

Chapter 17. The Initial Stages of the Rulemaking Process

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17.1 Introduction

An agency that proposes rules usually has several goals in mind. It needs to comply with laws the legislature enacted requiring it to adopt rules. It needs to establish specific requirements, standards, or procedures to enable it to enforce or administer certain laws or programs. It needs to solve problems that have been brought to its attention and respond to comments or suggestions it has received from the public. It also needs to emerge from the rulemaking process with a rule that is clear, cogent, and understandable.

Rulemaking success depends on the ability of concerned-citizen groups and agency regulators to work together to find a solution to a problem, to propose the solution to the legislature, to obtain legislative rulemaking authority, and then to continue collaborating through the rule adoption process.

17.2 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.

17.2.1 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

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.

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 repeal the rules.⁴

17.2.2 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.

³ This procedure is rarely used.

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.

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 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

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.”).

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

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 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.

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.

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

17.2.3 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 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

17.2.4 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, subs. 1 and 3 state:

¹⁶ Minn. Stat. § 14.366(a) (2014).

¹⁷ *Id.* § 14.101, subd. 2.

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.

* * *

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 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

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).

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.

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.

17.2.5 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 composed of members of certain groups²⁷ 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.

17.3 Drafting the SONAR

The agency possesses the responsibility for drafting the rules²⁸ and the necessary supporting documentation. This supporting documentation includes a document equal in its importance to the rules themselves—the statement of need and reasonableness. (SONAR)

Most agencies assign staff with program responsibilities to draft rules. For example, if the agency must write rules to administer a grant program, a staff person familiar with the

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).

²⁸ The APA requires that the agency prepares the rules before publishing its notice of intent to adopt rules, since the rules must be published with the notice of intent to adopt rules. *See* MINN. STAT. §§ 14.14, subd. 1a, .22, subd. 1 (2014) (requiring notice of proposed rule, which notice “must include either a copy of the proposed rule or an easily readable and understandable description of its nature and effect”).

subject matter will be assigned the task. In the department of human services, rule drafting is centralized in the rulemaking unit. This allows some staff to work full time on rules to become proficient drafters who are well versed in the APA's intricacies.

17.3.1 The Statement of Need and Reasonableness

The agency must justify every rule in a written document called a statement of need and reasonableness (SONAR). Specifically, the APA requires an agency to “prepare, review, and make available for public review a statement of the need for and reasonableness of the rule.”²⁹ The SONAR must conform to rules of the Office of Administrative Hearings (OAH).³⁰

The SONAR must cite the agency's grant of statutory authority to adopt the rule. Also, the SONAR must contain a summary of all the evidence and argument that the agency is relying on to justify both the need for and the reasonableness of the proposed rule.³¹ The SONAR explains why the agency believes a rule is needed on a particular subject. It also explains why the rule the agency has proposed is a reasonable way to meet that need. Usually, each rule part and subpart is separately justified, and alternative solutions that were considered and rejected are discussed. The SONAR summarizes the factual and policy basis for the rule. A general description of the statute being implemented or restating the proposed rule is not sufficient. It also must show citations to statutes, case law, and economic, scientific, or other manuals or books that the agency relies on or will use at the hearing; a list of witnesses; and a summary of the witnesses' testimony.

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

In addition to demonstrating the general need for and reasonableness of the rule, the agency must include certain specific information, based on its regulatory analysis.³² To the extent the agency, through reasonable effort, can ascertain this information, the agency must address the following factors:

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

²⁹ *Id.* § 14.131; *see also id.* § 14.23 (“[T]he agency shall prepare a statement of need and reasonableness, which must be available to the public.”).

³⁰ *Id.* § 14.131; *see* Minn. R. 1400.2070 (2013).

³¹ Minn. R. 1400.2070 (2013).

³² *Id.*, subp. 2.

regulations.³³

The agency must also describe the agency's efforts to provide additional notification to persons who might be affected by the proposed rules.³⁴

17.3.2(1) Classes of Persons Affected By Proposed Rule

This analysis requires that the agency describe the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule. The agency should have initially identified the types of groups and individuals likely to be affected in the request for comment.³⁵ By the time the SONAR is completed, however, and during the course of the rule development, the agency might have identified other entities or individuals as affected parties. The agency brings the list of groups and individuals up to date in the SONAR under this analysis.³⁶

17.3.2(2) Probable Costs to Agencies

The agency must discuss probable costs. This three-prong analysis must describe 1) the cost to the agency proposing the rule, 2) the cost to other state agencies, and 3) whether the proposed rules will have any effect on state revenues. Often, when an agency implements a new program there are start-up costs. If an agency is only amending a set of existing rules, however, there might not be additional costs to the agency. Or the costs to the agency might be reduced because a program's operating procedures have been streamlined. Such fiscal effects are described in the SONAR.³⁷

17.3.2(3) Less Costly or Less Intrusive Methods

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

Often an agency will choose a particular method because it is more cost-effective or less intrusive, either to the agency or to the regulated parties. An agency may also choose, however, not to adopt the least costly method if it will not achieve the best results. By discussing the agency's thought process in the SONAR, the agency will inform the public why an agency chose the particular method that it did.³⁸

³³ Minn. Stat. § 14.131 (2014).

³⁴ *Id.* § 14.22, subd. 1; *see also id.* § 14.23 (requiring agencies to also describe agency efforts to provide such additional notification).

³⁵ *Id.* § 14.101, subd. 1.

³⁶ *Id.* § 14.131(1).

³⁷ *Id.* (2).

³⁸ *Id.* (3).

17.3.2(4) Alternative Methods Seriously Considered

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

There are several reasons why an agency might reject an alternative, such as cost or the administrative burden that might be placed on an agency or the regulated parties. By reading the agency's analysis, the public will be able to see the agency's rationale for rejecting an alternative. In addition, the analysis will be valuable for future amendments to the rule. The SONAR will serve as a written history of options and alternatives discussed and the disposition of those alternatives.³⁹

17.3.2(5) The Probable Costs of Complying With the Proposed Rule

This analysis discusses the cost of the proposed rule on the regulated parties. For example, new costs may be imposed for continuing education requirements for licensed professionals or for new filing requirements. This section might also inform regulated persons that there will be no new costs associated with the rule. In fact, if the agency has streamlined the rules or required fewer documents that need to be filed with an agency, there might be a reduction in costs. The agency's analysis will inform the regulated persons of the impact of the costs, so that they can respond with specificity to the proposed rules. Agencies are also required to estimate the portion of the total costs and consequences that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.⁴⁰

17.3.2(6) Costs of Not Adopting the Proposed Rule

Agencies are also required to estimate the probable costs or consequences of *not* adopting the rule, including the portion of the total costs that will be borne by identifiable categories of affected parties. Examples of affected parties are separate classes of governmental units, businesses, or individuals.⁴¹

17.3.2(7) Differences From Federal Regulations

An assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference must

³⁹ *Id.* (4).

⁴⁰ *Id.* (5), (6).

⁴¹ *Id.*

be discussed under this factor. At times, an agency will implement a federal program where the federal government already has regulations in place. The state will adopt the federal regulation with some modifications that are needed to comply with state law. If there are such differences, the agency must explain those differences in this analysis.⁴²

17.3.2(8) Cumulative Effect With Federal and State Regulations

An agency must assess in its SONAR the cumulative effect of the proposed rule with other federal and state regulations related to the rule's specific purpose.⁴³ "Cumulative effect" means the impact that results from the incremental impact of the proposed rule in addition to other rules, regardless of what state or federal agency has opted the other rules. Cumulative effects can result from individually minor but collectively significant rules adopted over a period of time.

17.3.2(9) Performance-Based Rules

Agencies must describe in the SONAR how the agency considered and implemented the legislative policy supporting performance-based regulatory systems in their rules development.⁴⁴ The legislative policy requires that agencies develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives. They must also consider maximum flexibility for the regulated party and the agency in meeting the agency's goals.⁴⁵

17.3.2(10) Additional Notification

This provision requires the agency to explain its efforts to provide "additional notification."⁴⁶ This means that the agency must make an active effort during the rule development to identify persons or classes of persons who may be affected by the proposed rule and bring the rulemaking process to their attention. If the agency does not do this, it must explain why these efforts were not made. The agency identifies persons or classes of persons who might be affected by the proposed rule in the Request for Comments and again in the SONAR. Furthermore, the agency must also describe in the SONAR how it provided notice to those persons.

To elaborate, the agency can provide additional notice of the rulemaking at two different stages. The first opportunity is at the beginning of the rulemaking process when the agency publishes the Request for Comments in the *State Register*. In addition, the agency may also notify individuals and entities through separate mailings or electronic communications

⁴² *Id.* (7).

⁴³ *Id.* (8).

⁴⁴ *Id.* § 14.131.

⁴⁵ *Id.*; see also *id.* § 14.002; *In re Amendment to & Repeal of Rules of the Minn. Dep't of Emp't & Econ. Dev.*, OAH 80-1200-31264, 2014 WL 2156996, at *3 (Minn. Off. Admin. Hrgs. May 5, 2014) (ruling in favor of agency's rules as to form and legality; finding that "[t]o the extent possible, the proposed rules are expressed in terms of desired results instead of the specific means for achieving those results").

⁴⁶ Minn. Stat. § 14.131 (2014).

such as an email subscription service. Other avenues for getting notice out are publications in newsletters or newspapers, or other means of communication. Additional notice beyond publication of the Request for Comments in the *State Register* is optional by the agency at this stage.

When the agency, however, is ready to propose a set of rules by publication of the rules in the *State Register*, the agency must give notice of its intention to adopt rules to all persons on its rulemaking list.⁴⁷ Each agency may, at its own discretion, also contact persons not on its list who may be affected by the rule being proposed. The agency is also required to make reasonable efforts to notify persons or classes of persons who may be *significantly* affected by the rule being proposed by giving notice of its intention in newsletters, newspapers, or other publications, or through other means of communication.⁴⁸ Current practice often entails agencies using electronic subscription services that use email lists compiled specifically for the project in question.

Therefore, beyond publication of its notice of intent to adopt rules in the *State Register*, the agency is required to send notice to persons on the rulemaking list and to make reasonable efforts to notify affected persons through some other means of communication. Each agency is required to maintain a list of all persons who have registered with the agency for the purpose of receiving notice of rule proceedings.⁴⁹ The agency must mail these persons a notice of hearing or notice of intent to adopt rules at least 33 days before the end of the comment period or the start of the hearing.⁵⁰ The agency must also publish the notice in the *State Register* at least 30 days before the end of the comment period or the start of the hearing.⁵¹

An agency may ask the Office of Administrative Hearings (OAH) for prior approval of its plan for additional notice of planned rulemaking under section 14.101, or of its plan for additional notice of proposed rules under sections 14.131, 14.14, 14.22, and 14.23.⁵² The review and approval is optional by the agency. However, an approved notice plan at this stage is the OAH's final determination that the notice plan is adequate and avoids the possibility of being found defective at a later stage of the process.⁵³

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

⁴⁷ *Id.* § 14.14, subd. 1(a).

⁴⁸ *Id.* §§ 14.14, subd. 1(a), .22, subd. 1(a).

⁴⁹ *Id.* § 14.14, subd. 1(a).

⁵⁰ Minn. R. 1400.2080, subp. 6 (2013).

⁵¹ Minn. Stat. §§ 14.14, subd. 1(a), .22 (2014).

⁵² Minn. R. 1400.2060, subp. 1 (2013).

⁵³ *Id.*, subp. 4.

granting the rulemaking authority.

17.3.2(11) Fiscal Impact on Local Government

An agency must also consult with the commissioner of management and budget to help evaluate the fiscal impact and fiscal benefits of the proposed rules on units of local government.⁵⁴

17.3.2(12) Mailing to the Legislative Reference Library

The agency must send a copy of the SONAR to the Legislative Reference Library when it mails the Notice of Hearing to persons on the agency's rulemaking list.⁵⁵

17.3.3 Agency-Specific information to Be Included in the Statement of Need and Reasonableness.

Individual agencies may have special requirements, such as the requirement to analyze the effect of pollution control agency rules on business, commerce, and municipalities.⁵⁶

17.3.3(1) The Effect of Pollution Control Agency Rules

The pollution control agency (PCA) has extensive and broad authority to adopt rules to regulate: air, noise, and water pollution; solid and hazardous waste storage, processing, and disposal; animal lots; and sewage sludge.⁵⁷ The PCA, however, must meet numerous requirements when proposing to adopt rules. The PCA must give due consideration to the operation of business, industry, traffic, and other economic and material factors affecting the feasibility and practicability of proposed action.⁵⁸ This includes consideration of the burden on a municipality of any tax that results from PCA action. All the provisions granting the PCA authority to adopt standards or rules addressing various pollutants also require that the PCA consider factors such as physical conditions, zoning, topography, wind direction, population, local transportation, and land use bear on the type of solution proposed.⁵⁹

In some cases, the PCA must evaluate different methods of achieving the goal. For example, the PCA is authorized to adopt rules for generators of hazardous waste and for the identification, labeling, classification, storage, treatment, transportation, and disposal of hazardous waste.⁶⁰ In this case, the legislature directed the PCA to consider particular methods of hazardous waste management:

In implementing its hazardous waste rules, the Pollution Control Agency shall

⁵⁴ Minn. Stat. § 14.131 (2014).

⁵⁵ *Id.*

⁵⁶ *Id.* § 116.07, subd. 6.

⁵⁷ *See, e.g., id.* § 116.07.

⁵⁸ *Id.*, subd. 6.

⁵⁹ *Id.*, subds. 1, 2.

⁶⁰ *See id.*, subd. 4(g).

give high priority to providing planning and technical assistance to hazardous waste generators. The agency shall assist generators in investigating the availability and feasibility of both interim and long-term hazardous waste management methods. The methods shall include waste reduction, waste separation, waste processing, resource recovery, and temporary storage.⁶¹

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

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

17.3.3(3) Rules that Affect Farming Operations

If an agency adopts or repeals rules that affect farming operations, the agency must provide a copy of the proposed rules to the commissioner of agriculture for review before publishing the rules in the *State Register*.⁶²

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

17.3.4 Other Required Documentation

As described below, agencies must make additional determinations during rulemaking. While these are not required additions to the SONAR, including them with the regulatory factors that must be included in the SONAR is good practice.⁶³

17.3.4(1) Cost of Complying Exceeds \$25,000

An agency is required to determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for businesses with fewer than 50 full-time employees or statutory or home rule charter cities with fewer than ten full-time employees. The agency must make this determination before the close of the record, and the ALJ must review and approve or disapprove the agency's determination.⁶⁴

17.3.4(2) Local Ordinance Implementation

Under Minnesota Statutes, section 14.128, an agency must determine whether a local government will have to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the record

⁶¹ *Id.*

⁶² *Id.* § 14.111.

⁶³ D. ORREN & P. WINGET, MINNESOTA RULEMAKING MANUAL, ch. 4, Developing the Statement of Need and Reasonableness (2014).

⁶⁴ Minn. Stat. § 14.127, subd. 2 (2014).

or before the agency submits the record to the administrative law judge if there is no hearing. The administrative law judge must review and approve or disapprove the agency's determination. The statute defines "local government" as "a town, county, or home rule charter or statutory city."⁶⁵

If the agency determines that the proposed rule requires the local government to adopt or amend an ordinance or other regulation, or if the administrative law judge disapproves the agency's determination that the rule does not have this effect, the rule's effective date is delayed. The rule will not take effect until either "(1) the next July 1 or January 1 after notice of final adoption is published in the State Register; or (2) a later date provided by law or specified in the proposed rule."⁶⁶

The statute, however, contains exceptions. First, the delay does not apply to a rule adopted under section 14.388 (exempt rules), 14.389 (expedited rules), or 14.3895 (obsolete rules) or under any other law specifying that the rulemaking procedures of chapter 14 do not apply. It likewise does not apply if the agency has been directed by law to adopt the rule or to commence the rulemaking process. It does not apply if the ALJ approves an agency's determination that the rule has been proposed because of a specific federal statutory or regulatory mandate that requires the rule to take effect before the deferred date. Nor does the delay apply if the governor waives it.⁶⁷

17.3.5 Fees

Agencies do not possess the authority to set fees through rule. They may only be set or increased by the legislature. A "fee" is defined as "any charge for goods, services, regulation, or licensure, and ... includes charges for admission to or for use of public facilities owned by the state."⁶⁸ The definition contains an exception for "charges for goods or services provided for the direct and primary use of a private individual, business, or other entity."⁶⁹ Agencies may reduce fees set by rule before July 1, 2001 without legislative approval or rulemaking.⁷⁰

17.4 Review of Rules by the Governor

The Governor has the authority to veto a rule adopted by an agency by submitting a notice of the veto to the *State Register* for publication within 14 days of receiving a copy of the adopted rule.⁷¹ Recognizing that review at the end of the rulemaking process could be a waste of resources, the Governor established procedures that provide for communication throughout the process, and, in particular, a review early in the process.⁷² The procedure requires agencies to submit proposed rules, the SONAR, and an executive summary to the Governor's office for

⁶⁵ *Id.* § 14.128, subd. 1.

⁶⁶ *Id.*, subd. 2.

⁶⁷ *Id.*, subd. 3.

⁶⁸ *Id.* § 16A.1283(a).

⁶⁹ *Id.* (b)(3).

⁷⁰ *Id.* (c).

⁷¹ Minn. Stat. § 14.05, subd. 6 (2014).

⁷² D. Orren & P. Winget, *Minnesota Rulemaking Manual*, App., GOV-PLCY (2014).

review and approval before publishing a notice of intent to adopt rules. The procedure calls for agencies to identify any potential controversies about adoption of the rules. The Governor's office attempts to complete its review within three weeks. If the Governor disapproves the rule, the agency may not continue. If approved, the agency advances to the rulemaking process' next stage.