# Chapter 9 - Adopting Rules with a Hearing

## Introduction

This chapter describes what to do after the 30-day comment period has ended and your agency plans to adopt the rules with a public hearing. It is a good idea to review this entire chapter before proceeding. At the end of this chapter is a checklist so you can note when you have completed each of the required steps for adopting rules with a hearing.

## 9.1 Preparing for the Hearing

### 9.1.1 Schedule meetings for immediately after the hearing; clear your calendar

Time is of the essence after the hearing. It is absolutely essential to meet with agency decision makers after the hearing as soon as possible to get a preliminary decision on the agency’s response to comments made at the hearing. (If your agency’s standard practice is to have the agency’s Assistant AG review and sign off on rules projects, then be sure to consider including the AG at this point as well.) If you wait to do all the work of preparing your response until near the end of the posthearing comment period, there will not be time to complete the response. If you procrastinate, it will be almost impossible to get your response done by the deadline.

As noted in chapters 6 and 7, at the time of scheduling the hearing date, check with agency decision makers not only about their availability to be at the hearing but also their availability immediately after the hearing to discuss issues raised at the hearing. Also, clear as much of your calendar as possible for the length of the comment period after the hearing. It takes more time than you can imagine to prepare your response to comments.

### 9.1.2 Notify the ALJ

If your hearing follows publishing a Dual Notice, let the ALJ know that the hearing will be held as scheduled (see section 6.17.3).

### 9.1.3 Make copies of the Rules and SONAR to distribute at the hearing

You must have copies of the proposed rules and the SONAR available at an in-person hearing.[[1]](#footnote-1) For virtual hearings, make sure you have a webpage dedicated to the hearing with links to the rules and SONAR available for the public.

### 9.1.4 Prepare documents to submit into the record

The agency must prepare the exhibits required under Minnesota Rules, part 1400.2220, subpart 1—the exhibits should be labeled according to the items under subpart 1.

#### In-person hearings

ALJs generally prefer two or three binders with the printed exhibits, but it’s always a good idea to confirm with your ALJ. If the agency is conducting a videoconference public hearing, you must ensure that a copy of the hearing exhibits is also available at each of the locations participating in the hearing.

#### Virtual hearings

If the agency is conducting a virtual hearing (no physical location), you must post all the exhibits to your agency’s webpage, so the public has access to the exhibits during and after the hearing. Be sure to give yourself time to ensure each document is accessible before being posted.

Example:



Ask your ALJ whether they want physical copies of exhibits mailed to them prior to the hearing in addition to those that are eFiled.

#### eFiling rule-related documents

All documents submitted for ALJ review should be eFiled. 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.**

**Best Practices for Working Within OAH’s eFiling System**. To accommodate eFiling, it is best to take some extra steps to organize your documents before uploading them into OAH’s system. Simply consolidating all your individual documents into one huge file will make navigating it difficult for both the ALJ’s review and your own reference. You can make a consolidated file easier to navigate with a little planning. Here are some options (and it might be advisable to confer with your assigned ALJ on more complex cases):

* Organize your documents as described in Minnesota Rules 1400.2220, items A to K. OAH prefers that you consolidate the documents as one PDF document and bookmark them. Best practice: Include the agency response to comments along with those comments.
* If your case has a large volume of pages, consider adding a unique sequential page number through the entire set. This is often called applying a “Bates” stamp. Some photocopiers can do this, and so can Adobe Pro.
* Scan the pages as a single PDF or combine saved PDF files into a single PDF. Prepare an index keyed to the unique numbers. Prepare an index keyed to the unique numbers. In Adobe Pro, for example, it is simple to mark and label a bookmark at the first page of each document.
* If the filing is quite large, you may create more than one PDF. For example, a large volume of comments or a large map file may require a separate document to keep file size manageable.
* Consolidating your exhibits might simply exceed your technology’s capabilities, so you might have to solicit additional assistance within your agency or acquire more powerful software, such as Adobe Pro.

Strongly consider communicating with your ALJ (through William Moore) when you are ready to file. Even though this communication isn’t required by law, ALJs appreciate a heads-up before an agency will file, especially if you have a long or complex rule.

If you have questions about submitting your rules file to OAH, refer to **OAH-INF** in the appendix for the location of or general information about OAH.

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.

Finally, you should also plan to post electronic versions of these documents on your agency’s website.As explained in section 9.2.3, OAH has been asking agencies to make electronic versions of all exhibits introduced into the public hearing record available on the agencies’ respective websites.

### 9.1.5 Prepare a summary to read at the hearing

For most rules, a five- to ten-minute presentation is sufficient. The summary is a condensed version of certain sections of the SONAR, including the sections that give general background. The summary should also include a description of the rules and a short discussion of any controversial areas in the rules. For some very technical rules, a longer presentation may be necessary to adequately explain the rules. In this case, it’s best to let the ALJ know in advance the length of your presentation.

### 9.1.6 Prepare agency staff and agency AG for the hearing

Shortly before the hearing, send a memo to and, if possible, meet with agency staff who will be at the hearing. If the agency wants its AG to attend the hearing, include the agency AG in the memo and staff hearing. The memo and meeting should cover the points made in section 9.2—namely, what to say and what not to say at the hearing.

You should take copious notes and arrange to meet with staff immediately after the hearing. Let them know what to expect at the hearing and answer any of their questions. Do a dress rehearsal with agency staff if you feel it would be worthwhile. A form for the memo is in the appendix as **STAFF-HR**.

### 9.1.7 Respond to prehearing comments

Start drafting your preliminary responsesfor the prehearing comments received during the 30-day comment period. See **section 9.3** for general advice on how to respond and how to coordinate your preliminary responses with the posthearing responses. Ideally, the agency eFiles and posts preliminary responseson the day of, or within a couple days after the hearing. Whether you can do this depends on many variables, such as how many comments the agency received, how complex the issues are, when the comments were submitted, whether the comments raise a novel issue, etc. Check with the ALJ at the hearing and come up with a plan.

Keep in mind that the comments and responses are to further public participation and assist the ALJ in understanding your rules. So do the best you can to deliver these responses quickly.

### 9.1.8 Decide on any proposed rule changes you want to announce at the hearing

During the 30-day comment period, the agency may receive comments on the proposed rules that point out errors or request changes. You are not required to make changes suggested by the public, but sometimes the comments are compelling. If you plan to make modifications, you should announce at the rule hearing that you intend to make these changes or that you are strongly considering making these changes and that you invite comments. You should have copies of the intended changes available to introduce into the record and to distribute to people attending the hearing.

**Note**: You do not need a Revisor’s draft when you announce changes at the hearing. It’s possible that your decision could change, or that you might make further changes, so you should wait to request a Revisor’s draft until after the hearing. Shortly after the Notice of Intent Hearing is published, the Revisor will send you a “stripped” version of your proposed rules with all stricken text deleted and all new text incorporated. You can use the stripped version to indicate any changes you intend to make to the proposed rules. You do not have to wait for the Revisor’s Office to send you the stripped version to request one. If you don’t receive one, be sure to ask for one.

When controversial issues come up during the 30-day comment period, you should consider notifying the Governor’s Office. Per the Governor’s Office administrative rule review policy, **GOV-PLCY**:

**COMMUNICATION**

The Governor’s Office recognizes that agencies cannot predict all controversies at the outset of a rules project. As a result, the agency should use its judgment to send issues to the Governor’s Office for review throughout the process. Additional review might be necessary if a rule suddenly becomes controversial. If the agency believes that an issue or proposed change might be in conflict with the Governor’s beliefs and principles, the agency should notify its Policy Advisor.

### 9.1.9 Set the room up for an in-person hearing

In most cases, agencies must physically set up the hearing room. You will need places for the ALJ, agency staff, speakers, audience, and court reporter (if you choose to hire one). Estimate your likely number of attendees.

Remember to check for accessibility in case you need to make accommodations for people with disabilities. A suggested room arrangement is included in the appendix as **HEARING ROOM SETUP.**

Customarily, the ALJ brings a packet of items to the hearing: the sign-in sheet for attendees and a hearing-procedure handout. OAH asks for email addresses on the signup sheet it provides, and each person checks the corresponding places to indicate which notices that they want to receive. Confirm this with the judge’s legal assistant.

### 9.1.10 Holding virtual hearings

It is highly recommended that the agency and the ALJ do a short dress rehearsal or “run through” before a virtual hearing through the platform that will be used. Also, prior to the hearing, ask the ALJ whether they want to walk through hearing procedure with attendees at the beginning of the hearing. Alternatively, hearing procedures may be posted to the agency’s webpage.

Consider requiring attendees to register for the hearing as this will allow you to gather email addresses and ask whether the attendee wants notices sent to them following the hearing. At the time you set up your virtual hearing, such as through WebEx, you can review the different platform features, such as registration requirements and disabling chat. Registration is a great way to collect email addresses and ask attendees whether they would like to speak at the hearing, need accommodations such as a translator, and or want certain notices sent following the hearing. Additionally, the agency can completely disable the chat feature, allow attendees to chat with agency staff, or chat with all attendees (not recommended).

## 9.2 At the Hearing and Immediately After

### 9.2.1 What to say and what not to say at the hearing

At the hearing, agency staff should not answer questions that would set agency policy. You may answer questions that would clarify a person’s misunderstanding about the proposed rules but be careful not to agree to policy suggestions that are not already in the proposed rules. A recommended standard response to a policy suggestion is that the agency will take the suggestion under consideration and will issue a decision in the agency’s preliminary response to comments before the end of the posthearing comment period.

Also keep in mind that this is the public’s opportunity to present its case to the ALJ. The agency has already spoken in the SONAR. Resist any urges to contradict or rebut public comments, as difficult as this may be. Remember that you will have the rebuttal period before the record closes.

### 9.2.2 Copious notes or court reporter

At least two or three agency staff should take copious notes on all testimony given at the hearing. The notes should identify the speaker’s name and affiliation and summarize the testimony and any suggestions made. It is important that several agency people take complete notes so that you do not miss anything when you submit the agency’s response.

There might be situations in which you would want a court reporter to attend and transcribe the hearing, including for virtual hearings. Note that the agency would have to pay for the court reporter. Therefore, you need to balance the cost of the court reporter against the benefits of having an immediate and complete written record of the hearing. Make this decision early on, because you must arrange for a court reporter and order the transcripts yourself – OAH does not arrange for court reporters. Thus, the agency is responsible for all logistical and payment arrangements. Furthermore, if the agency has arranged for a court reporter to be at the hearing, OAH asks that the agency notify it before the hearing.

If you are not using a court reporter, the judge will record the hearing. Typically, OAH includes the recording when it returns the record, so you must contact the judge’s legal assistant if your agency wants the recording right away. If you are using a court reporter, the judge may or may not record the hearing. Your best practice is to make your wishes known and confirm your arrangements with the judge’s legal assistant so you can plan accordingly. In any event, taking good notes will still be important. Having a recording to go back to in the absence of a transcript is essential.

If you are holding a virtual hearing, you can record the hearing and make it available afterward. Many platforms, such as WebEx, can also prepare transcripts, though they are not as precise as a court reporter.

### 9.2.3 Place hearing exhibits on agency’s website

Exhibits the agency will introduce into the hearing record should be posted on the agency’s website before the hearing. Immediately after the hearing, the agency will also need to post exhibits that interested parties submitted into the hearing record. You should inform your website staff that the agency needs to post these exhibits expeditiously on the agency’s website after the hearing. You may also need to upload these documents in OAH’s eComments system. You should clarify with your assigned ALJ about what they expect your agency to post and where.

Note also, as identified in **section 9.3.9**, that OAH is routinely asking agencies to promptly post the comments submitted during the posthearing comment and rebuttal periods on the agency’s website.

### 9.2.4 Meet with agency decision makers ASAP after the hearing

At this time, discuss each of the issues raised at the hearing and decide on a tentative response. The purpose in meeting ASAP after the hearing is to maximize the time available for drafting the agency’s response to comments. Therefore, if possible, meet immediately after the hearing.

## 9.3 The Agency’s Response to Comments in the Hearing Record

### 9.3.1 The posthearing comment period and the rebuttal period

After the hearing, there is a comment period that lasts for five working days, which can be extended to 20 calendar days, if ordered by the ALJ. The agency and interested parties can submit written comments or responses to comments in the hearing record during this time.

After the posthearingcomment period, there is a five-working-day rebuttal period, when the agency and interested persons can respond in writing to comments and information submitted during the posthearingcomment period. No new evidence may be submitted during the rebuttal period.[[2]](#footnote-2)

See **section 9.3.9** related to how to collect the comments that the ALJ received during the posthearingcomment periodand rebuttal periodfor timely posting on the agency’s website and uploading them to the OAH eComments website. Because OAH’s eComments are mandatory after hearings, you must retrieve these according to the ALJ’s directions.

**Note:** While agencies must use the eComments system, the public may also submit comments to OAH by U.S. mail, eComments, personal service or fax, so you must check for and respond to these comments.

### 9.3.2 OAH eComments

You must use OAH’s eComments website for collecting public comments after a hearing. (See **section 1.6.2** and **OAH-INF** for explicit instructions). OAH will set up the webpage after the hearing. If you have questions, contact William Moore, Administrative Rule and Applications Specialist, at william.t.moore@state.mn.us or 651-361-7893.

**Note:** While agencies must use the eComments system, the public may also submit comments to OAH by U.S. mail, eComments, personal service or fax. So, you must check for and respond to such comments. Public instructions for making comments can be found at <https://mn.gov/oah/forms-and-filing/ecomments/>.

### 9.3.3 What to include in the posthearing comment period

An agency may submit its response and any intended rule changes during the posthearingcomment period. In addition, particularly if the posthearingcomment period is extended, the agency may choose to respond to information or comments submitted earlier in the comment period.

Some ALJs prefer a preliminary agency response (including any intended rule changes) by the end of the comment period to allow affected persons to react to the agency’s intended rule changes, particularly on controversial issues. After considering responses, the agency would submit a final response before the end of the rebuttal period. In any event, ask the ALJ for their preference on the timing of the agency’s response and tell the ALJ your preference. There are probably several ways to accomplish the agency’s response. You should seriously consider the ALJ’s preference.

### 9.3.4 Complete a draft of the agency’s preliminary response ASAP

This preliminary draft should be completed within two or three days of the hearing. **HR-RSPNS** is one possible framework. After your summary of the comments made on each part, put the tentative reaction decided on at the meeting with agency decision makers, including any changes the agency intends to make in the proposed rules. For each intended change, the response letter should justify the change. You must also state that the changes would not make the adopted rules substantially different from the proposed rules. Finally, give a copy ASAP to all agency personnel involved in the rules for their review and to all agency decision makers for their review and approval.

### 9.3.5 Monitor posthearing comments

At several points during the posthearing comment period, check OAH’s eComments system to find out the nature of the written comments submitted. OAH can download the eComments received to the agency, possibly with a request that the agency promptly add the posthearing comments to the agency’s website.If there are any major unexpected comments, discuss them immediately with agency decision makers. If you choose, update the agency’s preliminary response letter as needed to respond to these comments. Near the end of the comment period, contact the ALJ one last time about comments submitted that are not available on OAH’s eComments site.

### 9.3.6 Meet with agency decision makers near the end of the comment period; finalize agency’s preliminary response

After contacting OAH one last time about comments received by the ALJ, it is necessary to again meet with agency decision makers to make final decisions about the agency’s preliminary response letter, including any changes that the agency intends to make to the proposed rules. It is absolutely essential that you prepare a complete draft of the preliminary response letter before this meeting so that the letter can be finalized immediately after the meeting. Immediately after the meeting, finalize the letter, have it signed by the appropriate agency person, and eFile the preliminary response. Note: some agencies submit multiple preliminary responses during the posthearing comment period.

### 9.3.7 Rebuttal period response

You should continue to monitor the comments received by the ALJ during the rebuttal period. The rebuttal period allows the agency to respond to any new information or comments not previously responded to and to propose final changes to the rules. No new evidence can be submitted during the rebuttal period.

The agency’s final response letter should build off the preliminary response letter. In some cases, the letter may contain the simple statement that the agency’s preliminary response letter contains the agency’s final responses to comments. If you have responses or intend to make changes in addition to those in your preliminary response letter, then you should include the rationale for these intended changes, a description of the intended changes, and that the intended changes will not make the adopted rules substantially different than the proposed rules.

You may eFile your final response at any point during the five-day rebuttal period; however, most agencies file their response on the last day to ensure they have addressed all comments.

### 9.3.8 Place comments received by the ALJ during the posthearing comment period and rebuttal period on agency’s website.





More commonly, ALJs prefer a single eComments site for the prehearing and initial posthearing comment periods. After the latter ends, OAH closes the site and creates a second eComments site for the rebuttal period. Although the first eComments site is closed, you and the public can still access it under the closed-discussions tab. Additionally, OAH will link to the closed comment period on the site it creates for the rebuttal period.

By 4:30 pm, on the first working day after the posthearingcomment period, OAH will send the agency an electronic version of all comments that the ALJ received during the posthearingcomment period, including those from the eComments site and those sent to OAH by mail or fax. Most ALJs want the agency to post the comments on the agency’s website.

It’s important that the agency not delay posting the comments because OAH closes the eComments page immediately after the comment period ends and the public must be able to access the comments for the rebuttal period. Optimally, you should forewarn your website staff that the documents must be posted expeditiously.

Similarly, after the rebuttal periodcloses, OAH will provide the agency with an electronic copy of all comments received during the rebuttal period; these comments should be posted on the agency’s website as well.

OAH must allow any interested persons to review the posthearing comments submitted to the ALJ.[[3]](#footnote-3) Further, there is no law requiring that a state agency place hearing exhibits or comments received during the posthearing comment periodand rebuttal period on a website. Nevertheless, ALJs are more frequently requesting that agencies post these documents so that the public can access them more readily.

## 9.4 The ALJ Report

After the posthearing comment period and rebuttal period close, the ALJ has 30 days to complete the hearing report, unless the Chief ALJ orders an extension.[[4]](#footnote-4) Rulemakings with few comments are usually completed within 30 days. The ALJ can do one or more of the following:

1. Approve all or portions of the rules.
2. Disapprove all or portions of the rules.
3. Make technical suggestions for the agency to consider.

If the ALJ disapproves all or part of the rules, the Chief ALJ reviews the rules and issues a report in addition to the ALJ Report. The Chief ALJ has ten days to do this.[[5]](#footnote-5)

## 9.5 Withdrawal, Disapproval, or New Modifications of the Rules

After you receive the ALJ Report, identify options based on the ALJ’s findings and recommendations. Within those options, decide how to proceed and get approval to do so from agency decision makers. Exactly how you proceed depends on the findings in the ALJ Report and on whether you want to make changes other than those approved by the ALJ. The various possibilities are described below**.**

**Note:** An agency must wait at least five working days after the ALJ Report is issued before taking any formal action on the rules (such as passing a resolution or submitting the Final Form to the Governor’s Office). [[6]](#footnote-6) An agency that is a multi-member board must follow board procedures, which usually means passing a formal resolution adopting the rules and authorizing a person to sign the Order Adopting Rules. A form for such a board resolution is in the appendix as **BD-ADPT**.

### 9.5.1 Approval of the rules

If the ALJ has approved your proposed rules and you are either making no changes to the proposed rules or the ALJ has approved all changes in the ALJ Report, you can proceed with adopting your rules.

### 9.5.2 Disapproval of the rules

There are three reasons the ALJ may disapprove your rules under part 1400.2240:

* The ALJ finds a defect in the rule text such as unfettered discretion, overly vague, etc. (subpart 4).
* The ALJ determines that you modified the rule so that it’s substantially different from the proposed rule (subpart 7).
* The ALJ determines that you didn’t adequately justify the need for and reasonableness of your rule (subpart 6).

As mentioned in section 9.4, if the ALJ disapproves the rules, the rules go to the Chief ALJ for further review. If the Chief ALJ disapproves the rules, they must explain why and tell the agency what changes are necessary for approval. [[7]](#footnote-7) The agency then may:

1. make the suggested changes or other changes to address the reasons for disapproval and resubmit the rules to the Chief ALJ;
2. ask the Chief ALJ to reconsider the disapproval; or
3. end the rule proceeding.

#### 9.5.2.1 Making suggested or other changes to address disapproval

If you choose to make the suggested changes or other changes to address the reasons for disapproval, first ask the Revisor to prepare a draft with the changes, then submit the changed rules to the Chief ALJ, requesting review of the changes, as necessary for approval. A cover letter for this is in the appendix as **CHNG-DIS**. The Chief ALJ must review and approve or disapprove the changed rules within five working days after receipt.[[8]](#footnote-8) If the Chief ALJ approves, you can proceed with adopting your rules.

#### 9.5.2.2 Disapproval based on substantial difference, and you don’t want to make the suggested changes

If the Chief ALJ disapproves the rules under Minnesota Rules, part 1400.2240, subpart 7, because they are substantially different than the proposed rules, **and** the agency chooses not to make the changes suggested by the Chief ALJ, the agency has several options:

1. end the rule proceeding;
2. adopt the portions of the rules that are not substantially different (requires withdrawing rules);[[9]](#footnote-9)
3. start a new rule proceeding to adopt the substantially different rules; or
4. proceed under Minnesota Rules, part 1400.2110, to adopt substantially different rules.

#### 9.5.2.3 Disapproval based on need and reasonableness, and you don’t want to make the suggested changes

If the Chief ALJ disapproves the rules under Minnesota Rules 1400.2240, subpart 6, because the agency has not shown them to be needed and reasonable, **and** the agency chooses not to make the changes suggested by the Chief ALJ, the agency may submit the rules to the Legislative Coordinating Commission and the and the House and Senate policy committees with primary jurisdiction over state governmental operations for review.[[10]](#footnote-10) This course requires careful political consideration.

#### 9.5.2.4 Requesting reconsideration of the disapproval

You may choose to request that the ALJ reconsider the disapproval. A cover letter for this is in the appendix as **CHNG-DIS**. The Chief ALJ must review and approve a request for reconsideration within five working days after receipt.[[11]](#footnote-11) If the Chief ALJ approves, you can proceed with adopting your rules.

### 9.5.3 Making changes other than those recommended

If the agency wants to make changes to the proposed rules other than those that the ALJ or Chief ALJ approved, the agency should submit the documents listed in Minn. R. 1400.2240, subp. 5, to the Chief ALJ:

1. the rules as initially proposed;
2. the agency’s proposed Order Adopting Rules;
3. the rules showing the agency’s proposed changes; and
4. any other part of the hearing record requested by the Chief ALJ.

Request the Revisor to prepare a draft with the changes, then submit the draft to the Chief ALJ with the other documents listed above. A form letter asking the Chief ALJ to review changes other than those approved by the ALJ is in the appendix as **CHNG-OTH**.

**Note:** Minn. R. 1400.2240, subp. 5, applies to changes other than those recommended by the ALJ or Chief ALJ. There is nothing in chapter 14 or chapter 1400 that speaks directly to changes that are recommended, but not approved, by the ALJ or Chief ALJ. The Editor therefore recommends following Minn. R. 1400.2240, subp. 5 for recommended changes, unless OAH advises otherwise.

When the ALJ Report goes beyond the rule changes proposed by the agency and includes a statement such as: “The agency might consider rewording the language to clarify that . . .,” these statements are considered the ALJ’s recommendations. The agency may choose to follow the ALJ’s recommendations, but it is not required to do so. If you choose not to follow an ALJ recommendation, you do not need to address this in your Order. Having said that, if you are going to reject the ALJ’s recommendation on a significant or controversial issue, it is a good idea to discuss your reasons for rejecting the recommendation.

The Chief ALJ has ten days to make a written decision. If the Chief ALJ approves the changes, you can proceed with adopting your rules.

### 9.5.4 Withdrawal of rules

Sometimes an agency decides it must withdraw its proposed rules or a portion of its proposed rules. If you withdraw your rules from OAH review, refer to Minnesota Rules, part 1400.2240, subpart 8, for how to proceed. Note that statute requires that you publish notice in the *State Register* that you have withdrawn the rules.[[12]](#footnote-12) The form for Notice of Withdrawn Rules is available in the appendix as **NTC-WITHDRAWL.** At a minimum, the notice should:

* identify what rule parts are being withdrawn;
* reference the *State Register* citation at which the rules were initially proposed; and
* briefly summarize the rules and why they are being withdrawn:

For example:

**Board of Cosmetology
Notice of Withdrawn Rules for Proposed Amendments to Governing Schools, Instructors and School Managers; Minnesota Rules, Chapter 2110; Proposed Repeal of Minnesota Rules parts 2110.0010, subparts 14 and 15; 2110.0100; 2110.0320, subparts 9, 11, and 12; 2110.0330, subparts 3, 4, and 5; 2110.0390, subpart 3a; 2110.0410, subparts 2 and 5; and 2110.0710; Revisor’s ID Number 4456, OAH Docket Number 65-9013-36457**

 The Minnesota Board of Cosmetologist Examiners is withdrawing its proposed amendment to rules governing schools, instructors and school managers that were published in the Dual Notice of Intent to Adopt Rules on September 26, 2022, in the State Register, volume 47, number 13, pages 285-314. Administrative Law Judge O’Reilly and Chief Judge Starr disapproved the amendments as not meeting the requirements of Minnesota Statutes, section 14.15, subdivisions 3 and 4, and Minnesota Rules part 1400.2240, subpart 4.

 The board is withdrawing the following proposed amendments: Minnesota Rules, parts 2110.0010, subparts 14, 15, 17f, 18d, 18e, 18f, and 19a; 2110.0125; 2110.0190; 2110.0310; 2110.0320; 2110.0390, subparts 3, 3a, 3b, 5; 2110.0395; 2110.0410; 2110.0500; 2110.0510; 2110.0520; 2110.0525; 2110.0530; 2110.0545; 2110.0590; 2110.0625; 2110.0640; 2110.0650; 2110.0660; 2110.0670; 2110.0671; 2110.0680; 2110.0690; 2110.0705; 2110.0730; and 2110.0740.

 The withdrawal is a modification to the Dual Notice published in the State Register, volume 47, number 13, pages 285-314…

What if an agency wants to withdraw portions of its rules? If the agency is proposing new language, the agency can strike the language in its AR draft instead of formally withdrawing the rules by publishing a withdrawal in the *State Register*.[[13]](#footnote-13) For larger withdrawals for which the agency still wants to adopt other parts of its rule, such as in the example above, the agency should follow the normal withdrawal process. A few tweaks are needed, however, because the APA doesn’t explicitly outline a process for a hybrid rule withdrawal/rule adoption:

* Receive approval from the governor’s office
* Send a letter to OAH stating that the agency plans to withdraw rule parts, citing to Minnesota Statutes section 14.05, subdivision 3, and Minnesota Rules, part 1400.2240, subpart 8 (or 1400.2300, subpart 4).
* Publish a Notice of Withdrawal in the *State Register*
* Fill out the AR draft with the *State Register* cites (volume and page number):

**2110.0320 [Withdrawn at … SR …]**

**2110.0330 [Withdrawn at … SR …]**

* 1. **PHYSICAL REQUIREMENTS.**

Subpart 1. **Space.**

1. The school must have enough classroom and clinic space and workstations on the clinic floor to support the school’s scheduled instruction and training programs.
2. The school classrooms must have chairs and table work space for the maximum number of students scheduled for class at any one time.

*[For text of item C, see Minnesota Rules]*

1. The school must ~~comply with the Minnesota State Building Code, the Minnesota State Fire Code~~ meet applicable building codes, fire codes, and zoning codes as determined by local zoning and building officials and the state fire marshal.

*[For text of item E, see Minnesota Rules]*

*[For text of subparts 2 ~~and 2a~~ to 6, see Minnesota Rules]*

 Subp. 3. [Withdrawn at … SR …]

 Subp. 3a. [Withdrawn at … SR …]

 Subp. 3b. [Withdrawn at … SR …]

* Last, proceed as you would when submitting modifications or defect corrections to OAH

## 9.6 Draft the Order Adopting Rules

A form for the Order is in the appendix as **ORD-ADPT** and is designed to be a checklist to meet the requirements of part 1400.2090. A form with sample findings for making changes to the proposed rules is in the appendix as **SMPLFNDS**.

**Note:** If you are making changes other than those approved in the initial ALJ Report, you must submit your unsignedproposed Order Adopting Rules to the ALJ or Chief ALJ for approval before having it signed. You should check with OAH if you are uncertain whether OAH must approve the proposed Order.

## 9.7 Governor’s Office Approval

After you decide on the final rules, you must get approval to proceed from the Governor’s Office. Per the Governor’s Office administrative rule review policy, **GOV-PLCY**:

**FINAL RULE FORM**

This form **[GOV-FNL]** notifies the Governor’s Office of any new information or late changes. This last notification gives the Governor’s Office a final opportunity to make changes before only having the option of veto. The Governor’s Office is seeking information describing any late controversies that might have arisen since the agency submitted the Proposed Rule and SONAR Form. The Final Rule Form requests information on any changes to the previously submitted draft rules. Also, if a hearing were requested, information as to why it was requested. The timing for submitting the Final Rule Form varies, depending on the type of rulemaking the agency is doing.*If the agency is adopting rules without a hearing, adopting rules after a public hearing, or adopting expedited rules, the agency must wait for the Policy Advisor to approve the final rule before taking the next step, as described below. [emphasis added]*

**When the agency is adopting rules after a hearing:** the agency must submit the completed Final Rule Form to the Office of the Governor **and wait for approval** before the agency submits its signed Order Adopting the Rules to OAH. The agency must explain why a hearing was requested and attach a copy of the Administrative Law Judge Report. The agency must also explain any changes made in response to the ALJ Report, including any large deletions from the rule. The Policy Advisor will direct any concerns the Advisor might have directly to the agency. Upon final approval of the rule by the Policy Advisor, the Legislative Coordinator will contact the agency and inform it that the Commissioner or Director may sign the Order Adopting Rules andformally submit it to OAH.

\* \* \*

 …If the proposed rule remained substantially unchanged from the SONAR stage, final review of the rule should take less than a week. If the agency hasn’t received a communication by the 7th day after the Governor’s Office received the above information, the agency should contact the Legislative Coordinator for a status report.

## 9.8 Get a Copy of Adopted Rules from the Revisor

During the 30-day comment period, the Revisor will send you a “stripped” copy of your proposed rules with all stricken text deleted and all new text incorporated in the rules. The rule title will indicate that the rules are in “adopted” form (the number on the top of your draft will change from “RD” to “AR”).



If you are making no changes to the proposed rules, you may use the stripped version for the Order Adopting Rules. If you are making changes to the proposed rules, ask the Revisor to mark the modifications and send you an updated copy of the adopted rules. In your request, indicate when you would like the adopted rules back, and the Revisor will tell you if that is workable.

## 9.9 Finalize and File the Order Adopting Rules

After OAH approves your rules, the commissioner (or other authorized person) must sign the Order Adopting Rules.[[14]](#footnote-14) eFile your signed Order with OAH as you would any other documents.

The OAH, Revisor’s Office, and Secretary of State’s Office accomplish the final steps electronically.

1. When the agency eFiles the signed Order Adopting Rules, OAH requests the Final Rules from the Revisor’s Office, which then has five working days to provide them to OAH.
2. Once OAH gets the rules, OAH files the Final Rules with the Secretary of State’s Office.
3. The Secretary of State’s Office serves the Final Rules on the Governor’s Office via email using a distribution list that includes the agency. This starts the 14-day veto period. The email contains no explanation and is how you will know your rule was served on the Governor’s Office, so you must watch for it. Typically, the agency rule contact is copied on the service email from the Secretary of State’s Office to the Governor’s Office. After you receive this email or some other confirmation, you should proceed with publishing the updated rule in the *State Register*. The Secretary of State’s Office will also notify the Revisor’s Office that the rule has been filed.
4. It is the Revisor’s standard practice to prepare the Notice of Adoption after notification from Secretary of State and send it to you without any request from you. If time is of the essence, you should notify the Revisor so that they expedite the Notice.

**Note:** While these steps can take place swiftly, that’s not always the case. Make sure to keep track of where and when the rule was forwarded and how long it has been at a specific office. Follow up with the appropriate office, as needed.

## 9.10 Give Notice of Filing

During the rulemaking process, usually during the 30-day comment period or at the hearing, individuals may request to be informed of when you adopt the rules, and the rules are filed with the Secretary of State. You must provide a Notice of Filing Rules with the Secretary of State on the same day that the rules are filed.[[15]](#footnote-15) **Therefore, get this notice ready *before* you file the signed Order Adopting Rules with OAH.** This Notice must be sent to any persons who have notified the agency during the comment period or at the hearing that they want to get this Notice. OAH will notify the agency on the day it files the rules with the Secretary of State. Forms for the Notice and for the certificate showing the agency sent this Notice are in the appendix as **NTC-SECY** and **CRT-SECY**.

## 9.11 Publish the Notice of Adoption in the *State Register*

See **ST-REG** in the appendix for information on how to publish in the *State Register*. The agency must give the *State Register* a copy of the Notice of Adoption. The rules become effective five working days after the Notice of Adoption has been published in the *State Register* unless the rules specify a later effective date.[[16]](#footnote-16)

### 9.11.1 Governor veto

After the Governor receives a copy of the adopted rules, the Governor may veto the rules. To veto the rules, the Governor must submit a notice of the veto to the *State Register* within 14 days of receiving the rules from the Secretary of State. A veto is effective when the veto notice is submitted to the *State Register*.[[17]](#footnote-17) The Governor’s Office will let you know whether the rule or portions of the rule will be vetoed.

### 9.11.2 When to publish the Notice of Adoption

Even though the statute is silent on whether the agency must wait for the Governor to act before publishing its Notice of Adoption, you should wait to submit your agency’s Notice of Adoption to the *State Register* for publication until after your agency is certain that the Governor will not veto the rules.

### 9.11.3 180-day deadline

The agency must submit the Notice of Adoption to the *State Register* for publication within 180 days after the ALJ Report or Chief ALJ Reportis issued, or the rules are automatically withdrawn. If you miss the deadline, the rules cannot be adopted unless you begin and successfully complete a new rulemaking proceeding. The 180 days does not include days needed for Chief ALJ or LCC review or because the Legislature delayed adoption of the rules.[[18]](#footnote-18)

It is important to not tempt fate by letting final adoption of rules get close to using up the 180 days allowed. This time can get eaten up quickly when you are grappling with changes to complex and controversial rules.

**Note:** The statute says that you must submit the Notice of Adoption for publication to meet the 180-day requirement. A wiser course of action is to publish the Notice of Adoption within the 180 days to eliminate all questions. You do not want to rely on your date of submission to meet this important deadline if you can possibly avoid it by publishing sooner.

### 9.11.4 *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.**

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.

## 9.12 Prepare and Store the Official Rulemaking Record

After publishing the Notice of Adoption, you can complete the last official step, which is preparing and storing the Official Rulemaking Record.[[19]](#footnote-19) Note that OAH sends a memo to the agency when OAH approves the rules along with the original rulemaking documents that had been filed with OAH, which are most of the documents the agency needs for the rulemaking record. A form for the Official Rulemaking Record is in the appendix as **RECORD**. Note that paragraphs (1) to (11) of this form are keyed to clauses (1) to (11) of Minnesota Statutes, section 14.365, so this form can serve as a checklist to meet the requirements of section 14.365. In addition to the required documents, it is good practice to keep documents that show any additional justification for your rules, the date the rules took effect, evidence of official approval by your agency, and any information on how you considered giving affected parties notice.

**Note:** With eFiling, OAH will return your file as a downloadable link in an email message. Only the person who receives the email with the link can open it. Furthermore, the link will expire. Download the materials as soon as possible and save it securely according to your agency’s record retention schedule and practices. This eFile and any others not included will become your official record, which your agency must preserve as a permanent record. OAH is not responsible for preserving the permanent record and does not keep the electronic file available indefinitely.

**Best practice:** Your returned file from OAH might be labeled “official record,” but rename it something like “return of OAH submission file.” This will help you distinguish it from the official rule record that you must prepare under statute after your rulemaking concludes.

## 9.13 Get a Complete Version of the Entire Chapter of the New Rules

Shortly after the Notice of Adoption is published, the Revisor will send you a “stripped” copy of the rules with the stricken text deleted and the underscoring removed. In most cases, the persons within your agency who work with the rules would like a complete version of the entire chapter of the rules, including the portions amended and the portions not amended. So, at this stage in the process, if it is appropriate, get a complete copy of your rules from the [Revisor’s website](http://www.revisor.leg.state.mn.us/rules/). Your rules will be available after the Revisor has finished editing them.

## 9.14 Notify Agency Decision Makers of the Completion of the Process

Tell people at the agency that the rulemaking project has been completed. In the process, take some credit for your work on the rules. Send a memo to the persons at the agency most interested in the rules. Include the agency decision makers, the staff persons you worked most closely with on the development of the rules, and the staff person in charge of updating your agency’s rulemaking docket. A form for the memo is in the appendix as **CLOSURE**.

## Checklist for Chapter 9 – Adopting Rules with a Hearing

**Date Completed Item**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **9 – Entire chapter reviewed before proceeding**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **9.1 – Hearing preparations complete**- **9.1.1 – Meetings scheduled; calendar cleared
- 9.1.2 – ALJ notified
- 9.1.3 – Copies of rules and SONAR made (if holding in-person hearings); rules and SONAR posted on agency webpage
- 9.1.4- Documents prepared to submit into the record** - Exhibits prepared and labeled according to M.R. 1400.2220, subpart 1.
 - Exhibits posted on agency webpage
 - Exhibits eFiled
**- 9.1.5 – Summary prepared to read at hearing
- 9.1.6 – Agency staff and agency AG prepared for hearing
 - STAFF-HR** used
**- 9.1.7 – Preliminary responses to prehearing comments prepared
- 9.1.8 – Changes to rules decided; ready to announce at hearing** - If needed, Governor’s Office review and comment obtained.
**- 9.1.9 – Room set up for in-person hearing
- 9.1.10 – Virtual hearing considerations** - “Run through” with ALJ scheduled
 - Consider requiring attendees to register
 - Decide how chat feature will or will not be used

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **9.2 – At the hearing
- 9.2.1 – What to say and what not to say
- 9.2.2 – Take notes, record meeting, use court reporter
- 9.2.3 – Post exhibits on agency website
- 9.2.4 – Meet with decision makers ASAP after hearing**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **9.3 – Agency responses to comments prepared**- **9.3.1 – Posthearing comment period and rebuttal period
- 9.3.2 – OAH eComments site
- 9.3.3 – What to include in the comment period
- 9.3.4 – Agency preliminary response drafted
 - HR-RSPNS** used
**- 9.3.5 – Posthearing comments monitored**

**Checklist for Chapter 9 (Continued)**

**Date Completed Item**

**- 9.3.6 – Agency’s preliminary response finalized and signed
- 9.3.7 – Rebuttal period comments monitored; final response prepared
- 9.3.9 – Comments received by ALJ during posthearing comment period and rebuttal period placed on agency’s website**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **9.4 – ALJ Report received**- Disapprovals noted

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **9.5 – Decide how to proceed; get agency approval
-** If agency is a multi-member board, **BD-ADPT** form used
**- 9.5.1 – Rules approved – proceed with adopting
- 9.5.2 – Rules disapproved** - Changes made to address disapproval; **CHNG-DIS** letter used
 - Choosing not to make changes to address disapproval
 - Requesting reconsideration of disapproval; **CHNG-DIS** letter used
 - Withdrawing rules; **NTC-WITHDRAWAL** form used
 - Making changes other than those recommended; **CHNG-OTH** letter used

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **9.6 – Order Adopting Rules drafted
- ORD-ADPT** and **SMPLFNDS** used

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **9.7 – Governor’s Office approval obtained
- GOV-FNL** used

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **9.8 – Copy of adopted rules obtained from Revisor**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **9.9 – Order Adopting Rules finalized and filed** - Order Adopting Rules signed by: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
 - Signed order eFiled with OAH
 - Rules filed with Secretary of State
 - Notice of Adoption received from Revisor

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **9.10 – Notice of Filing given
-** Give notice *on the same day*that OAH files the rules with Secretary of State

**Checklist for Chapter 9 (Continued)**

**Date Completed Item**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **9.11 – Notice of Adoption published in the *State Register***- Published within 180 days after the ALJ Report is issued
- Notice submitted after agency is certain Governor will not veto rules
- **ST-REG** used

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **9.12 – Official Rulemaking Record prepared
- RECORD** used

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **9.13 – Complete version of entire chapter of new rules obtained**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **9.14 – Agency decision makers notified of completion of process
 - CLOSURE** used

1. Minn. R. 1400.2220, subp. 2. [↑](#footnote-ref-1)
2. Minn. Stat. § 14.15, subd. 1; Minn. R. 1400.2230, subp. 2. [↑](#footnote-ref-2)
3. Minn. R. 1400.2230, subp. 2. [↑](#footnote-ref-3)
4. Minn. Stat. § 14.15, subd. 2. [↑](#footnote-ref-4)
5. Minn. R. 1400.2240, subp. 4. [↑](#footnote-ref-5)
6. Minn. Stat. § 14.15, subd. 2. This limitation appears to apply only to the first issuance of the report; if your rules are disapproved and you correct the reason for the disapproval, you might be able to act on the rules immediately after getting the Chief ALJ’s advice, but you should check with the Chief ALJ to make sure it is okay. [↑](#footnote-ref-6)
7. Minn. R. 1400.2240. [↑](#footnote-ref-7)
8. Minn. R. 1400.2240, subp. 4. [↑](#footnote-ref-8)
9. Minn. R. 1400.2240, subp. 7. [↑](#footnote-ref-9)
10. Minn. Stat. § 14.15, subd. 4. [↑](#footnote-ref-10)
11. Minn. R. 1400.2240, subp. 4. [↑](#footnote-ref-11)
12. Minn. Stat. § 14.05, subd. 3. [↑](#footnote-ref-12)
13. Withdrawing amendments to existing language is tricky; ask the revisor’s office for help. [↑](#footnote-ref-13)
14. Minn. R. 1400.2090. [↑](#footnote-ref-14)
15. Minn. Stat. § 14.16, subd. 1. [↑](#footnote-ref-15)
16. Minn. Stat. § 14.27. [↑](#footnote-ref-16)
17. Minn. Stat. § 14.05, subd. 6. [↑](#footnote-ref-17)
18. Minn. Stat. §§ 14.126, .19. [↑](#footnote-ref-18)
19. Minn. Stat. § 14.365. [↑](#footnote-ref-19)