoming effective.[12] The *State Register* continues today as the principal vehicle for transmitting notice of major state agency actions to the public, although use of the Internet as a means of providing notice is steadily increasing.

Chapter 355 of 1974 Minnesota Laws created the Legislative Commission to Review Administrative Rules (LCRAR).[13] This action was another direct reflection of the increasing concerns of legislators about agency rulemaking. The LCRAR was abolished in 1995 as a part of a legislative effort to cut back on legislative commissions. The Legislative Coordinating Commission (LCC) took over many of its duties under 1997 legislation. The topic of legislative rule review activities is discussed in a later chapter.

The most significant legislation affecting the APA since its 1957 enactment was 1975 Minnesota Laws Chapter 380. This act was the culmination of the extensive legislative committee activity in the mid-1970s. Although it focused on rulemaking, Chapter 380 had implications for all administrative activities in the executive branch of Minnesota government. Because the 1975 legislation continues to be the cornerstone of the current APA, its various provisions will be discussed in detail in later chapters. However, it is useful to summarize the provisions of Chapter 380 responding to the major concerns of legislators as set forth above:

1. The definition of agency statements to which the APA applied was refined considerably. Agency statements subject to APA rulemaking requirements were defined as those "of general applicability and future effect . . . made to implement or make specific the law enforced or administered by [the agency] or to govern its organization or procedure."[14] The key elements of this definition stressed the nature of the statements themselves and did not rely on the agency's interpretation of those statements.
2. The number of exclusions from the APA was greatly reduced. In the past, there had always been APA exclusions. Some entire agencies, and particular activities of other agencies, were excluded from APA rulemaking procedures. The 1975 amendments greatly limited those exclusions and expressly applied the APA to every other agency in the executive branch, although some programs remained excluded.[15]

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[11] 1974 Minn. Laws ch. 344, § 1, at 577.
[12] *Id.*
[13] 1974 Minn. Laws ch. 355, § 69, at 629-30.
[14] 1975 Minn. Laws ch. 380, § 1, at 1286.
[15] 1975 Minn. Laws ch. 380, § 1, at 1286.

3. The rulemaking procedure itself was revised. These procedural changes lengthened the time period for rulemaking by expanding public notice requirements, requiring an agency to "make an affirmative presentation of facts establishing the need for and reasonableness of the rule," allowing the hearing record to be kept open for post-hearing comments, and ensuring adequate opportunity for the attorney general's review.[16]
4. Expanded use of the *State Register* was provided in order to improve public notice of proposed agency rulemaking.[17] A number of other procedural changes also served to improve the opportunity for public input into the process (e.g., the requirement that agencies publish notice of their intention to seek outside opinion before drafting their proposed amendments).[18]
5. An independent office of hearing examiners (now the Office of Administrative Hearings) was created to respond to the criticisms of bias and lack of procedural consistency in the hearing process.[19] Hearing examiners were required to have law degrees, and various hearing examiners from state agencies were transferred to the new office.[20]

As might be expected, Chapter 380 was not met with universal acclaim by executive branch agencies. New time and cost burdens were placed on them, and they lost the high degree of control formerly possessed over the rulemaking process. From the standpoint of the public and regulated constituencies, however, there were noticeable gains. Access to the rulemaking process was greatly expanded, new opportunities were added for public input into the process, and confidence began to grow in the new office of hearing examiners. Legislators also gained from the new procedures. With the increased public access, legislators were more likely to receive constituent complaints early enough in the process to allow them to exert formal or informal pressure to change the proposed rules. In addition, legislators more often appeared at rulemaking hearings to offer the hearing examiners their interpretations of legislative history on controversial points.

These rulemaking changes increased costs. Informal surveys taken by legislative staff persons one year after the adoption of Chapter 380 indicated the rulemaking process took, on the average, slightly more than six months. In addition, the cost of adopting a typical rule exceeded $2,000 (not including agency personnel staff time). For those agencies typically involved in complex rulemaking (such as those regulating pollution or health care facilities), the time and cost increases were substantial. Agencies responded to the new changes in various ways. Some sought to cut back on their rulemaking, others engaged in a more subtle variety of "informal" rulemaking, and still others sought to obviate the need for rulemaking altogether by urging the enactment of regulatory standards by statute rather than by rule. However, most agencies simply learned to cope with the new requirements.

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[16] 1975 Minn. Laws ch. 380, § 2, at 1287.
[17] *Id.*
[18] 1975 Minn. Laws ch. 380, § 2, at 1288.
[19] 1975 Minn. Laws ch. 380, § 16, at 1293.
[20] *Id.*

1.5 Amendments to the Rulemaking Procedures 1975-1995

Because of the new constraints posed by Chapter 380 and rules adopted by the office of hearing examiners in response to the new statute, demand soon grew for less restrictive and less costly procedures. In 1977, Chapter 443 was enacted to reduce some of the time and cost restraints imposed by the 1975 amendments. Various time and publication requirements were reduced, and alternative rulemaking procedures were enacted for certain categories of rules.[21] One way the legislature sought to control rulemaking costs was to expressly prohibit agencies from adopting a rule that simply repeated statutory language.[22]

Occasionally, legislators themselves urged a retrenchment from the 1975 amendments when they realized that implementation of their favorite legislative programs was being slowed by these new time requirements. An example of a response to this concern was 1977 Minnesota Laws Chapter 443, which expanded opportunities for "temporary" rulemaking.[23]

After 1977, the pendulum continued to swing in the direction of further loosening of the 1975 APA reforms. Such action was encouraged by commentators such as Professor Carl Auerbach of the University of Minnesota Law School, who conceded that the 1977 changes were helpful, but complained that the Minnesota APA was still in need of further simplification and reform. Auerbach described the rulemaking procedure as "unnecessarily complicated, cumbersome, costly, and time-consuming."[24] He concluded that the process scattered authority and responsibility, had become overly judicialized, and, ultimately discouraged rulemaking.[25] He argued further that the APA encouraged competition between the office of hearing examiners and the office of the attorney general.[26] Auerbach called for a series of additional reforms designed to streamline the rulemaking process.[27]

The suggestions of Professor Auerbach, the complaints of state agencies, and the recommendations of the administrative law section of the state bar association as well as informal groups such as the 1979 Task Force on the Administrative Procedure Act, prompted further legislative consideration of APA amendments. The result was a series of amendments between 1979 and 1984 that clarified, streamlined, and improved the cost efficiency of APA rulemaking.

Perhaps the most significant of these changes was the enactment in 1980 of Chapter 615. The act made a number of APA changes, but the most important change allowed state agencies to engage in "noncontroversial" rulemaking if an agency determined that its proposed rule was not likely to be challenged.[28] To take advantage of noncontroversial rulemaking, the agency was required to publish notice of its intentions, with a copy of the proposed noncontroversial rule, in the *State Register.*[29] If less than seven persons (now 25 persons)

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[21] 1977 Minn. Laws ch. 443, § 2, at 1218-20.
[22] 1977 Minn. Laws ch. 443, § 2, at 1218.
[23] 1977 Minn. Laws ch. 443, § 2, at 1219.
[24] Carl A. Auerbach, *Administrative Rulemaking in Minnesota,* 63 Minn. L. Rev. 151 (1979).
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] 1980 Minn. Laws ch. 615, § 47, at 1561.
[29] 1980 Minn. Laws ch. 615, § 47, at 1561-62.

objected, the agency was permitted to adopt its rule without public hearing.[30] However, review by the attorney general was still required.[31]

Chapter 615 also made significant changes in the roles of the attorney general and the chief hearing examiner relating to the determination of "substantial change." The issue of "substantial change" or "substantial difference" deals with the extent to which an agency may change a rule during the rulemaking proceeding. This issue had long plagued administrative law practitioners and arose when the final form of the rule as adopted by the agency differed from the rule as proposed. Although Chapter 615 attempted to deal with this issue by dividing functions between both the attorney general and the chief hearing examiner, the issue continued to cause some uncertainty.[32]

In the early 1980s, two other legislative enactments and one action of the revisor of statutes are worthy of note. Before the publication of 1984 Minnesota Statutes, the revisor exercised his discretion and recodified the APA into a separate chapter of the codified laws of the state. Thereafter, Minnesota Statutes Chapter 14, was set aside exclusively for laws governing rulemaking and contested case provisions, the operations of the LCRAR, judicial review of administrative actions, and the structure and duties of the (renamed) Office of Administrative Hearings (OAH).

In 1983, the legislature enacted Chapter 210, which clarified the responsibilities of the revisor of statutes with respect to rulemaking. The revisor began to share, with the attorney general and the chief administrative law judge, various responsibilities for drafting and reviewing rules.[33] Form review is now the responsibility of the revisor, and the revisor's staff has drafting, codification, and technical change authority for rulemaking.[34] Other changes by the 1983 legislature include clarifications of attorney general responsibilities and time lines.[35]

Chapter 640 of the 1984 enactments contains a number of clarifications of APA provisions. The subjects of these 1984 changes include approval of rule form, hearing and publication requirements, correction of defects, and emergency (formerly temporary) rulemaking.[36]

There were relatively few significant amendments to the APA from 1985 through 1994. In 1987, the chief administrative law judge was given explicit authority to hear cases, and to appoint workers' compensation judges.[37] In 1989, the small business in rulemaking act (since repealed) was broadened to specifically include farms and other agricultural operations[38] as well as public utilities and telephone companies.[39] The legislature also provided that a notice had to be published in the *State Register* before rules exempt from the APA have the force and

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[30] 1980 Minn. Laws ch. 615, § 47, at 1562.
[31] *Id*.
[32] 1980 Minn. Laws ch. 615, § 6, at 1544-46.
[33] 1983 Minn. Laws ch. 210, § 2, at 604-605.
[34] 1983 Minn. Laws ch. 210, § 1, at 602.
[35] 1983 Minn. Laws ch. 210, § 8, at 607.
[36] 1984 Minn. Laws ch. 640, §§ 1-34, at 1783-95.
[37] 1987 Minn. Laws ch. 332, § 1, at 1961-62.
[38] 1989 Minn. Laws ch. 131, § 1, at 263.
[39] 1989 Minn. Laws ch. 87 § 1, at 194.

effect of law.[40] In 1989, the LCRAR was given authority to periodically review statutory exemptions to the rulemaking provisions of Chapter 14.[41] In addition, several rulemaking exemptions were deleted[42], and one exemption was added in the rules for the commissioner of corrections relating to the placement and supervision of inmates serving a supervised release term.[43] In 1990, the legislature added a statement of purpose to the APA, which was intended to be an indication of legislative intent in the application of the APA.[44]

In 1991, the Department of Natural Resources lost its exemption for game and fish rules, and a special expedited procedure was created to adopt these rules.[45] The same year, an exemption was added for revenue notices and tax bulletins from the commissioner of revenue.[46] The 1992 legislature passed two important additions to the APA. The first was a "harmless error" provision intended to address an agency complaint that too many rules were being ruled invalid by the attorney general and OAH due to technical violations. The statute directed the attorney general and the administrative law judge reviewing the rule to disregard errors in a rulemaking proceeding unless the defect deprived someone of an opportunity to participate.[47] The same statute also authorized "dual notice" rulemaking, a procedure that agencies had been using for several years without explicit legislative approval.[48] Under dual notice rulemaking, an agency may give notice of a hearing on the rules but later cancel the hearing unless 25 persons request it be held.[49] The legislature directed that there must be at least ten calendar days between the last day for requesting a hearing and the day of the hearing to allow interested persons time to prepare.[50] The 1992 legislature also extended the time period for response to earlier submissions or comments from three business days to five working days.[51]

The legislature adopted only two minor changes to the APA in 1993 and 1994. In 1993, the requirements of the notice of intent to solicit outside information were expanded to require agencies to include within the notice information on any advisory task force formed, and mail the notice to its rulemaking list.[52] In 1994, the commissioner of commerce was granted an exemption from rulemaking for uniform real estate conveyancing forms.[53]

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[40] 1989 Minn. Laws ch. 155, § 1, at 383.

[41] 1989 Minn. Laws ch. 155, § 2, at 384.

[42] 1989 Minn. Laws ch. 155, § 5, at 385.

[43] 1989 Minn. Laws ch. 290, art. 2, § 1, at 1586-87.

[44] 1990 Minn. Laws ch. 422, § 1, at 832-33.

[45] 1991 Minn. Laws ch. 259, § 3, at 926. The procedure was removed from the APA and put in the DNR statutes in 1995.

[46] 1991 Minn. Laws ch. 291, art. 21, § 1, at 1639-40.

[47] 1992 Minn. Laws ch. 494, §4, at 399.

[48] 1992 Minn. Laws ch. 494, § 5, at 400.

[49] *Id*.

[50] *Id*.

[51] 1992 Minn. Laws ch. 494, § 3, at 399.

[52] 1993 Minn. Laws ch. 370, § 10, at 2692.

[53] 1994 Minn. Laws ch. 388, art. 1, § 1, at 27.

1.6 Amendments to the Contested Case Procedures

The APA history discussed above relates primarily to the quasi-legislative activities of state agencies (rulemaking), and not to the quasi-judicial activities (contested cases). Although contested case revisions have been made by the legislature during recent years, these amendments do not compare in significance to the rulemaking amendments. Most of the changes involving contested cases, such as the development of discovery procedure, have been accomplished through rulemaking by OAH. Some limited changes have been made to judicial review of agency actions but, again, the changes are not significant.

Of interest, however, is the 1982 Minnesota constitutional amendment that created the Minnesota Court of Appeals. This intermediate appellate court, by virtue of 1982 Minnesota Laws chapter 501, section 8, subdivision 4, was given jurisdiction to review both rulemaking and contested case decisions of state agencies.[54] Before this change agency decisions were reviewed in district court and the decisions were not reported. One result of this change has been a larger body of case law dealing with administrative practice and procedure. Later chapters in this book will discuss in detail the contested case and judicial review provisions of the APA.

1.7 The CORE and LCRAR Reports

Attention to state agency rulemaking was at a peak in early 1992 when two separate bodies decided to study rulemaking. In February of 1992, the Commission on Reform and Efficiency (CORE) selected administrative rulemaking as one of several topics to study. CORE was a group of 22 citizens appointed by Governor Arne Carlson and the Minnesota Legislature to develop state government reform initiatives. The concern of the members of the Commission was that oversight of rulemaking was weak and rules were often setting policy rather than implementing legislative initiatives. Then, in April of 1992, the Legislative Audit Commission also directed the Legislative Auditor to look at how well rulemaking was working in Minnesota, and to recommend whether any changes to the APA were needed. Each group conducted extensive interviews and issued detailed reports.[55]

The CORE staff interviewed agencies, regulated parties, legislators, the attorney general's office, the revisor of statutes, the LCRAR, and OAH. Although CORE made 27 individual recommendations concerning the rulemaking process, it identified the most serious problem as the large scope of authority granted to agencies by the legislature, which then resulted in policy being made by non-elected officials. The group's recommendations were grouped into five areas:

1. *Delegation of rulemaking authority* - CORE recommended that the legislature limit and focus past and future delegation of rulemaking powers, including stating desired outcomes, requiring examination of major cost impacts, and setting a deadline for rulemaking;

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[54] 1982 Minn. Laws ch. 501, § 1, at 573.

[55] Commission on Reform and Efficiency, *Reforming Minnesota's Administrative Rulemaking System,* Detailed Report (March 1993).

2. *Accountability for rules* - CORE recommended that the governor have the opportunity to comment on all rules and help agencies obtain clarification of legislative intent, and that rulemaking authority be limited to governor-appointed commissioners and not be given to independent boards;
3. *Oversight of rulemaking* - CORE recommended that the LCRAR be strengthened or replaced, that it evaluate legislative rulemaking delegations, and that it keep policy committees informed of rules adopted under a delegation originating in the committee;
4. *Amendments to the APA* - CORE recommended that the agencies should be required to provide more information about the task forces formed to work on rules and alternatives considered in rulemaking. CORE also suggested that people requesting a hearing be required to state their objections, and a shorter process be provided to cure substantial change determinations; and
5. *Agency initiatives* - Several changes were recommended by CORE, including better notice of rulemaking, a simplified approval process by the attorney general, repeal of obsolete rules, and exploration of the exemption of interpretative material from rulemaking.

The CORE report was issued in March of 1993 with the stated goal of helping the legislature to regain control over rulemaking.

Generally, the focus of the study by the Legislative Auditor was to gather data about how the rulemaking process was functioning and to determine if it could be improved to make rulemaking more efficient while ensuring the process is open and accessible to the public. The study sought to answer complaints that rulemaking took too long and was too complicated. It also sought to determine whether the public had meaningful input into the process. The interview and data analysis for this study was extensive and thorough. It is a wealth of information about how the rulemaking process actually works in Minnesota. The study has been nationally recognized as an outstanding analysis of a state rulemaking process.

The final report contained a large number of conclusions based upon the data gathered.[56] The following are among the most significant:

- Approximately 125 rules are adopted each year of which 80 percent are adopted without a hearing and with an average time-frame for adoption of 14 months;
- A small number of rules take an unusually long time to adopt because they are very controversial and because agency staff may proceed at their own pace in drafting a rule;
- Rulemaking is a lengthy process principally due to the demands of rule drafting and the need to accommodate competing interests, not because of procedural requirements in the APA;
- There is a great deal of public input into rulemaking, but negotiating the content of rules to avoid a hearing may exclude some participants.
- The present public notice provisions may be inadequate to ensure timely notice and meaningful participation; and

[56] Office of the Legislative Auditor, *Administrative Rulemaking* (March 1993).

- Statements of Need and Reasonableness (SONARs) could be improved and receive wider public distribution.
- Rules without a public hearing are not as thoroughly scrutinized as rules with a hearing.

The final report made 14 specific recommendations for improving rulemaking.[57] Many were later acted upon by the legislature. The following were among the most important:

1. Agencies should maintain a rulemaking docket to show the status of rulemaking actions;
2. Rules not adopted within 18 months should require reauthorization from the legislature;
3. There should be a single definition of "substantial change" in the APA;
4. Notice efforts by agencies should be part of the record and subject to external review;
5. Exempt rules should be reviewed;
6. OAH should review all rules; and
7. Legislative rule review should be strengthened.

The Legislative Auditor's recommendations were intended to shorten the rule process, ensure minimum due process, strengthen legislative oversight, and minimize requirements that may be appropriate for only a few rules.

1.8 The 1995 Amendments

The legislative response to the reports by CORE and the Legislative Auditor came during the 1995 session. Two competing bills were introduced. In the House of Representatives, Representative Mindy Greiling introduced a bill that was initially modeled after the rulemaking provisions of the model State Administrative Procedure Act. The legislation would have produced a simpler process more akin to notice and comment rulemaking. In the Senate, Senator John Hottinger introduced a bill that substantially adopted the recommendations of the Legislative Auditor. After extensive testimony in both bodies, the Senate bill prevailed and was enacted into law.

The 1995 legislation enacted the most extensive changes to the APA since 1975. The legislative review authority was strengthened by specifying the reasons for rule suspension,[58] and by giving the LCRAR the power to object to a rule, which then shifts the burden to the agency to defend the rule upon judicial review.[59] The LCRAR itself was authorized to challenge a rule in court after its objection to the rule.[60] Additionally, the LCRAR was authorized to allow agencies to omit publication of rules in the *State Register* if the agency could establish that

[57] Office of the Legislative Auditor, *Administrative Rulemaking* (March 1993).
[58] 1995 Minn. Laws ch. 233, art. 2, § 2, at 2085.
[59] 1995 Minn. Laws ch. 233, art. 2, § 3, at 2086.
[60] *Id.*

publication would be unduly expensive given the number of people interested in the proposed rule.[61]

For a number of years, the attorney general and OAH had differing definitions of "substantial change" in their rules to determine when an agency had changed a rule so much that it had to start the rulemaking process over again. The 1995 legislature addressed the issue of "substantial change" by defining what makes a rule "substantially different" in statute.[62] The definition employs the "logical outgrowth" test developed in federal case law, but also requires, in accordance with the OAH rule, consideration of the extent to which the "effects" of the rule differs.[63] The legislation also required the chief administrative law judge to adopt a rule that creates an expedited procedure for adoption of a rule found to be substantially different.[64]

Notice of the rulemaking process was strengthened by mandating that agencies publish requests for comments for *every* rule prior to initiating the rule proceeding.[65] The agencies are also explicitly authorized to establish advisory committees to comment on a rule.[66] The agencies are directed to "make reasonable efforts" to give notice to people affected by the rule who are not on the agency's rulemaking list.[67] The chief administrative law judge was further directed to adopt rules that allow agencies to receive prior binding approval of its plan for additional notice of proposed rules.[68] Each agency is required to maintain a public rulemaking docket to advise interested persons of pending proceedings.[69] Although the new rule repealed the small business considerations in rulemaking act, it then proceeded to add several requirements to the SONARs.[70] The new requirements mandate agency consideration of who will bear the costs of the new rule and who will benefit. The agency is also required to describe its efforts to provide additional notice of the rulemaking.[71]

Under prior law, 25 or more requests for review would require an agency to conduct a rule hearing.[72] As a result, agencies negotiated with requesters to withdraw their requests in exchange for changes in the rule. Because of complaints that not all requesters were involved in such negotiations, the 1995 legislation set out specific requirements for the agency to meet when requests were withdrawn, including notice to all persons who requested a hearing.[73] An administrative law judge was then authorized to review the withdrawal process upon legal review of the rule.[74]

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[61] 1995 Minn. Laws ch. 233, art. 2, § 14, at 2092.

[62] 1995 Minn. Laws ch. 233, art. 2, § 6, at 2087-88.

[63] *Id*.

[64] 1995 Minn. Laws ch. 233, art. 2, § 31, at 2104.

[65] 1995 Minn. Laws ch. 233, art. 2, § 11, at 2089-90. This requirement replaced the optional notice of solicitation of outside opinion.

[66] 1995 Minn. Laws ch. 233, art. 2, § 11, at 2090.

[67] 1995 Minn. Laws ch. 233, art. 2, §§ 14-20, at 2091-95.

[68] 1995 Minn. Laws ch. 233, art. 2, § 31, at 2104.

[69] 1995 Minn. Laws ch. 233, art. 2, § 26, at 2099-2100.

[70] 1995 Minn. Laws ch. 233, art. 2, § 13, at 2090-91.

[71] *Id*.

[72] 1992 Minn. Laws ch. 494, § 5, at 400.

[73] 1995 Minn. Laws ch. 233, art. 2, § 23, at 2096-97.

[74] *Id*.

The legislation also established, for the first time, an abbreviated procedure for the review of rules exempted from the APA by the legislature.[75] The procedure required approval by the revisor of statutes, approval by OAH, and publication in the *State Register*.[76] Agencies were also authorized to use this procedure for a limited number of rules where the full procedure is unnecessary and the change is either minimal or required by federal law or court order.[77] OAH must approve this "good cause" exemption.[78] The legal review of non-hearing rules was transferred from the attorney general to OAH.[79]

Traditionally agencies have made policy not only in rulemaking, but also to some extent in contested cases by following the precedent of prior decisions. In an apparent attempt to affect the balance of this type of policymaking, the legislature added a provision encouraging agencies to codify precedent when asked to do so.[80] The new requirement provides that:

> Upon the request of any person, and as soon as feasible and to the extent practicable, each agency shall adopt rules to supersede those principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases it intends to rely on as precedents in future cases. This paragraph does not apply to the public utilities commission.[81]

The Public Utilities Commission successfully sought an exemption because it traditionally set most of its policy through contested case proceedings.

An unexpected detour on the road to greater legislative review also occurred in the 1995 session. In a cost-cutting measure, the LCRAR, along with a number of other legislative commissions, were abolished.[82] The measure provided that the statutory duties of an abolished commission "shall be performed as determined necessary by the legislative coordinating commission."[83] Therefore, the legislature would have to resolve the question of defining legislative review in order for it to survive in a future session.

1.9 Subsequent Changes

After all of the attention given to the APA in 1995, things slowed down considerably in 1996. Only one significant change was adopted, which dealt with agency rules setting out penalties or fines.[84] This change provided specific factors for agencies to consider in determining fines, and prohibited agencies from adopting fines of more than $700 for a single violation by rule without legislative authorization.[85]

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[75] 1995 Minn. Laws ch. 233, art. 2, § 27, at 2100.
[76] *Id*.
[77] 1995 Minn. Laws ch. 233, art. 2, § 29, at 2103.
[78] *Id*.
[79] 1995 Minn. Laws ch. 233, art. 2, § 24, at 2097.
[80] 1995 Minn. Laws ch. 233, art. 2, § 8, at 2088.
[81] *Id*.
[82] 1995 Minn. Laws ch. 248, art. 2, § 6, at 2422.
[83] *Id.* at 2423.
[84] 1996 Minn. Laws ch. 390, § 11, at 447.
[85] *Id.*

The legislature waited until the longer 1997 session to pursue legislation made necessary by the 1995 changes, or raised in the CORE and Legislative Auditor reports and not addressed in 1995. Two important bills were passed. The first dealt with agency exemptions from rulemaking. Preparation for this bill actually began in the 1996-97 interim when a rulemaking exemption subcommittee of the Legislative Coordinating Commission (LCC) conducted a careful review of agency exemptions from the rulemaking requirements of the APA. This study resulted in a lengthy bill that eliminated some exemptions, concluded some exemptions were not rules, and amended some retained exemptions.[86] The legislation also authorized two or more members of the LCC or five members of the legislature to initiate review of a state rule by the LCC.[87] This legislation also contained a new expedited process for rulemaking that can be used only when specifically permitted by the legislature in the law authorizing rulemaking.[88] The process is a simple notice and comment procedure followed by legal review by an administrative law judge.[89] The legislature may also specify an optional procedure under which a public hearing would be held if requested by 100 or more persons.[90]

The second major bill in 1997 established the LCC as the successor to most of the functions of the LCRAR.[91] The LCC or a subcommittee appointed by the LCC has the power to file objections to rules, request a public hearing on a rule, and review findings of a lack of need or reasonableness by the chief administrative law judge.[92] Some of the duties of the LCRAR were transferred to other agencies. For example, agencies now submit their SONARs to the legislative reference library.[93] In addition, the chief administrative law judge now has authority to authorize agencies to omit the text of a rule from the notice published in the state register.[94] Some of the LCRAR's duties were abolished, including the power to suspend a rule, the duty to make reports to the legislature, and the duty to publish a bulletin.[95]

The 1998 legislative session was a quiet one for administrative law issues. One bill was passed that underscored the legislature's interest in performance-based regulation. This addition to the APA required agencies to develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximize flexibility for the regulated party and the agency in meeting those objectives, "whenever feasible."[96] The agency must describe how it considered and implemented the legislative policy supporting performance-based regulatory systems in its statement of need and reasonableness.[97] The legislation also required agencies to report on obsolete rules and identify rules that are

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[86] 1997 Minn. Laws ch. 187, art. 1-4, at 1285-1324.
[87] 1997 Minn. Laws ch. 187, art. 5, § 1, at 1324.
[88] 1997 Minn. Laws ch. 187, art. 5, § 5, at 1327.
[89] *Id.* at 1327-28.
[90] *Id.* at 1328.
[91] 1997 Minn. Laws ch. 98, § 1, at 710-11.
[92] *Id.*
[93] 1997 Minn. Laws ch. 98, § 6, at 713.
[94] 1997 Minn. Laws ch. 98, § 7, at 713.
[95] 1997 Minn. Laws ch. 98, § 17, at 718.
[96] 1998 Minn. Laws ch. 303, § 1, at 368.
[97] 1998 Minn. Laws ch. 303, § 4, at 369.

unnecessary or duplicative of state or federal statutes or rules.[98] The agency is required either to repeal the rules identified or prepare legislation to accomplish the task.[99]

A gubernatorial veto was added to the rulemaking process in 1999.[100] The governor may veto all or a severable portion of a rule by publishing notice of the veto in the State Register within 14 days of receiving a copy.[101] The law was later amended to require submission to, rather than publication in, the State Register within 14 days.[102] A second major addition to rulemaking in 1999 was the adoption of a petition process allowing cities, or counties, to petition a state agency for amendment or repeal of a rule or a portion of a rule.[103] If the agency declines to grant the petition, it is referred to OAH for hearing.[104] The agency is required to demonstrate the need for and reasonableness of the rule at the hearing, and the administrative law judge is authorized to declare the rule invalid if the agency fails to meet its burden.[105]

Legislative review of rules was considered by the 2000 legislature. The authority of the LCC to object to rules was extended to the governmental operations committees in both the house of representatives and the senate.[106] The two committees were also given authority to advise the agency regarding adoption of a rule found not to be necessary and reasonable by the chief administrative law judge.[107] The legislation also set up a schedule for major agencies to justify existing rules to the legislature beginning in 2002 and ending in 2005.[108] The same session law also established a rules task force made up of legislators, and public members appointed by the governor.[109] The task force was directed to study legislative review of rules and recommend changes to rulemaking procedures.[110]

A second law passed in 2000 was an initiative advanced by OAH, providing that administrative law judges and workers compensation judges be subject to the code of judicial conduct – the same code applicable to judicial branch judges.[111] The provision directed the chief administrative law judge to apply the code to the judges at OAH consistent with the interpretations of the board of judicial conduct.[112] The chief administrative law judge was made subject to the jurisdiction of the board of judicial standards.[113] This law also allowed

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[98] 1998 Minn. Laws ch. 303, § 2, at 368.

[99] *Id*.

[100] 1999 Minn. Laws ch. 129, § 1, at 525, codified as Minn. Stat. § 14.05, subd. 6 (2021).

[101] *Id*.

[102] 2001 Minn. Laws ch. 179, § 1, at 669, codified as Minn. Stat. § 14.05, subd. 6. The process for rule review by the governor is explained *infra* § 17.4.

[103] 1999 Minn. Laws ch. 193, § 1, at 1044-45, codified as Minn. Stat. § 14.091 (2021). The following year, sanitary districts were added. 2000 Minn. Laws ch. 335, §1, at 286.

[104] 1999 Minn. Laws ch. 193, § 1, at 1044-45, codified as Minn. Stat. § 14.091.

[105] *Id.* The petition process is explained further *infra* § 17.2.2.

[106] 2000 Minn. Laws ch. 469, § 1, at 1380-81, codified as Minn. Stat. § 3.842, subd. 4a (2021).

[107] 2000 Minn. Laws ch. 469, § 2, at 1381.

[108] 2000 Minn. Laws ch. 469, § 4, at 1382-83.

[109] 2000 Minn. Laws ch. 469, § 5, at 1383-84.

[110] *Id*.

[111] 2000 Minn. Laws ch. 355, § 1, at 375-76, codified as Minn. Stat. § 14.48 (2021).

[112] *Id*.

[113] *Id*.

administrative law judges and workers compensation judges to hear cases in each other's area with appropriate training.[114]

The report of the rules task force was presented to the 2001 legislature, and most of the recommendations were adopted. The resulting legislation added another avenue for legislative review by authorizing the standing house or senate committee with jurisdiction over the subject matter of a proposed rule to delay implementation of a proposed rule until after the next full legislative session.[115] The law also created a new procedure to challenge agency enforcement of unadopted rules. A petition may be filed with OAH seeking a final order determining that an agency is enforcing a policy, guideline or bulletin as a rule.[116] The order may direct the agency to cease enforcement, and is appealable to the court of appeals.[117] The 2001 law also set up a simplified process to repeal obsolete rules, requiring only a notice and comment procedure without a SONAR.[118] However, if 25 people object to the simplified procedure, the repeal must be done through a standard APA rule proceeding.[119] The law also made the governor's veto authority over rules permanent.[120] Finally, the legislation set out a procedure for the filing of a petition with an agency to obtain a variance from a rule. Discretionary variances may be granted where the rule creates a hardship for the applicant, and the variance is in the public interest and would not prejudice the rights of any person or entity.[121] The variance statute was effective July 1, 2002.[122]

A housekeeping bill proposed by OAH containing technical changes to the APA rulemaking provisions was also passed by the 2001 legislature. It allowed the chief administrative law judge to reduce the time period between a request for comments and a notice of intent to 30 days, if good cause is shown.[123] It also clarified that the 5-20 day period after a rule hearing is called the comment period, and the subsequent five business day period is called the rebuttal period.[124] It also provided that a rule hearing may not be cancelled by an agency within three days of the hearing.[125]

Several changes designed to expedite the resolution of contested cases were adopted in 2002. The legislation offered two new final resolution alternatives to agencies with contested cases at OAH: arbitration by an administrative law judge or delegation of the final contested case decision to the ALJ.[126] Both resolution options streamlined the OAH contested case process by avoiding agency consideration of the case after an ALJ issued a decision. The arbitration option also bypassed discovery and provides limited grounds for appeal of the decision.

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[114] *Id*.
[115] 2001 Minn. Laws ch. 179, § 5, at 672.
[116] 2001 Minn. Laws ch. 179, § 8, at 673.
[117] *Id*.
[118] 2001 Minn. Laws ch. 179, § 9, at 674-75.
[119] *Id*.
[120] 2001 Minn. Laws ch. 179, § 1, at 669.
[121] 2001 Minn. Laws ch. 179, § 2, at 669-70.
[122] 2001 Minn. Laws ch. 179, § 12, at 675.
[123] 2001 Minn. Laws ch. 106, § 6, at 267.
[124] 2001 Minn. Laws ch. 106, § 9, at 269.
[125] 2001 Minn. Laws ch. 106, § 14, at 272.
[126] 2002 Minn. Laws ch. 251, § 1, at 234, codified as Minn. Stat. § 14.57 (2021).

Two other 2002 legislative changes were aimed at greater agency accountability. One specified that an ALJ recommended decision became final if not modified or rejected by the agency within 90 days after the close of the agency record.[127] The chief ALJ may order an extension of the 90-day deadline.[128] The other change required an agency to state its reasons for each rejection or modification of the findings of fact, conclusions, or recommendation issued by an ALJ.[129]

The 2003 regular and special sessions saw four separate amendments to the APA. The first was an addition to the requirements of the SONAR, a document that must be prepared by an agency to support rulemaking.[130] The amendment required more specificity in estimating the probable costs of compliance with the new rule, and also required an estimate of the costs or consequences of not adopting the rule.[131] The second change added new procedures to the abbreviated "good cause exemption" rulemaking process. The agency is now required to give notice of adoption to its rulemaking list and allow five business days for comments to OAH.[132] If the rules are reviewed by the chief administrative law judge, the agency is also required to give notice of that review to its rulemaking list.[133] This amendment was added in response to complaints regarding a lack of public notice and opportunity to comment on a controversial drivers' license rule related to homeland security that was adopted under the good cause exemption process. Also in 2003, OAH sponsored a change requiring ALJs and workers compensation judges to retire at age 70 and authorizing retired judges to hear cases for the office.[134] Finally, the sunset provision for an APA provision allowing local governments to petition for amendment or repeal of a state rule was removed.[135]

The 2004 regular session made one change to the APA relating to agency rulemaking efforts, requiring an agency to consult with the commissioner of finance[136] to help evaluate the fiscal impact and fiscal benefits of the proposed rules on units of local government.[137] This information should be included in the Statement of Need and Reasonableness.[138]

Effective July 1, 2004, OAH was charged with implementing a new process for the speedy resolution of complaints of unfair campaign practices.[139] Prior law mandated that county attorneys investigate all campaign complaints, which often delayed the resolution of such complaints until some time after the relevant election had taken place. The new process

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[127] 2002 Minn. Laws ch. 251, § 5, at 235, codified as Minn. Stat. § 14.62, subd. 2a (2021).

[128] *Id.*

[129] 2002 Minn. Laws ch. 251, § 4, at 235, codified as Minn. Stat. § 14.62, subd. 1 (2021).

[130] 2003 Minn. Laws, ch. 3, § 1, at 88-89, codified as Minn. Stat. § 14.131(6) (2021).

[131] *Id.*

[132] 2003 Minn. Laws 1st Spec. Sess. ch. 6, § 1, at 1485-86, codified as Minn. Stat. § 14.388 (2021).

[133] *Id.*

[134] 2003 Minn. Laws 1st Spec. Sess. ch. 1, art. 2, § 30, at 1326, codified as Minn. Stat. § 14.48 (2021).

[135] 2003 Minn. Laws 1st Spec. Sess. ch. 1, art. 2, § 29, at 1324-26, codified as Minn. Stat. § 14.091 (2021).

[136] In June 2008, the Minnesota Departments of Finance and Employee Relations merged to form Minnesota Management and Budget.

[137] 2004 Minn. Laws ch. 274, § 1, at 1160-61, amending Minn. Stat. § 14.131 (2021).

[138] *Id. See also infra* subsection 17.3(11).

[139] 2004 Minn. Laws ch. 277, § 7, at 1167-68, codified at Minn. Stat. §§ 211B.31-.37 (2021).

required that all campaign complaints be filed with OAH,[140] and that administrative law judges make a preliminary determination as to whether a complaint stated a prima facie violation within 1-3 business days of filing.[141] During the campaign season, complaints must be processed very quickly. For example, if an ALJ finds that a complaint sets forth a prima facie violation, a probable cause hearing must be scheduled within three days.[142] After the hearing, a complaint is either dismissed as frivolous or for lack of probable cause, or scheduled for an evidentiary hearing in front of a three-judge panel.[143] In some cases, the panel must hold a hearing within 10 days of assignment.[144] The intent of these tight timelines was to considerably shorten the time necessary to resolve complaints of unfair campaign practices, ensuring that at least some complaints would be resolved before an election was held. The new process also provides other procedural rights, such as appeals to the chief administrative law judge,[145] as well as the option of levying costs and respondents' attorneys' fees against those bringing frivolous complaints.[146]

The 2005 regular session saw several changes to the APA. The first amendment required the Revisor of Statutes to provide to OAH, free of charge, three copies of all compilations, reissues, or supplements to the Minnesota Statutes and Minnesota Rules.[147] The second amendment removed the requirement that an administrative law judge make conclusions in a report following a hearing about whether an agency fulfilled all relevant *substantive* requirements of law or rule.[148] However, the administrative law judge is still required to reach a conclusion on the *procedural* requirements of law or rule. The third change allowed the chief administrative law judge to adopt rules to govern the procedural conduct of all types of hearings conducted by OAH.[149] In addition, the subpoena powers of the chief administrative law judge were expanded to *any* matter being heard by OAH.[150] Fourth, the chief administrative law judge was directed to consult with the commissioner of finance, instead of the commissioner of administration, to assess agencies the costs of services rendered to them.[151] The fifth change to the APA required an agency, upon failing to act within 90 days on a licensing case, to return the record of the proceeding to the administrative law judge for consideration of disciplinary action.[152] This amendment expanded upon the 2002 change making the decision of the administrative law judge final if the agency did not act within 90 days after the close of the agency record. The sixth change made during the 2005 regular session expanded upon the description of Department of Corrections rules that do not fall under the definition of a rule as set forth by Minnesota Statute Section 14.02.[153]

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[140] 2004 Minn. Laws ch. 277, § 7, at 1167, codified at Minn. Stat. § 211B.32 (2021).
[141] 2004 Minn. Laws ch. 277, § 7, at 1168, codified at Minn. Stat. § 211B.33 (2021).
[142] 2004 Minn. Laws ch. 277, § 7, at 1169, codified at Minn. Stat. § 211B.34 (2021).
[143] 2004 Minn. Laws ch. 277, §§ 9-10, at 1169-70, codified at Minn. Stat. §§ 211B.34-.35 (2021).
[144] 2004 Minn. Laws ch. 277, § 10, at 1169, codified at Minn. Stat. § 211B.35 (2021).
[145] 2004 Minn. Laws ch. 277, § 9, at 1169, codified at Minn. Stat. § 211B.34 (2021).
[146] 2004 Minn. Laws ch. 277, § 11, at 1170, codified at Minn. Stat. § 211B.36 (2021).
[147] 2005 Minn. Laws ch. 16, § 1, at 173, amending Minn. Stat. § 14.47, subd. 8 (2021).
[148] 2005 Minn. Laws ch. 16, § 2, at 174, amending Minn. Stat. § 14.50 (2021).
[149] 2005 Minn. Laws ch. 16, § 3, at 174, amending Minn. Stat. § 14.51 (2021).
[150] *Id.*
[151] 2005 Minn. Laws ch. 16, § 4, at 175, amending Minn. Stat. § 14.53 (2021).
[152] 2005 Minn. Laws ch. 16, § 5, at 175, amending Minn. Stat. § 14.62, subd. 2a (2021).
[153] 2005 Minn. Laws ch. 136, art. 4, § 2, at 971, amending Minn. Stat. § 14.03, subd. 3(b)(1) (2021).

The final addition to the APA during the 2005 regular session required an agency to determine if the cost of complying with a proposed rule in the first year after the rule takes effect would exceed $25,000 for businesses with less than 50 full-time employees or statutory or home rule charter cities with less than ten full-time employees.[154] This determination must be made before the close of the record, and the administrative law judge must review and approve or disapprove the agency's determination.[155] If the agency or the ALJ determines that the cost of complying with the proposed rule will exceed $25,000 for small businesses or cities in the first year, then the affected entity may file a written statement with the agency claiming a temporary exemption from the rules.[156] If a city or business meeting the criteria files such a statement, the rule does not apply to that entity until the rules are approved by a law enacted after the agency determination or the ALJ disapproval of that determination.[157] The legislation contains several exceptions to the process, as well as a severability provision, and became effective July 1, 2005.[158] The legislature added conforming language to Minnesota Statute Section 14.19.[159]

The Minnesota Legislature made no changes to the APA in the 2006 and 2007 sessions. In 2008, only one minor conforming change went into effect regarding what is not included in the definition of a rule in Minnesota Statute Section 14.02, subdivision 4.[160]

In 2009, the legislature required that an agency proposing rules determine if a local government unit will be required to adopt or amend an ordinance or other regulation to comply with the proposed rules.[161] This determination must be made before the close of the hearing record, or before the agency submits the record to the administrative law judge if there is no hearing.[162] If the proposed rule requires adoption or amendment of an ordinance, the rule may not become effective until: (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.[163] The law provided some exceptions to this requirement.[164]

The 2009 legislature also authorized agencies to use electronic mail to send rulemaking notices to persons who have registered with the agency to receive notices.[165]In 2010, the legislature clarified electronic mail notices by providing that persons may register to receive notice of agency rulemaking proceedings by submitting to the agency either their electronic mail address or their name and United States mail address.[166] The 2010 legislature also assigned

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[154] 2005 Minn. Laws ch. 156, art. 2, § 9, at 1652, codified in Minn. Stat. § 14.127 (2021). *See also infra* subsection 17.3.4(1).

[155] 2005 Minn. Laws ch. 156, art. 2, § 9, at 1652, codified in Minn. Stat. § 14.127 (2021).

[156] *Id.*

[157] *Id.*

[158] *Id.* at 1652-53.

[159] 2005 Minn. Laws ch. 156, art. 2, § 10, at 1653, amending Minn. Stat. § 14.19 (2021).

[160] 2008 Minn. Laws ch. 238, art. 3, § 1, at 6-7, amending Minn. Stat. § 14.03, subd. 3(b) (2021).

[161] 2009 Minn. Laws ch. 152, § 1, at 1-2, codified at Minn. Stat. § 14.128 (2021).

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] 2009 Minn. Laws ch. 71, § 1, at 1-3, amending Minn. Stat. §§ 14.07, subd. 6, 14.14, subd. 1a, 14.22, subd. 1, 14.389, subd. 2, 14.3895, subd. 3 (2021).

[166] 2010 Minn. Laws ch. 280, § 1, at 1, amending Minn. Stat. § 14.14, subd.1a (2021).

OAH new duties relating to alleged violations of the Minnesota Government Data Practices Act.[167]

No changes to the rulemaking or contested case provisions of the APA were enacted in 2011. The 2011 legislature made some changes in the laws governing assignment of compensation judges in OAH to conduct workers' compensation proceedings.[168]

The 2012 legislature required that when an agency mails notice of intent to adopt a rule, the agency must send a copy of the notice and the agency's SONAR to the LCC (in addition to sending these materials to the chair and ranking minority members of the policy and budget committees with jurisdiction over the subject matter of the rules, as required by prior law).[169] The same 2012 law required that agencies submit, by January 15 each year, their rulemaking docket and the rulemaking record from rules adopted in the prior year to the chairs and ranking minority members of relevant legislative committees.[170] The law also required that the SONAR include an assessment of the cumulative effect of the proposed rule with other federal and state regulations related to the specific purpose of the rule.[171] The 2012 legislature also repealed the requirement that an administrative law judge or workers compensation judge retire at age 70.[172]

In 2013, the legislature required that in an appeal of a contested case, the petition for a writ of certiorari filed with the court of appeals must be served on all parties to the contested case.[173] The law previously required the petition to be served on the agency. In 2014, the legislature repealed the Chapter 14 requirement that the Commissioner of Administration publish a guidebook of state agencies at least once every four years.[174]

One of the most significant recent legislative developments in administrative rulemaking involved not a change in law, but rather an action by the Revisor of Statutes. In 2013, the revisor began providing an administrative rule status feature on the revisor's website. This system allows users to follow many of the actions taken by state agencies when they adopt administrative rules. It also provides access to historical rule information, documents, and notices for rules adopted since 1980. This system provides access to the entire State Register in electronic form, to over 1,140 SONARs, and to over 900 documents from the Office of Administrative Hearings.

Since 2015, the APA has remained substantially intact. A legislative enactment in 2015 modernized the process somewhat, permitting rule-related documents to be filed with the Office of Administrative Hearings in an electronic format.[175] In 2021, the number of requests

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[167] 2010 Minn. Laws ch. 297, § 3, at 2, codified at Minn. Stat. § 13.085 (2021).

[168] 2011 Minn. Laws ch. 89, §§ 1-4, at 1-2, amending Minn. Stat. §§ 14.48, subds. 2-3, 14.49, 14.50 (2021).

[169] 2012 Minn. Laws ch. 238, § 1, at 1 amending Minn. Stat. § 14.116 (2021).

[170] *Id.*

[171] 2012 Minn. Laws ch. 238, § 2, at 2, amending Minn. Stat. § 14.131 (2021).

[172] 2012 Minn. Laws ch. 224, § 1, at 1, amending Minn. Stat. § 14.48, subd. 4 (2021).

[173] 2013 Minn. Laws ch. 56 § 1, at 1, amending Minn. Stat. § 14.63 (2021).

[174] 2014 Minn. Laws ch. 248, § 19, at 9, repealing Minn. Stat. § 14.04 (2021).

[175] 2015 Minn. Laws ch. 62, amending Minn. Stat. §§ 14.05; 14.08; 14.16; 14.26; 14.386; 14.58 (2021).

necessary to require a public hearing on an expedited rule, if that procedure is authorized, was reduced from 100 to 50 people.[176]

This period of relative stability should not be read to indicate a lack of interest from the legislature, however. Proposals for both broad-based and narrowly targeted reform of the APA continue to be introduced and heard by the appropriate legislative committees and, as described more fully in a later chapter, it was during this period that the legislature exercised for the first time its authority to delay adoption of an agency's proposed rule.

1.10 Conclusion

Little attention was given to state administrative procedure in Minnesota from the adoption of the first codified APA in 1957 through the mid-1970s, by either the public or the legislature. Since that time, however, administrative procedures have generated substantial interest and much legislation. The relative informality of procedures before 1975 gave way to a more formal and somewhat burdensome system. The system, in turn, became the subject of legislation between 1977 and the early 1980s to reduce cost and time requirements. The 1995 legislation has now reversed the movement, and legislative interest is growing in ways to limit state agency rulemaking. The 1997 legislation allowed agencies to use a simplified notice and comment procedure for rulemaking if authorized by the legislature.

This pendulum will no doubt continue to swing with political and programmatic redirections. In the end, however, it is unlikely that the basic characteristics of the Minnesota APA, such as public notice and hearing in contested matters and the use of independent administrative law judges, will change. Refinements will be made in the statutory procedures, and practitioners and those affected will need to stay abreast of legislators' penchant for APA amendments.

[176] 2021 Minn. Laws, First Special Session, ch. 12, art. 2, § 3, amending Minn. Stat. § 14.389, subd. 5 (2021).