# Chapter 6 - Giving Dual Notice

## Introduction

Once the rules and SONAR have been drafted, you must decide how to proceed with your rulemaking. You have three choices:

1. Publish a Notice of Hearing
2. Publish a Notice of Intent to Adopt Rules Without a Public Hearing
3. Publish a Dual Notice, where you publish a hearing date but state that you will cancel the hearing and adopt the rules without a hearing if fewer than 25 people request a hearing.

When deciding how to proceed, you should consider several factors. If the rules are controversial and 25 or more people are likely to request a hearing, you will most likely give a Notice of Hearing (Chapter 7). If there is near universal agreement with the rules by affected parties, you might consider giving a Notice of Intent to Adopt Rules Without a Public Hearing (this chapter). If you really cannot predict whether there will be more or fewer than 25 people requesting a hearing, you might want to go with a Dual Notice (Chapter 6).

In some cases, the issues surrounding the rules are so controversial or so political that the agency will decide to give Notice of Hearing regardless of whether it thinks 25 people will request a hearing.

This chapter explains how to start the formal rule-adoption process using a **Dual Notice**. It is a good idea to review this entire chapter before proceeding. At the end of this chapter is a checklist so you can easily note when you have completed each of the required steps for giving a Dual Notice.

## 6.1 Considerations

### 6.1.1 Rules and SONAR must be done

Before you start this chapter, you should be finished developing your rules and writing your SONAR. Chapters 3 and 4 describe rule and SONAR development.

### 6.1.2 Leave plenty of time to complete steps

**Everything will take longer than you think it will.** Be sure to prepare the paperwork for each step well ahead of the day that it needs to be signed or approved. Some things take time, such as getting signatures for various approvals and getting Revisor’s drafts of the rules. People are not always available on a Tuesday morning to sign documents so that you can meet the *State Register’*s deadline.

### 6.1.3 Cannot propose rules until *at least* 60 days after Request for Comments is published

An agency may not publish a Notice of Intent to Adopt or a Notice of Hearing until at least 60 days after it has published a Request for Comments (see Chapter 2).[[1]](#footnote-1)

### 6.1.4 Rulemaking authority expires 18 months after the effective date of the law authorizing the rules

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 the rules or the rulemaking authority expires.[[2]](#footnote-2) This applies to first-time rule adoptions under the statutory authority and not to subsequent amendments or repeals.

### 6.1.5 If proposed rules affect farming operations

There are two statutory requirements for an agency when it proposes rules that affect farming operations.

* “Before an agency adopts or repeals rules that affect farming operations, the agency must provide a copy of the proposed rule change to the commissioner of agriculture, no later than 30 days prior to publication of the proposed rule in the *State Register*.”[[3]](#footnote-3)
* “When a public hearing is conducted on a proposed rule that affects farming operations, at least one public hearing must be conducted in an agricultural area of the state.”[[4]](#footnote-4)

Everybody is affected by everything to some degree, so where do you draw the line when determining whether farming operations will be affected by your rules? Common sense says that the rules would have to *significantly* affect farming operations to trigger the extra notice and hearing requirements. The requirements related to giving Dual Notice are consistent with this position in that the Notice must be given to persons or classes of persons who may be *significantly* affected.

Even this guidance will not solve the problem if you have a close question about your rules significantly affecting farming operations. If you play it safe and proceed as if your rules triggered the statutory requirements, you would, by virtue of this, guarantee an extra 30 days in the adoption process and extra hearing expenses for holding at least one hearing in an agricultural area. If, on the other hand, you determine that your rules have a small, but insignificant, effect on farming operations and therefore do not trigger the statutory requirements, you risk that your rules will be disapproved at the end of the process and that you will have to start over at the beginning of the formal rulemaking process.

In one of the few rulemakings to address this issue since this requirement was enacted, the ALJ determined that the rules did not affect farming operations. (Water and Wastewater Operators Certification Rules, Chapter 9400, adopted jointly by the Minnesota Department of Health and the Minnesota Pollution Control Agency in 1996.) The ALJ based this decision on the fact that the rules were not specifically designed to affect farming operations and that while an impact might occur, it would be no more than the impact to the community in general. A further basis for the decision was that no regulatory controls were directed at or triggered by farming operations as such.

There is no formal OAH procedure to request prior approval of an assertion that rules do not affect farming operations like there is with seeking prior approval of an Additional Notice Plan. Until the Legislature acts or until precedent is established for interpreting this statute, use your best judgment in asserting whether your rules affect farming operations.

If Minnesota Statutes, section 14.111, applies to your rules and you notify the Commissioner of Agriculture, send a copy to Doug Spanier, Department Counsel for Agriculture.

### 6.1.6 Counting time

The APA has many time-related provisions. When counting time, the day that an action occurs—such as mailing a notice—does not count and the last day counts.[[5]](#footnote-5)

**Calendar day.** A period is counted in calendar days unless it is specifically stated in statute or rule that the period will be counted in “working days.” Calendar days include Saturdays, Sundays, and state holidays. However, if the period ends on a Saturday, Sunday, or state holiday, the period is extended to end on the next day that is not a Saturday, Sunday, or state holiday.

Example: For a seven-day period, a period starting on a Monday ends the next Monday. If that Monday were a state holiday,[[6]](#footnote-6) the period would end on Tuesday.

**Working day**. Working days do not include Saturdays, Sundays, and State holidays.

Example: For a seven-day period, a period starting on a Monday would end the next Wednesday. If a state holiday falls within the seven-day period, the period would be extended and end on Thursday.

## 6.2 Get Agency Approval to Give Notice

How you get approval within your agency is as individual as your agency. It is a good idea to circulate draft documents to those who might edit them well in advance so the only last-minute edits will be typos or spelling errors. Your agency might use a memo that contains a brief description of the rules and details any controversial issues or policy decisions. Some agencies have formal routing processes and sign-off sheets to document approval by all persons in the chain of command. Other agencies are satisfied by verbal briefings followed by the commissioner signing the Notice of Intent to Adopt Rules Without a Public Hearing.

In some agencies, it is standard practice for the agency’s Assistant Attorney General (AG) to review and sign off on all rule projects. An agency that is a multimember board must follow board procedures, which usually means passing a formal resolution authorizing the Notice and authorizing a person to sign the Notice. A form for such a board resolution is in the appendix as **BD-NTC**.

## 6.3 Get Governor’s Office Approval to Give Notice; Consult with MMB

The Governor’s Office administrative rule review policy, **GOV-PLCY**, states:

**PROPOSED RULE AND SONAR FORM**

After the agency has published its Request for Comment, created the SONAR, and has final or almost final draft rules, it should complete the Proposed Rule and SONAR Form and the Commissioner or Director sign it. The agency must then submit the completed form, SONAR, and draft rules to the Governor’s Office.

This stage is crucial to rulemaking and is the critical point of information for the Governor’s Office. The Proposed Rule and SONAR Form seeks the information received during the Request for Comment, an Executive Summary of the SONAR, supporters, opponents, possible controversies, and any significant changes from the Preliminary Proposal Form. The form also contains an ‘other’ box. The Governor’s Office understands that every rulemaking experience is slightly different. Therefore, the “other” box seeks information that might not fit into the SONAR or one of the other boxes of information requested. The ‘other’ box can be viewed as ‘any information that may be of importance to this rule.’

The Proposed Rule and SONAR Form again seeks fiscal impact information. However, at this point, only two options (yes or no) exist. The fiscal impact ‘yes’ box should be checked for positive or negative fiscal impact to the state of Minnesota. If the fiscal impact declaration changed from the Preliminary Proposal Form, the agency should explain why. Within the SONAR Executive Summary box, the agency should include all fiscal information that affects individuals, businesses, units of government, or the agency itself.

**NOTICE OF INTENT TO ADOPT PROPOSED RULES**

The agency must receive official approval from the Legislative Coordinator of LACA before proceeding with the Notice of Intent to Adopt Proposed Rules. In most cases, the agency will receive the approval to proceed with the Notice of Intent to Adopt Proposed Rules within three weeks of the Governor’s Office’s receiving the SONAR, draft rules, and Proposed Rules and SONAR Form. If the agency hasn’t received a communication by the 21st day after the Governor’s Office received this information, the agency should contact the Legislative Coordinator for a status report.

The agency’s Policy Advisor will communicate any questions, comments, or concerns about the content of the proposed rule to the agency.

The agency may proceed with the Notice of Intent to Adopt Rules after the Policy Advisor has approved the proposed rule and only after the Legislative Coordinator has communicated approval to the agency.

The Governor’s Office has been reliably timely at doing its review within its self-imposed three-week deadline. Nevertheless, this review might take additional time depending on the scope and nature of the rules.If you have any time constraints on your rules, you should inform the Governor’s Office to help ensure that your rules will be reviewed within the time that you need them.

This is also the time for the agency to consult with MMB to help evaluate the fiscal impact and benefits of proposed rules on local governments. Send a copy of the Governor’s Office form, draft SONAR, and draft rules to the Executive Budget Officer (EBO) for your agency to initiate the consultation with MMB. A form for a letter to your EBO is in the appendix as **MMB-LTR**.You do not need to wait for MMB’s response to move forward with giving notice.

## 6.4 Get Revisor’s Draft Approved for Publication

Before the agency may publish the rules and the Notice of Intent to Adopt Rules Without a Public Hearing, the rules must be in the Revisor’s format with a Revisor’s certificate stating that the rules are approved as to form. *See section 3.3.1 for details on obtaining a preliminary Revisor’s draft.*

When your rules are ready to propose, provide the Revisor with any final changes and ask for “a draft approved for publication.” Unless the Revisor is busy with the Legislative Session or other projects, a Revisor’s draft approved for publication can usually be produced fairly quickly if there are not too many changes from your preliminary draft. Contact your Revisor to see how long it will take.

## 6.5 Set a Tentative Hearing Date and Location; Contact OAH

In most cases, it is best to find a hearing date **and time** that is compatible with all necessary agency personnel (including your AG, if applicable) before you contact OAH to request an ALJ. Additionally, you will want to determine how you will hold your hearing (such as, in a specific location, virtually through WebEx or other online platform, or via videoconferencing). If more than one day is needed for the hearing, schedule accordingly. If you plan to accommodate people outside of regular business hours, you must plan accordingly for this too and disclose that fact when requesting an ALJ.

**Note:** Each judge has their own preferences for hearings. It is best practice to communicate regularly with OAH Administrative Rule and Applications Specialist, William Moore, at William.T.Moore@state.mn.us or (651) 361-7893 to work out the details for the hearing.

### 6.5.1 Choose a hearing date

Consider the following factors in choosing a hearing date:

* **30-day comment period.** The Dual Notice must be published at least 30 days before the end of the comment period. Also see section 6.5.2 about possibly building in more time to the prehearing comment period. You might wish to allow for focused comments and their possible resolution or, if your agency is a board, to have a meeting to approve changes.
* **10 additional days after the end of the comment period.** If a hearing is required, there must be at least 10 calendar days between the last day for requesting a hearing and the day of the hearing.[[7]](#footnote-7)
* **OAH review time.** Before you publish your Dual Notice, you must request to schedule a hearing and submit the Notice, the rules, and the SONAR to the ALJ for review. The ALJ has five working days to review and approve or disapprove.[[8]](#footnote-8) You should also submit your Additional Notice Plan for review and approval at this time.[[9]](#footnote-9) If you submit your Notice and your Additional Notice Plan at the same time, the ALJ will do the review concurrently.
* **Rules affecting farming operations.** If your rules affect farming operations, you must provide a copy of the proposed rule change to the commissioner of agriculture at least 30 days before you publish the Notice in the *State Register.*[[10]](#footnote-10)
* ***State Register* lead time.** The *State Register* publishes on Mondays. The submission deadline is noon on the Tuesday before publication (except when the deadline is changed by a holiday). **For rules that are long (more than 20 pages) or complex (include tables, charts, pictures, etc.) contact the editor to negotiate a deadline.**
* **Availability of key agency personnel/clear your calendar.** Check with the key agency personnel who should be at the hearing to find out which dates they have available for the hearing. In most cases, key agency personnel include staff who have taken an important role in developing the rules, managers and decision-makers who have made and will make policy decisions on the rules, and your agency’s AG (if you are using your agency’s AG on the rulemaking).

When you check with key agency personnel about their availability for the hearing, you might want to schedule a prehearing “dress rehearsal.” You should also schedule a meeting with them for immediately after the hearing to discuss issues raised at the hearing. Ask them to leave enough time open in their schedules for other meetings at important times during the posthearing comment and rebuttal periods. It is a good idea to clear as much of your calendar as possible for the length of the comment and rebuttal periods after the hearing. It takes more time than you can imagine to review comments and prepare the agency’s response.

* **Several possible hearing dates.** If you find several dates that would work for the hearing, defer to the ALJ for choosing a date.
* **Give yourself enough time.** If you are done and ready to go with everything (rules approved by Revisor, SONAR done, and all agency and Governor’s Office approvals obtained), then only consider the factors listed above in setting your hearing date. If you don’t yet have an approved Revisor’s rules draft or your SONAR is not yet finished or the rules are still circulating for review and approval within your agency or at the Governor’s Office, then leave enough time for these things to be completed. There are usually several people at each agency and at the Governor’s Office who must approve going forward with proposed rules. **Be aware that the last steps of finalizing the rules and SONAR can be excruciatingly slow.**

### 6.5.2 Prehearing comment period

You might want to build more time into the prehearing comment period to obtain focused comments and analyze issues that have emerged so you can prepare to address or resolve them at the hearing. You may come to the hearing with modifications to the rules in response to prehearing comments that will resolve or diffuse controversy.

If your agency is a multimember board, you might need to build in time for a board meeting between the end of the 30-day comment period and the hearing to consider comments and approve any needed changes to rules. An optional worksheet for boards to keep track of the dates involved appears in the Appendix as **BD-WKSHEET.**

### 6.5.3 Arrange for a location; consider holding the hearing via videoconference or virtually

Just about any location is okay for the hearing if it is large enough for the number of people likely to attend the hearing and if it is accessible to people with disabilities. A board room or meeting room at your agency would be okay if it is large enough. If your rules affect farming operations and if you have a public hearing in a physical location, remember that at least one hearing must be in an agricultural area of the state (see section 6.2.6 of this chapter). Also, be aware of any hearing location requirements that might be specific to your rules or your agency.

If your rules affect persons from around the state, you might consider making your hearing available via videoconference or holding a virtual hearing.

A **videoconference hearing** typically refers to a hearing that is held in multiple physical location. Attendees can see and hear each of the locations and participate as needed.

A **virtual hearing** refers to a hearing held entirely through an online platform, such as WebEx, Teams, or Zoom. There is no physical location for a virtual hearing.

Holding virtual hearings has become the preferred method for OAH (when in doubt, check with your ALJ). WebEx or Teams are the preferred platforms. Please note that WebEx requires a license and someone who is familiar with operating the software.

### 6.5.4 Contact OAH

Each judge has their own preferences for hearings. It is best practice to communicate regularly with OAH Administrative Rule and Applications Specialist, William Moore, at William.T.Moore@state.mn.us or (651) 361-7893 to work out the details for the hearing, including choosing the date and location.

If you are holding a virtual hearing, you may also want to schedule a hearing “run through” with the ALJ through whatever platform you intend to use during the hearing. That way, you have it scheduled should you hold a hearing.

## 6.6 Draft the Dual Notice

A Dual Notice must contain the information in Minnesota Rules, part 1400.2080, subparts 2, 3, and 4. A form for the Dual Notice is in the appendix as **NTC-DL**. **NTC-DL** is designed to be a checklist for meeting the requirements of part 1400.2080. If your hearing will be virtual, you must include the meeting details in your Notice. The ALJ may also request that you provide this information on your rulemaking website and include the website in your Notice.

Example of how one agency provided WebEx details for their virtual hearing in the Dual Notice:

**Notice of Hearing.** If 25 or more persons submit valid written requests for a public hearing on the rules, the Board will hold a hearing following the procedures in *Minnesota Statutes*, sections 14.131 to 14.20. The Board will hold the hearing on Thursday, February 2, 2023, starting at 9:30 a.m. The hearing will continue until all interested persons have been heard. Administrative Law Judge Barbara J. Case is assigned to conduct the hearing. Judge Case’s Legal Assistant William Moore can be reached at the Office of Administrative Hearings, 600 North Robert Street, P.O. Box 64620, Saint Paul, Minnesota 55164-0620, telephone 651-361-7900 and fax 651-539-0310 or william.t.moore@state.mn.us.

For a video and audio connection, join the hearing through an internet connection, such as with a computer or tablet:

Enter *https://minnesota.webex.com*

Meeting number (access code): 2490 892 3819

Password: PELSB

For audio connection only, join the hearing by phone:
Call: 1-415-655-0003 (US Toll)

Access code: 2490 892 3819

### 6.6.1 Collecting comments

OAH collects public comments on its [eComments website (https://minnesotaoah.granicusideas.com)](eComments%20website%20%28https%3A//minnesotaoah.granicusideas.com%29), as well as through U.S. Mail, eFiling, personal delivery, or fax. Public instructions for making comments can be found at <https://mn.gov/oah/forms-and-filing/ecomments/>. For additional details on setting up your public eComments site, see section 1.7.2 and **OAH-INF**.

### 6.6.2 “Substantially different” rules

The description of the rules in the Notice might affect whether postcomment modifications to the rules will make the adopted rules “substantially different” from the proposed rules.

Minnesota Statutes, section 14.05, subdivision 2, specifies the scope of the matter announced in the Notice, logical outgrowth, and fair warning as factors to be considered when determining whether the adopted rules are substantially different from the proposed rules. For example, suppose you have two substantially different alternative rule provisions or rules that set a numerical value (such as pollution discharge levels, noise levels, minimum number of employees to trigger a requirement, or utility rates). You might be able to draft the description of the rules in the Notice in a way that will allow the agency to adopt either alternative or adopt a value within a range without having to go through additional rule proceedings to adopt substantially different rules. The point is to provide sufficient notice and fair warning to the public about the potential scope of the proposed rules.

To adopt rules that are substantially different from the proposed rules, you must go through additional rule proceedings.[[11]](#footnote-11)

### 6.6.3 Timing the signatures

Before publication, the Dual Notice must be signed and dated, but this cannot be done until after the Chief ALJ assigns an ALJ and the ALJ approves the Notice and the hearing date.

## 6.7 Develop an Additional Notice Plan

### 6.7.1 Develop an Additional Notice Plan

The agency is required to “make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule by giving notice of its intention in newsletters, newspapers, or other publications, or through other means of communication.” Minnesota Statutes, section 14.23, requires that the SONAR contain a description of “the agency’s efforts to provide additional notification . . . or must explain why these efforts were not made.” In other words, the agency must develop and implement what is called an Additional Notice Plan to reach significantly affected people and then include a description of this Additional Notice Plan in its SONAR.

There are many ways for an agency to develop an Additional Notice Plan. One way is to work with agency staff who are working on the rules or who will work with regulated parties after the rules are adopted to (1) identify people or classes of people who might be significantly affected by the proposed rules, (2) select ways (in addition to publishing in the *State Register* and mailing to people on the agency’s rulemaking mailing list) designed to reach these people or classes of people, and (3) write down your decisions and the rationale for them.

You should be creative in developing your plan to reach potentially affected people. If this is a small group of people, perhaps mailing individual letters would be effective. If this is a large group of people where an individual mailing is too expensive or cumbersome, then a reasonable plan could be to mail the Notice and rules to people who have inquired, shown an interest, or commented on the rules and to send a postcard to the rest directing them to the website where the information may be found. Make sure your plan encompasses people who would be in favor of your rules and people who would be opposed to the rules. Also, your plan could include notice to trade or professional associations representing potentially affected people, with a request to have the notice or a summary published in their newsletters.

In some cases, your plan could include press releases to general circulation newspapers or to broadcast media. Agencies also use online resources, including special email lists and their public websites, and some develop issue-specific sites for a rulemaking.

There are undoubtedly other reasonable ways to reach potentially affected people. When deciding what is reasonable, consider the cost and effort of what you might do and the likelihood that you will reach the intended people. Finally, if your rules will potentially affect people who do not traditionally interact with government, make an extra effort to reach them.

Section 6.13 discusses giving notice per your Additional Notice Plan and documenting your efforts.

### 6.7.2 OAH prior approval of Additional Notice Plan

An agency may ask OAH for prior approval of its Additional Notice Plan.[[12]](#footnote-12) It’s best practice and strongly recommended to seek prior approval of your Additional Notice Plan, although this is optional, not mandatory. An approved Additional Notice Plan is OAH’s final determination that the Additional Notice Plan is adequate, which means that prior approval protects you from a challenge to your Additional Notice Plan at the end of the rulemaking process when it would be difficult to correct a problem without starting over.

Further, OAH review of your Additional Notice Plan helps ensure that the agency makes reasonable efforts to give adequate and timely notice of the rules to people who may be significantly affected by them. See section 6.8.3 for instructions on requesting prior approval of your Additional Notice Plan.

## 6.8 Contact OAH

### 6.8.1 Obtain an ALJ assignment

After finding one or more workable dates for the hearing, prepare almost finished drafts of the Dual Notice (section 6.6) and cover letter to OAH (section 6.8.3). Then, obtain an OAH Docket Number and ALJ assignment (section 1.7.1), unless you already obtained these before eFiling your Request for Comments for posting on eComments, and schedule your hearing. When the ALJ is assigned, follow OAH’s directions.

**Note:** You may also obtain an OAH Docket Number and ALJ assignment without filing anything for OAH review such as a Request for Comments or Additional Notice Plan. Some agencies find it helpful to get an assigned ALJ and Docket Number so they can put this information on all the rule-related documents and forms.

### 6.8.2 Set up eComments

If you are using OAH eComments to collect comments at this phase, you must set up your public eComments site. Contact OAH Administrative Rule and Applications Specialist, William Moore, at William.T.Moore@state.mn.us or (651) 361-7893 at least a week before you publish your notice in the *State Register* or eFile your notice and provide the following information:

1. OAH docket number, if already assigned.
2. The dates that the comment period will open and close.
3. A link to the agency’s rulemaking webpage, if applicable. OAH will add a link to the agency’s rulemaking webpage on the eComments site.
4. If applicable, the date that the Notice will appear in the *State Register*.
5. Optional: Finalized, accessible copies of the documents you want to appear on the OAH eComments webpage, if any. These might include the Notice, proposed rules, SONAR, etc. See the [Office of Accessibility (https://mn.gov/mnit/about-mnit/accessibility/)](https://mn.gov/mnit/about-mnit/accessibility/) for more information on making documents accessible.

### 6.8.3 Letter to OAH

A form for the cover letter to the Chief ALJ requesting a hearing and submitting the necessary documents for review is in the appendix as **HR-RQST**. This letter is designed to serve as a checklist for meeting the requirements of parts 1400.2020 and 1400.2080 to request a hearing. The letter can also be used to request prior approval of your Additional Notice Plan under part 1400.2060.

A request to schedule a rule hearing must be accompanied by:

1. the proposed Dual Notice;
2. a copy of the proposed rules approved as to form by the Revisor;
3. a draft or final copy of the SONAR;[[13]](#footnote-13) and
4. if requesting prior approval of your Additional Notice Plan, an explanation of why the agency believes that its Additional Notice Plan complies with Minnesota Statutes, sections 14.101 and 14.14, subdivision 1a—that is, why its Additional Notice Plan constitutes reasonable efforts to notify persons or classes of people who might be significantly affected by the rules.

Submitting these documents also serves as the agency’s request for ALJ approval of the Notice before mailing it or publishing it in the *State Register*. In addition to reviewing the Notice, the ALJ must advise the agency as to when and where the hearing should be held to allow for participation by all affected interests. The ALJ has five working days to review and either approve the Notice or advise the agency how the Notice must be revised.

### 6.8.4 Omitting full text of the proposed rules from publication

The Chief ALJ may authorize an agency to omit the full text of the rules from the published Notice if the publication would be unduly cumbersome, expensive, or otherwise inexpedient.[[14]](#footnote-14)

A best practice is to write a letter to the Chief ALJ explaining how your circumstances meet the three criteria listed in the statute and request permission to omit the full text. You should include this letter when you submit to OAH your Additional Notice Plan for prior approval.

### 6.8.5 eFiling rule-related documents

OAH requests that agencies eFile all rule-related documents wherever possible. OAH has posted step-by-step instructions for creating an account and filing your documents on its website at [OAH Forms & Filing (https://mn.gov/oah/forms-and-filing/efiling/)](https://mn.gov/oah/forms-and-filing/efiling/). (The page also includes a link to frequently asked questions.) **See section 1.7 for explicit instructions.**

Always check to make sure that the system has uploaded your documents. Saving a screenshot or printing the window showing a file has uploaded is prudent. In addition, save any correspondence or documents that you receive from OAH for your own records because those items might not remain in your eFile folder.

## 6.9 Finalize the Dual Notice

After the ALJ approves your hearing date and Dual Notice, you need to finalize the Notice. Enter the name of the ALJ, make any changes required by the ALJ, and then print the Notice if you’ll be mailing it.

The Notice must be signed and dated by the person authorized to give the notice, which is usually a commissioner, board chair, or a designee.

**Note:** An image of the signature does not need to appear in the publication in the *State Register*; the typed name of the authorized person is sufficient.

## 6.10 Email the SONAR to the Legislative Reference Library

When an agency sends the Dual Notice, the agency must send a copy of the SONAR to the Legislative Reference Library.[[15]](#footnote-15) The library requests that all agencies email SONARs to sonars@lrl.leg.mn. The SONAR need not be signed, but a signature is a good idea to show that it is official. The agency should send an email, attaching a cover letter to the Legislative Reference Library (form **LRL** in the appendix) and the SONAR (preferably in PDF). You should keep a copy of your cover letter or complete a certificate documenting compliance with this requirement(form **CRT-LRL** in the appendix).

**Note:** The date on the certificate and cover letter should be the same as or earlier than the date you send the Dual Notice.

Why send a cover letter with your email transmission? According to the library, it keeps cover letters because they provide useful information that could answer future questions about your project. Forms for the cover letter and certificate are in the appendix as **LRL** and **CRT-LRL**. If you have questions for the LRL, you may contact Chris Steller at (651) 296-0586.

## 6.11 Publish the Notice in the *State Register*

The Dual Notice and the full text of the proposed rules must be published *at least 30 days* before the end of the comment period unless the Chief ALJ has authorized omitting the full text. (See **ST-REG** in the appendix for information on how to publish in the *State Register* and “Production Schedule” on the [Minnesota State Register website](https://mn.gov/admin/bookstore/register.jsp) for publication dates and deadlines.)

When you send your documents to the *State Register*, you must provide the *State Register* Editor with your Revisor’s ID number and a copy of the Revisor’s certified rule PDF. The editor will request the Revisor’s Office to transmit the approved rule text directly to the *State Register* electronically.

You must keep a copy of the Notice as published in the *State Register*, as this will later be submitted to OAH. **Note:** You do not need to submit the whole *State Register* edition to OAH; you can submit the cover page plus the pages on which your Notice appears.

## 6.12 Send the Notice

You must send your Notice through mail or email to everyone on your agency’s rulemaking mailing list **at least 33 days** before the comment period ends.[[16]](#footnote-16) However, there is no good reason to wait until three days before the publication date to begin work on sending the Notice, especially if you are mailing the Notice and not emailing it. There is no penalty for sending the Notice early. Email delivery can be accomplished using a subscription service such as GovDelivery.

**Note:** If you have a large mailing list or get frequent additions to your mailing list, make sure that you also mail to any people who have been added to your mailing list after you began work on your mailing and before the date of mailing.

You are not required to send a copy of your rules along with the Notice. If the rules are not included, the Notice must include an easily readable and understandable description of the nature and effect of the proposed rules and an announcement that a free copy of the proposed rules is available on request from the agency.[[17]](#footnote-17)

A Certificate of Accuracy of the Mailing List and a Certificate of Mailing must be completed and saved for submission to OAH. The date on the Certificate of Mailing should be the same as the date that the Notice was sent. Forms for the certificates are in the appendix as **CRT-LIST** and **CRT-MLNG**. If one person performs both actions, you can create a single certificate for that person that covers both actions.

## 6.13 Give Notice per your Additional Notice Plan

Give notice according to your Additional Notice Plan and document your efforts. For any mailed notice, whether using U.S. mail or email, complete a certificate of mailing and attach a copy of the notice and the mailing list. [**Note:** Traditionally, this Manual has advised you to attach mailing lists to your certificate. This remains good practice **as long as your mailing list contains public information.** If your email lists consist of subscribers to your web delivery system, you may wish to describe your subscribers more generally. See the note in section 1.8.4 for Data Practices considerations.]

Detail any efforts you made to develop your mailing list. For more traditional paper-based Notices, obtain copies of newsletters or newspapers in which a Notice is published. Obtain tapes or transcripts of announcements made on radio or television. Detail any efforts you made to get a Notice published or broadcast, especially if you made a Notice available and others did not publish or broadcast it. You can document what you have done by using the generic certificate form that is in the appendix as **CRT-GNRC**.

## 6.14 Give Notice to Legislators

An agency must notify certain legislators when it mails the Notice.[[18]](#footnote-18) The agency must send a copy of the Notice and SONAR to:

1. the chairs and ranking minority party members of policy and budget committees with jurisdiction over the subject matter of the proposed rules;
2. if it is within two years of the effective date of the law granting the authority, chief House and Senate authors of the rulemaking authority; and
3. the Legislative Coordinating Commission.

We recommend that you send a copy of the rules along with the Notice and SONAR. Forms for the cover letter and a certificate of compliance with this requirement are in the appendix as **LEG** and **CRT-LEG**.

**Note:** The statute says “send,” but does not specify the method. You may email your Notice to lcc@lcc.leg.mn (preferred address) or mail it to the Legislative Coordinating Commission, 72 State Office Building, 100 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul MN 55155.

## 6.15 Meet Any Other Applicable Statutory or Rule Requirements

Meet any other statutory or rule requirements that are specific to your agency or to the rulemaking. Document what you do to comply with any other statutory or rule requirements.

## 6.16 Keep Track of Comments

After the Notice has been sent, carefully track all written comments on the proposed rules. This is important for various reasons. The most important being that the agency needs to consider and respond to any policy issues raised. Other important reasons to keep track of the comments include:

* Comments must be filed (along with any agency responses) with OAH as part of the rulemaking record reviewed by the ALJ.[[19]](#footnote-19)
* All requests for a hearing must meet the requirements of Minnesota Statutes, section 14.25, subdivision 1, to be counted. The hearing request must (1) include the name and address of the hearing requester and the portion or portions of the rules to which the person objects, or (2) a statement that the person opposes the entire set of rules. The request must be received before the end of the comment period. Hearing requests are important for determining whether you must hold a hearing and for several notices that may need to be given to persons who request a hearing.
* If the proposed rules were not attached to the Notice as sent, the agency must give a free copy of the rules to any person who requests one.[[20]](#footnote-20)
* The agency must place people on the agency’s rulemaking mailing list when requested to do so.[[21]](#footnote-21)
* If a hearing is required, after the hearing and at the very end of the rulemaking process, the agency must notify people who have requested that the agency notify them on the date the rules are filed with the Secretary of State.[[22]](#footnote-22)
* If a hearing is not required, the agency must notify people who have requested that the agency notify them on the date the proposed rules are submitted to the Chief ALJ.[[23]](#footnote-23)

It is important to keep careful track of comments because policy issues and the various requests might be buried in a comment letter. The agency may wish to develop separate lists or procedures to carefully track the comments for each purpose. A **COMMENT-TRACKER** is in the appendix.

**Note:** There is no requirement to acknowledge receipt or provide an individual response to each commenter, but depending on the number of comments you receive, you may choose to do so.

## 6.17 Proceed According to the Number of Hearing Requests

**6.17.1 What constitutes a hearing request?**

Historically, each signature on a document requesting a hearing is considered one request. Therefore, one letter with 27 signatures is 27 hearing requests. Also, the APA contains nothing that limits valid requests to those that come from individuals within Minnesota. Requests might also come from other states or countries.

**6.17.2 Handling hearing requests**

There is no single or simple answer for how to handle hearing requests. For example, if well before the deadline, you receive 25 or more identical requests for a hearing that don’t meet the statutory requirements, ignoring them would probably not be a wise course of action. Notifying them that their requests are defective and why would give them an opportunity to file valid requests. It also supports the goals of public participation and transparency in the rulemaking process. Furthermore, it helps community members learn about the process.

If for another example, however, you receive more than 25 valid requests and various invalid ones, you could disregard the invalid ones without further communication, though you might choose to give the individuals notice that the hearing will be held anyway. You will have to develop a strategy as best you can on a case-by-case basis.

Although Minnesota Statutes, section 14.25, addresses the withdrawal of hearing requests, it is silent about a deadline for these withdrawals. It contains no time restrictions on when an agency may obtain hearing request withdrawals. Further, there is precedent for the withdrawal of hearing requests after the end of the 30-day comment period. In 1993, when the AG adopted rules governing rulemaking, the AG received more than 25 hearing requests. After the end of the 30-day comment period, the AG obtained enough hearing request withdrawals to be able to adopt its rules using the no-hearing process. The only time deadlines or considerations for obtaining hearing request withdrawals are those imposed by other rulemaking requirements or other factors. For example:

* Hearings must be canceled at least three days before the scheduled hearing.
* With a Notice of Intent to Adopt Rules Without a Public Hearing, the agency has 180 days from the end of the comment period to submit the rules to OAH for review.

### 6.17.3 If there are 25 or more hearing requests, prepare for the hearing

If 25 or more people request a hearing, the agency must hold the hearing (unless enough requests are withdrawn). If you must hold a hearing, see chapter 9. Other things you need to do include:

* Notify agency management, agency staff members involved in the rulemaking process, and the agency AG (if you are using your agency’s AG on the rulemaking) that the hearing will be held as scheduled.
* Call the ALJ and report that the agency received 25 or more hearing requests and will be proceeding with the hearing as scheduled.
* Confirm the hearing room (if held in physical location).
* Notify the people who requested a hearing. Do this ASAP. Under Minnesota Statutes, section 14.25, subdivision 1, the agency must publish a Notice of Hearing in the *State Register* (the Dual Notice serves this purpose) and must mail a Notice of Hearing to people who requested a hearing. You may use email for the requests that you receive that way. A form for mailing notice to these persons is in the appendix as **NTC-HR25**. A form for a certificate of mailing this notice is in the appendix as **CRT-HR25**.

**Note:** ASAP means as soon as possible after you know that there will be a hearing. If you are trying to get withdrawals of hearing requests, you won’t know whether you will have a hearing until you find out if you can get below 25 (or three days before the hearing, which is the last day that you can cancel the hearing).

### 6.17.4 If there are fewer than 25 hearing requests, cancel the hearing

If there are fewer than 25 hearing requests, you can proceed to adopt the rules without a hearing. Use chapter 8 for this.

When adopting rules without a hearing, you must meet the deadline imposed by Minnesota Statutes, section 14.26, subdivision 1, which requires that the rules must be submitted to OAH within 180 days of the end of the comment period or the rules are automatically withdrawn. Other things you need to do include:

* Notify agency management, agency staff members involved in the rulemaking process, and your agency’s AG (if you are using your agency’s AG on the rulemaking) that there were fewer than 25 hearing requests and that the hearing will be canceled.
* Contact OAH and report that the agency has canceled the hearing because there were fewer than 25 hearing requests. Follow this up with a letter to the ALJ. A form for this letter is in the appendix as **ALJ-CNCL**. Also, cancel the hearing “run through” with the ALJ if you had one scheduled. Note: per Minnesota Statutes, section 14.25, subdivision 2, “No public hearing may be canceled by an agency within three working days of the hearing.”
* Cancel the hearing room.
* All people who requested a hearing must be notified in writing if enough requests are withdrawn to reduce the number of requests below 25 and if the agency has taken any actions to obtain the withdrawals. Minnesota Statutes, section 14.25, subdivision 2, sets out the requirements for this Notice. A form for this Notice is in the appendix as **NTC-HRWD**. The form is designed to serve as a checklist for meeting the requirements of section 14.25, subdivision 2. A form for a certificate of mailing this Notice is in the appendix as **CRT-HRWD**.
* If there were hearing requests (but fewer than 25 and the agency has done nothing to obtain withdrawals), notify people who requested a hearing that the hearing has been canceled. Even though this is not specifically required by Minnesota Statutes, section 14.25, mailing a Notice of Cancellation to these people as soon as possible after the end of the comment period is good practice. A form for this notice is in the appendix as **NTC-CNCL**.

## Checklist for Chapter 6 – Giving Dual Notice

**Date Completed Item**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6 – Entire chapter reviewed before proceeding** - Decision made on how to proceed

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.1 – Considerations before proceeding
- 6.1.1 – Rules and SONAR done
- 6.1.2 – Allow time to complete steps
- 6.1.3 – 60 days after Request for Comments published
- 6.1.4 – With 18 months of new or revised rulemaking authority (if appliable)
- 6.1.5 – Consideration for rules affecting farming operations
- 6.1.6 – Counting time**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.2 – Agency approval to give Notice obtained**- If agency is a multi-member board, **BD-NTC** form used

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.3 – Governor’s Office approval obtained
 - GOV-PRPS** used

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.3 – Consult with MMB
 - MMB-LTR** used

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.4 – Revisor’s Draft Approved for Publication obtained (with certificate signed by the Revisor)**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.5 – Tentative hearing date and location set. OAH contacted.
- 6.5.1 – Hearing date chosen. Factors considered:** - **30-day comment period** (minimum)
 - **10 additional days after end of comment period**
 **- OAH review time** (5 working days)
 **- Rules affecting farming operations** (30 days additional notice and, if a public hearing, at least one in agricultural area – unless hearing is virtual)
 **- *State Register* deadlines
 - Availability of key agency personnel
 - Give yourself enough time
- 6.5.2 – Prehearing comment period considered
 -** Optional for boards – **BD-WKSHEET** used  **- 6.5.3 – Location arranged; videoconference or virtual considered**

**Checklist for Chapter 6 (Continued)**

**Date Completed Item**

**- 6.5.4 – OAH contacted**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.6 – Dual Notice drafted
- NTC-DL** form used
- **6.6.1 -** Using OAH’s eComments website to collect comments considered
- **6.6.2 -** “Substantially different” rules considered

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.7 – Additional Notice Plan developed**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.8 – OAH contacted
 - 6.8.1 – ALJ assigned
 - 6.8.2 – Set up eComments (if using)
 - 6.8.3 – Letter to OAH
 - HR-RQST** letter used for cover letter
 - Request approval of Additional Notice Plan (optional)
 - **6.8.4 -** Request omission of full text of proposed rules from publication
 (rare)
 - **6.8.5 – eFile rule-related documents**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.9 – Notice finalized** - Notice signed and dated by: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.10 – SONAR emailed to Legislative Reference Library
 - LRL** and **CRT-LRL** used

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.11 – Notice published in the *State Register***- **ST-REG** used

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.12 – Notice sent
 - CRT-LIST** and **CRT-MLNG** used

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.13 – Notice given per Additional Notice Plan
 -** Actions documented and **CRT-GNRC** used

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.14 – Notice given to Legislators
 - LEG** and **CRT-LEG** used

**Checklist for Chapter 6 (Continued)**

**Date Completed Item**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.15 – Other applicable statute or rule requirements met**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.16 – Comments tracked; lists maintained** - comments on the rules, written or oral
 - hearing requests and hearing request withdrawals
 - requests for free copy of the rules
 - requests to be placed on the agency’s rulemaking mailing list
 - requests for notice of filing with the Secretary of State
 - requests for notice of submission to ALJ
 - **COMMENT-TRACKER** used

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **6.17 – Proceed according to number of hearing requests**- **6.17.3** - If 25 or more, hearing preparations made (Chapter 9)
 - Agency leadership, staff members, and agency AG (if using) notified
 - ALJ notified
 - Hearing room confirmed (if physical location used)
 - Hearing requestors notified. **HTC-HR25** and **CRT-HR25** used
- **6.17.4 -** If less than 25, hearing canceled and Chapter 8 used to adopt rules
 \*\* Hearing canceled at least 3 working days before hearing
 -Agency leadership, staff members, and agency AG (if using) notified
 - ALJ notified; **ALJ-CNCL** used
 - Hearing room canceled (if applicable)
 - If hearing withdrawals reduced number of hearing requests below 25,
 requestors notified. **NTC-HRWD** and **CRT-HRWD** used.
 - If fewer than 25 hearing requests (and agency did nothing to obtain
 withdrawals), requestors notified. **NTC-CNCL** used.

1. Minn. Stat. § 14.101. [↑](#footnote-ref-1)
2. Minn. Stat. § 14.125. [↑](#footnote-ref-2)
3. Minn. Stat. § 14.111. [↑](#footnote-ref-3)
4. Minn. Stat. § 14.14, subd. 1b. [↑](#footnote-ref-4)
5. Minn. R. 1400.2030, subp. 1. [↑](#footnote-ref-5)
6. *See* Minn. Stat. § 645.44, subd. 5. [↑](#footnote-ref-6)
7. Minn. Stat. § 14.22, subd. 2. [↑](#footnote-ref-7)
8. Minn. R. 1400.2080, subp. 5. [↑](#footnote-ref-8)
9. Minn. R. 1400.2060, subp. 3. [↑](#footnote-ref-9)
10. Minn. Stat. § 14.111. [↑](#footnote-ref-10)
11. Minn. R. 1400.2110, .2300, subp. 7; Minn. Stat. §§ 14.05, subd. 2, .24. [↑](#footnote-ref-11)
12. Minn. R. 1400.2060. [↑](#footnote-ref-12)
13. Minn. R. 1400.2080, subp. 5. [↑](#footnote-ref-13)
14. Minn. Stat. § 14.22, subd. 1(b). [↑](#footnote-ref-14)
15. Minn. Stat. § 14.23. [↑](#footnote-ref-15)
16. Minn. R. 1400.2080, subp. 6. The 33-day requirement applies only if you are mailing the requirement; otherwise, it must be 30 days before the comment period ends. [↑](#footnote-ref-16)
17. Minn. Stat. § 14.22, subd. 1(a). [↑](#footnote-ref-17)
18. Minn. Stat. § 14.116. [↑](#footnote-ref-18)
19. Minn. R. 1400.2310. [↑](#footnote-ref-19)
20. Minn. Stat. § 14.22, subd. 1(a). [↑](#footnote-ref-20)
21. Minn. Stat. § 14.14, subd. 1a. [↑](#footnote-ref-21)
22. Minn. Stat. § 14.16, subd. 1. [↑](#footnote-ref-22)
23. Minn. Stat. § 14.26, subd. 1. [↑](#footnote-ref-23)