



# Minnesota Rulemaking Manual

A REFERENCE BOOK FOR THE PRACTITIONER

September 2023

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Editors: Andrea Barker, Department of Transportation  
Ian Lewenstein, Bureau of Mediation Services  
Brittany Wysokinski, Department of Labor and Industry

26<sup>th</sup> Edition

<http://www.health.state.mn.us/data/rules/manual>

*To obtain this information in a different format, contact [health.generalcounsel@state.mn.us](mailto:health.generalcounsel@state.mn.us)*

## Acknowledgments

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The Minnesota Rulemaking Manual represents the collective knowledge and wisdom of the Interagency Rules Committee, Minnesota’s rulemaking community. First published on June 17, 1996, the Manual has been edited frequently. Dave Orren (Department of Health) compiled the first edition and served as editor until 2006. Patricia Winget (Department of Health) served as editor from 2006 to 2020. Josh Skaar (Department of Health) served as editor from 2020 to 2022. A group of rule writers from the Interagency Rules Committee now assume the role.

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Michelle Aguilar	Kerstin Forsythe	Sandra MacKenzie	ALJ Laura Schlatter
Catherine Anderson	Jill Freudenwald	Peggy Mancuso	Patricia Segal
Andrea Barker	Megan Gaudette	Audrey Kaiser Manka	Freeman
Susan Barry	Linda Geier	Paul Marinac	Ann Seha
Helen Bassett	Jonathan Hendricks	Bill Marczewski	Jonathan Sewall
Paula Bastian	Pat Glasrud	Cindy Maxwell	Pamela Shubat
ALJ George Beck	MaryBeth Gossman	Dan Medenblik	Josh Skaar
Sharon Beighley	Kristine Hernandez	Nitika Moibi	Mat Spaan
Andy Beisner	Pierce	Kevin Molloy	Karen Hook Sullivan
Joann Benesh	Kay Herzfeld	Pat Munkel-Olson	Annette M. Trnka
Kate Berger	Jennifer Holstad	Laura Nehl-Trueeman	Suzanne Todnem
Mary Bjornberg	Ryan Inman	Jane Nelson	Penny Troolin
Bibi Black	Gloria Johnson	Catherine Neuschler	Sage Van Voorhis
Mary Blackstock	Kate Kahlert	Laura Offerdahl	Michelle Vaught
Sally Bushhouse	ALJ Allan Klein	Deb Olson	Placida Venegas
Beth Carlson	Robert Klukas	Jocelyn Olson	Larisa Vishkovetsky
Jacquie Cavanagh	Stephanie Krieg	Marie O’Neill	Vanessa Vogl
Stacie Christensen	Nancy LaPlante	Michele Owen	Cretia Weaver
Norma Coleman	Cristine Leavitt	Robin PanLener	Alice Weck
Lorraine Colford	Vong Lee	Laura Peterson	Lori Wedeking
Denise Collins	Wendy Legge	Julian Plamann	Kay Weiss
Rick Cool	Yolanda Letnes	Sean Plemmons	Marsha West
Nathan Cooley	Ian Lewenstein	Linda Prail	Dick Wexler
Jamie Cullen	Kathy Lewis	ALJ Tammy Pust	Eric Witte
Rita Desmond	Katie Lin	Rick Reichert	Brittany Wysokinski
Kate Carlucci	Maria Lindstrom	Nancy Rice	
Jeanne Eggleston	Mary Lynn	Beth Scheffer	

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# Contacts

Revisor's Office - <https://www.revisor.mn.gov/staff/>

Governor's Office Rules Coordinator

- Parisa Rouzegar: [parisa.rouzegar@state.mn.us](mailto:parisa.rouzegar@state.mn.us)

Office of Administrative Hearings

- William Moore, Administrative Rule and Applications Specialist: [william.t.moore@state.mn.us](mailto:william.t.moore@state.mn.us); 651-361-7893

Secretary of State

- Official documents should be filed to: [Official.Documents@state.mn.us](mailto:Official.Documents@state.mn.us)
- Questions:
  - Jenna Lipman, Public Records and Involvement Coordinator: [jenna.lipman@state.mn.us](mailto:jenna.lipman@state.mn.us)
  - Bibi Black, General Counsel: [bibi.black@state.mn.us](mailto:bibi.black@state.mn.us); 651-201-1326

*State Register*

- Sean Plemmons: [sean.plemmons@state.mn.us](mailto:sean.plemmons@state.mn.us); 651-201-3204

Legislative Reference Library

- General email to send all reports: [reports@lrl.mn.gov](mailto:reports@lrl.mn.gov)
- Chris Steller: [chriss@lrl.mn.gov](mailto:chriss@lrl.mn.gov); 651-296-0586

Legislative Coordinating Commission: [lcc@lcc.leg.mn](mailto:lcc@lcc.leg.mn)

Department of Agriculture

- Doug Spanier: [douglas.spanier@state.mn.us](mailto:douglas.spanier@state.mn.us); 651-201-6166

Rulemaking Help Desk

- Andrea Barker, Department of Transportation: [andrea.barker@state.mn.us](mailto:andrea.barker@state.mn.us) or via Teams chat
- Mary H. Lynn, Pollution Control Agency: [mary.lynn@state.mn.us](mailto:mary.lynn@state.mn.us); 651-757-2439
- Josh Skaar, Department of Health: [josh.skaar@state.mn.us](mailto:josh.skaar@state.mn.us); 651-368-0751

IRC Teams Site

- Vanessa Vogl: [vanessa.vogl@state.mn.us](mailto:vanessa.vogl@state.mn.us)
- Brittany Wysokinski: [brittany.wysokinski@state.mn.us](mailto:brittany.wysokinski@state.mn.us)

# Chapter 1 - Rulemaking in General

## Introduction

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This chapter briefly describes the legal basis for rulemaking and the history of the Minnesota Administrative Procedure Act (APA),<sup>1</sup> lists ongoing rule management responsibilities, and provides information about an informal group of state agency rule staff and a rule help desk.

### On the web

The Manual can be found online at [MDH Rulemaking \(https://www.health.state.mn.us/data/rules/index.html\)](https://www.health.state.mn.us/data/rules/index.html). It is available in Adobe Acrobat and Microsoft Word.

### Accessibility

Minnesota law requires all state documents to be accessible to all individuals. A document or application is considered accessible if it meets certain technical criteria and can be used by people with disabilities. This includes access by people who are mobility impaired, blind, low vision, deaf, or hard of hearing, or who have cognitive impairments. We believe all documents that make up this Manual meet these state standards. See your agency's accessibility coordinator for further information or if you believe that these documents require further changes to make them accessible.

**Note:** All documents that you plan to post on OAH's eComments page must be accessible. OAH will not post documents that are not accessible.

### Plain language

Executive Order 19-29 requires state agencies to use plain language "to communicate with Minnesotans."<sup>2</sup> According to the order, "Plain Language is a communication which an audience can understand the first time they read or hear it."<sup>3</sup>

Whenever agencies communicate with the public, including when they publish rule-related legal documents under the APA, they must adhere to the executive order. There are also important practical reasons to embrace plain language.

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<sup>1</sup> Minnesota Statutes, chapter 14. See also Minnesota Rules, chapter 1400 (Office of Administrative Hearings' rules implementing the APA).

<sup>2</sup> [Executive Order 19-29](#).

<sup>3</sup> The Executive Order is in addition to various agencies' statutes that require the agency to use plain language. Minn. Stat. § 14.07, subd. 3(3), requires the Revisor's Office to use plain language when drafting rules and to avoid technical language."

First, plain language can help you avoid most of the ambiguity and vagueness that plagues legalese. For rules, ambiguity and unconstitutional vagueness can result in rule defects. Second, plain language engenders trust among agency stakeholders and the public. Why? Because plain language clearly communicates what you are trying to say. If people can understand what you are saying the first time that they read your SONAR, rules, etc., the more they will trust you, even if they disagree. Third, if people can understand your rules, the more likely that they can—and will—comply; and it's also more likely that you will be able to understand what you as an agency need to enforce. And fourth, there is mounting evidence that people prefer and want plain language because it reduces frustration among readers, especially those needing to comply with rule requirements.

There are many resources on plain-language best practices, but a good place to start is the [Center for Plain Language, Clarity](#), or the Michigan Bar Journal's [Plain Language column](#).

You can also read the articles and books of leading plain-language advocates such as Joseph Kimble, David Mellinkoff, Joseph Williams, Michele Asprey, and Richard Wydick.

## 1.1 What this Manual Covers and What it Does Not Cover

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This Manual covers the development and adoption of rules that follow the main process in Minnesota Statutes, chapter 14. This Manual also covers the adoption of exempt rules under sections 14.386 and 14.388, the expedited process for adopting rules in section 14.389, and the shortened process for repealing obsolete rules under section 14.3895. This Manual does not cover how to handle rulemaking petitions or variances to rules.

The Revisor's Office also has two rulemaking manuals. The first one, [Rulemaking in Minnesota: A Guide](#), is similar to this Manual in detailing the rulemaking steps and also includes the text of the APA. When in doubt or if there is conflicting information, defer to this IRC Manual, as it is more consistently updated.

The second manual is a rule-drafting manual entitled [Minnesota Rules Drafting Manual with Styles and Forms](#), which is similar to the bill-drafting manual also published by the Revisor's Office. Whether you are an experienced or first-time rule writer, read it. It is the most authoritative source on how to draft rules and provides plain-language practices. If you want to avoid rule defects and draft clear rules, you need to read the manual.

Another good reference source is the online book [Minnesota Administrative Procedure](#), which discusses the APA. The book traces the history of the APA, major changes to the APA, and other important APA elements. Now in its fourth edition, the book discusses both rulemaking and contested-case proceedings, with detailed references to court decisions. It's an invaluable resource and is frequently cited by the legal community, including administrative law judges.

## 1.2 Selected Statutory and Rulemaking Provisions

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### 1.2.1 Rule

As defined in the APA, “‘Rule’ means every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.”<sup>4</sup>

This definition means that rule language must be enforceable and must implement the statute, make the statute specific, or govern the agency’s organization or procedure.<sup>5</sup> Language that merely repeats statute is not generally considered a rule because it does not implement the law or make the law specific. Further, statutory language is a legislative statement, not an agency statement, and so should not be used in rule.<sup>6</sup>

In addition to taking issue with repeating statutory language, ALJs often call out providing examples in rule as a defect. In particular, ALJs will disapprove language that describes hypothetical scenarios. Using hypothetical scenarios to interpret the law should not be in the rule but rather in agency materials. The lone exception is the Department of Revenue, which has been allowed to use examples in its rules. For example, an ALJ noted the unique nature of tax rules:

Subpart 3 sets out examples of how the tax calculation is performed and who must pay the tax. While examples are not rules, the Department must commonly describe the impact of its rules in the form of “real world” applications. Due to the unique nature of tax rules, examples included in the rules themselves have been approved in rulemaking proceedings. The examples set out in subpart 3 are found to be needed and reasonable.<sup>7</sup>

Although ALJs are not consistent across the board, some ALJs will approve a list of a series of items (X, Y, and Z) when the word “example” is not used and the items are not hypothetical descriptions of potential scenarios. Many rules contain “such as” followed by a list of concrete items. For example, a Board of Animal Health rule defines a “confinement area as a structure used or designated for use to restrict an animal to a limited amount of space, such as a room, pen, cage, kennel, compartment, crate, or hutch.”<sup>8</sup> But again, ALJs are not consistent, as some disapprove *including but not limited to*, which semantically means the same as *such as*. Use these terms sparingly, if at all.

Finally, the word “may” is the most commonly cited rule defect for several reasons, but its use as it relates to a “rule” makes the language associated with the word not a rule because something may or may not happen—that is, there is no future effect.

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<sup>4</sup> Minn. Stat. § 14.02, subd. 4.

<sup>5</sup> Minn. Stat. § 14.03, subd. 3(a)(1).

<sup>6</sup> See also Minn. Stat. § 14.07, subd. 3(1): the revisor must “minimize duplication of statutory language.”

<sup>7</sup> OAH Docket Number 7-2700-13138-1. See also RD2951; OAH Docket Number 10-2700-12042-1.

<sup>8</sup> Minn. R. 1721.0490, subp. 2.

## 1.2.2 Nonapplicability

The APA carves out exceptions to the definition of a rule and states which entities are not required to comply with the APA's rulemaking requirements.<sup>9</sup>

## 1.2.3 Required rules

“Each agency shall adopt rules . . . setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public.”<sup>10</sup>

Agencies should not rely on this general authority as their only statutory authority for rulemaking. It is better to cite the agency's most specific rulemaking authority.

## 1.2.4 Counting time

The APA has many time-related provisions.<sup>11</sup> When counting time, the day that an action occurs—such as mailing a notice—does not count and the last day counts.<sup>12</sup>

**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.<sup>13</sup>

Example: For a seven-day period, a period starting on a Monday ends the next Monday. If that Monday were a state holiday,<sup>14</sup> the period would end on Tuesday.

**Working day.** Working days do not include Saturdays, Sundays, and state holidays.<sup>15</sup>

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.

## 1.3 Delegation of Power

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Legislative bodies delegate rulemaking power to administrative agencies by statute, either by authorizing rules on specific topics or by a general provision that the agency may make rules necessary to carry out the purpose of statutorily assigned duties. Historically, a legislature could not delegate its

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<sup>9</sup> See Minn. Stat. § 14.03.

<sup>10</sup> Minn. Stat. § 14.06(a).

<sup>11</sup> See Minn. R. 1400.2030, subp. 1.

<sup>12</sup> Minn. R. 1400.2030, subp. 1.

<sup>13</sup> Minn. R. 1400.2030, subp. 1.

<sup>14</sup> See Minn. Stat. § 645.44, subd. 5 (listing state holidays).

<sup>15</sup> Minn. R. 1400.2030, subp. 1.



lawmaking authority to administrative bodies. But because society has become increasingly complex, the courts have recognized the difficulty for legislatures to develop comprehensive regulations and, therefore, have allowed legislative bodies considerable flexibility in delegating authority.<sup>16</sup> However, legislative delegation of authority to an administrative agency will be sustained only if the delegation was accompanied by “ascertainable,” “adequate standards,” or “intelligible principles” necessary to guide the agency.

A rule is the product of rulemaking. Rulemaking is the part of the administrative process that resembles a legislature’s enactment of a statute. As such, rulemaking is an executive-branch quasi-legislative practice to formulate policy necessary to administer a legislatively created program and to fill any gap left, implicitly or explicitly, by the legislature. Administrative agencies have knowledge and experience to regulate and supervise programs of a highly specialized or rapidly changing subject matter.

## 1.4 The Minnesota Administrative Procedure Act

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Rulemaking in Minnesota follows procedures outlined in the APA, Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400. A codified set of procedures on rulemaking was first enacted in Minnesota in 1945.

For more on the APA’s history, the online book *Minnesota Administrative Procedure* provides additional background.

## 1.5 Office of Administrative Hearings Rules

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The Office of Administrative Hearings (OAH) is charged with many responsibilities under the APA. OAH has, therefore, adopted rules under Minnesota Rules, chapter 1400. For general information about OAH, refer to **OAH-INF** in the appendix.

## 1.6 Governor’s Office Rule Review Process

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The Governor may veto rules.<sup>17</sup> This statutory veto authority occurs at the end of the rulemaking process when 99.9% of the work on the rules is done. To reduce the risk of a veto at that late stage, agencies submit rules to the Governor’s Office for review at three different points during the rulemaking process. This way, if the Governor opposes the rules, the agency can stop the project early in the process and avoid wasting considerable time and effort by governmental staff and stakeholders. If the Governor wants the rules to take a different direction, the agency can redirect the rules at a point in the process where an advisory committee and the public have a chance to respond to the Governor’s decision. For a copy of the administrative rule review policy, see **GOV-PLCY** in the appendix.

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<sup>16</sup> This has been changing at the federal level with recent Supreme Court decisions.

<sup>17</sup> Minn. Stat. § 14.05, subd. 6.

The Legislative Coordinator manages the rules review process for the Governor’s Office and works with Governor’s Office staff to ensure a quick turnaround when rules are submitted for review. You can also communicate directly with your agency’s assigned policy advisor.

**Note:** The Governor’s Office encourages agencies to deliver documents via email. You may submit electronic rulemaking forms in PDF format to the Legislative Coordinator.

## 1.7 eFiling and eComments

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Agencies may file rule-related documents electronically with OAH through its eFiling system. OAH also has a system for receiving public comments electronically.

**Note:** With the advent of eFiling and eComments, OAH’s systems continue to evolve. eFiling is the default for business with OAH. But for public comment periods, using the eComments system remains voluntary unless the APA requires the administrative law judge (ALJ) to receive comments. OAH, the Revisor’s Office, and Secretary of State’s Office now accomplish the final steps electronically.<sup>18</sup>

### 1.7.1 eFiling rule-related documents

All documents submitted for review by an ALJ should be eFiled whenever possible. OAH has posted step-by-step instructions for creating an account and filing your documents on its website at [OAH eFiling \(https://mn.gov/oah/forms-and-filing/efiling/\)](https://mn.gov/oah/forms-and-filing/efiling/). (The page also includes a link to frequently asked questions.) You may also request a hearing date through eFiling, or, if you have difficulty with the eFiling system, you may call OAH via telephone.

#### 1.7.1.1 Obtaining an OAH docket number and ALJ assignment

You must obtain a docket number and ALJ assignment before submitting your documents for OAH review.

1. Complete the Notice of Appearance form. You may use either the form available on the OAH website at [OAH Forms \(https://mn.gov/oah/forms-and-filing/forms/\)](https://mn.gov/oah/forms-and-filing/forms/) or form **OAH-NOA** in the Appendix, which is customized for rulemaking use. (Skip the OAH Docket Number field at the top of the form. You will receive your docket number as part of this process.)
2. Complete the online [Contested Case Docket Request on the OAH website \(https://mn.gov/oah/lawyers-and-litigants/administrative-law/docket-request.jsp\)](https://mn.gov/oah/lawyers-and-litigants/administrative-law/docket-request.jsp); skip any nonapplicable fields in the request form. Identify the responsible agency unit as the Party Name. Attach the Notice of Appearance to your request. (Note that the Contested Case Docket Request form is used, even though rulemaking does not involve a contested case hearing. That is why some of the fields do not apply or field labels are an awkward fit, such as “Party Name.”)

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<sup>18</sup> See Minn. Stat. § 14.16, subd. 3.

3. OAH staff will create an eFiling folder and notify you of the ALJ assignment and OAH docket number.
4. An automated email will be sent to your email address. Check your spam folder if you do not receive an email. Click the link in the email to view your eFile folder (and activate your account if this is your first time eFiling).

#### 1.7.1.2 eFiling documents

Always check to ensure that the system has uploaded your documents. Saving a screen shot 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.

#### 1.7.2 Public comments using eComments website

Strongly consider using OAH's eComments website for collecting your public comments. If agencies request to use an eComments site, OAH will collect public comments on its [eComments website \(https://minnesotaoah.granicusideas.com\)](https://minnesotaoah.granicusideas.com), 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/>.

To set up your public eComments site, contact OAH Administrative Rule and Applications Specialist, William Moore, at [William.T.Moore@state.mn.us](mailto: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 case. 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.

See **OAH-INF** for more details about what to provide.

**Note:** Agencies must always use the eComments website after public hearings on proposed rules. Minnesota Rules, part 1400.2230, requires that commenters submit their comments to the ALJ. OAH will set up a public comment web page after the hearing.

Agencies may also use this system for collecting public comments during the 60-day comment period after the Request for Comments is published or the 30-day comment period after rules are proposed.

## 1.8 Ongoing Rule Management and Oversight Responsibilities

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An agency has several ongoing responsibilities on the agency's rules.

### 1.8.1 Rulemaking mailing list

The agency must maintain a rulemaking mailing list:

(a) Each agency shall maintain a list of all persons who have registered with the agency for the purpose of receiving notice of rule proceedings. Persons may register to receive notice of rule proceedings by submitting to the agency:

- (1) their electronic mail address; or
- (2) their name and United States mail address.<sup>19</sup>

**Note:** The statute further states that “[t]he agency may inquire as to whether those persons on the list wish to remain on it and may remove persons for whom there is a negative reply or no reply within 60 days.”

### 1.8.2 Public rulemaking docket

The agency must maintain a current, public rulemaking docket. The rulemaking docket must contain a listing of each possible proposed rule under active consideration and each pending rulemaking proceeding. There is an extensive list of details that must be included for each rulemaking project.<sup>20</sup>

By January 15 each year, agencies must submit their rulemaking docket and the official rulemaking record required under Minnesota Statutes, section 14.365, for any rule adopted during the preceding calendar year to the chairs and ranking minority members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rule.<sup>21</sup> You must also copy the Legislative Reference Library, as required by statute.<sup>22</sup>

### 1.8.3 Obsolete rules report

These are the main requirements under Minnesota Statutes, section 14.05, subdivision 5:

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<sup>19</sup> Minn. Stat. § 14.14, subd. 1a.

<sup>20</sup> Minn. Stat. § 14.366.

<sup>21</sup> Minn. Stat. § 14.116(a).

<sup>22</sup> Minn. Stat. § 3.195, subd. 1(a).

- By December 1 each year, the agency must submit a report to the governor, the Legislative Coordinating Commission (LCC), the policy and funding committees and divisions with jurisdiction over the agency, and the Revisor of Statutes.
- The report must list any of the agency's rules that are obsolete, unnecessary, or duplicative of other state or federal statutes or rules.
- The agency must either provide a timetable for repealing the rules or must develop a bill to repeal the rules.
- The report must be signed by the agency person responsible for identifying and initiating the rule repeal.
- The report must also provide the status of any rules identified in the agency's previous report.

**Note:** The best practice is to submit the report to each party electronically, which may be done in a single email.

You must also copy the Legislative Reference Library. The library allows you to search past [rule-related reports](#).

#### 1.8.4 Maintaining official rulemaking records

Minnesota Statutes, section 14.365, states, "The agency shall maintain the official rulemaking record for every rule adopted under sections 14.05 to 14.389. The record must be available for public inspection. The record required by this section constitutes the official and exclusive agency rulemaking record with respect to agency action on or judicial review of the rule."

**Note:** In 2013, the legislature added Minnesota Statutes, section 13.356, to the Data Practices Act, protecting certain telephone and email lists. Data maintained in your historic rulemaking files might be affected. Data classifications are based on the law at the time a request is made. In other words, data that was public at the time it was created can be changed retroactively to private data by a change to the Data Practices Act. Consult your data practices resource or legal counsel if you receive a data request related to rulemaking files.

### 1.9 Interagency Rules Committee

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The IRC is an informal group of agency staff that meets quarterly to discuss common issues related to rulemaking. It was started in February 1995 by a cadre of state agency rules staff. Meeting attendance usually ranges between 15 to 30 people. The committee communicates via a subscription service (see below). The IRC members provide the organization and expertise necessary for developing and updating this *Minnesota Rulemaking Manual*. The IRC also sponsors the annual rulemaking seminar and serves as an interagency forum to discuss proposed legislation governing rulemaking procedures.

### 1.9.1 IRC Teams site

The IRC has a Teams page called “DHS\_DLI\_IRC” where members can find resources and collaborate on rulemaking. To be added to the Teams site, send an email to Vanessa Vogl at [vanessa.vogl@state.mn.us](mailto:vanessa.vogl@state.mn.us) or Brittany Wysokinski at [brittany.wysokinski@state.mn.us](mailto:brittany.wysokinski@state.mn.us). Members frequently post on the site and ask questions. Important files are also housed on the site, such as relevant legislative bills, IRC meeting minutes, important court or ALJ cases, and other rule-related information.

## 1.10 Resources and the Rules Help Desk

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1. There are several important resources to obtain help or information during the rulemaking process. Questions about the status of filings that have been made or other OAH-related questions:
  - Contact OAH Administrative Rule and Applications Specialist, William Moore, at [William.T.Moore@state.mn.us](mailto:William.T.Moore@state.mn.us) or 651-361-7893.
2. Legal advice:
  - Seek the counsel of your agency’s in-house legal staff or your Assistant Attorney General.
3. Questions about APA - The IRC has established a “help desk” function for assistance with rulemaking. Contact:
  - Andrea Barker, Department of Transportation: [andrea.barker@state.mn.us](mailto:andrea.barker@state.mn.us) or via Teams chat
  - Mary H. Lynn, Pollution Control Agency: [mary.lynn@state.mn.us](mailto:mary.lynn@state.mn.us); 651-757-2439
  - Josh Skaar, Department of Health: [josh.skaar@state.mn.us](mailto:josh.skaar@state.mn.us); 651-368-0751

## 1.11 Training for Agency Rulemaking Staff

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The Interagency Rulemaking Committee provides annual training to state employees involved in rulemaking.<sup>23</sup> Continuing legal education credits may be available for some sessions at the seminar. Previous seminar materials are available on the [Minnesota Rulemaking Manual and Seminar webpage](#).

## 1.12 Information on the Cost of Rulemaking

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Refer to **COST-INF** in the appendix for information on approximate costs for rulemaking. The document reflects the collective experience of many agencies’ developing and adopting rules, starting with the Department of Human Services. The information has been updated and revised over time with notable

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<sup>23</sup> See Minn. Stat. § 43A.04, subd. 11.

contributions from the Pollution Control Agency, the Department of Health, and most recently, OAH. This cost information might not be right on point for agencies whose rules are not as controversial or do not have the same lengthy history as those of the contributing agencies. However, it is the best cost information available and provides a valuable starting point in estimating rulemaking costs.

**Note:** OAH charges are one category of rulemaking costs. If your agency is unaware that OAH bills agencies directly for all time ALJs and other professionals spend working on your agency's rules, you should inform them. This includes reviews before publishing notices and approving additional notice plans, in addition to ALJ time spent preparing for and conducting a hearing. OAH review is mandatory, so these are necessary costs of rulemaking for agencies.

## 1.13 Comments and Suggestions for the Manual

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Comments or suggestions for improvements to the Manual may be submitted via the IRC Teams Channel Chat or to any of the following editors:

- Andrea Barker, DOT, [andrea.barker@state.mn.us](mailto:andrea.barker@state.mn.us)
- Ian Lewenstein, BMS, [ian.lewenstein@state.mn.us](mailto:ian.lewenstein@state.mn.us)
- Brittany Wysokinski, DLI, [brittany.wysokinski@state.mn.us](mailto:brittany.wysokinski@state.mn.us)

# Chapter 2 - Request for Comments

## Introduction

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The Request for Comments is the first formal step in Minnesota’s rulemaking process. This chapter discusses how to complete a Request for Comments. It is a good idea to review this entire chapter before proceeding. Under Minnesota Statutes, section 14.101, subdivision 1, an agency “shall solicit comments from the public on the subject matter of a possible rulemaking proposal under active consideration within the agency by causing notice to be published in the *State Register*.” The publication in the *State Register* is “[i]n addition to seeking information by other methods designed to reach persons or classes of persons who might be affected by the proposal.” At the end of this chapter is a checklist so you can easily note when you have completed each of the required steps.

## 2.1 Timing Requirements

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There are two timing requirements<sup>24</sup> related to the Request for Comments:

1. The Request for Comments must be published within 60 days of the effective date of any new or amendatory law requiring rules to be adopted, amended, or repealed.
2. The agency may not officially propose rules by publishing a Notice of Intent to Adopt or a Notice of Hearing until *at least* 60 days after the Request for Comments was published.

For the first timing requirement, OAH has consistently held that missing the requirement does not invalidate the rule.<sup>25</sup> Because there are no stated consequences for missing this 60-day deadline, the statutory requirement is more aspirational than mandatory. Nevertheless, missing the deadline falls outside the spirit of the APA.

In other words, it is better to meet the deadline than to explain later why you missed it or to even invite a new OAH standard on missing the requirement.

## 2.2 Get Agency Approval to Publish the Request for Comments

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How you get approval within your agency is as individual as your agency. Your agency may use a memo that contains a brief description of the rules and details any controversial issues or policy decisions.

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<sup>24</sup> Minn. Stat. § 14.101, subd. 1.

<sup>25</sup> See, for example, OAH 21-9005-37182: “With one exception, the rules were adopted in compliance with the procedural requirements of Minnesota Statutes, Chapter 14 (2020) and Minnesota Rules, Chapter 1400 (2019). The Department’s failure to publish the Request for Comments within 60 days of the effective date of the new law requiring the rules to be amended was harmless error.”



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.

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. The board resolution form in the appendix as **BD-NTC** can be adapted for this purpose.

## 2.3 Get a Revisor’s ID Number

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Both the Revisor’s Office and Governor’s Office track rule proceedings using a unique project identifier called the “Revisor’s ID number.” The ID number is in the format “R-04767.” The four digits following the “0” will be used with a two-letter prefix to identify the rule at each stage of the process. The two letters change depending on the type of draft, but the four digits always remain the same. The letters are keyed accordingly:

- RD: “Rule Draft” – the draft to be published in the *State Register*.
- AR: “Adopted Rule” – the cleaned draft of the RD version with striking and underscoring removed (“stripped”); any modifications are made on this version.
- AR/ST: - this is the stripped draft of the AR version.
- SR: “*State Register*” - this is the draft published with the Notice of Adoption; if there are modifications to the published rule, changes would be shown in this draft
- SR/ST: “*State Register Stripped*” - this is the stripped version of the SR version.

05/11/22	REVISOR	JFK/CH	AR4677
<b>Bureau of Mediation Services</b>			
<b>Adopted Permanent Rules Relating to the Minnesota Labor Relations Act and the Public Employment Labor Relations Act</b>			

11/08/22	REVISOR	KRB/HL	RD4593
1.1	<b>Department of Transportation</b>		
1.2	<b>Proposed Permanent Rules Relating to Transportation for Elderly, Disabled</b>		

### *Examples:*

At any time, you can request that the Revisor's Office open a rule file and assign an ID number, even if your request does not also include a request to review or produce a rulemaking document for the agency. The Revisor's Office will open the file initially as a placeholder so that the agency can include this number on all future correspondence with the Revisor's Office, the Governor's Office, and OAH.

Requesting an ID number should be one of the first tasks you do when starting a rulemaking proceeding. Contact the Revisor assigned to your agency; if you do not know who that is, the Staff Directory page on the Revisor's website provides this information.

The Governor's Office will track the project by this Revisor's ID number (See **GOV-PLCY**). If your project does not go forward, simply notify the Revisor's Office, and the Revisor's Office will close the file.

## **2.4 Governor's Office Review**

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When an agency has developed a rule idea, it should complete the Preliminary Proposal Form, **GOV-PRLM**, and submit it to the Governor's Office.<sup>26</sup> The form should clearly set out why you need to adopt, amend, or repeal rules and what specific priorities that you want to accomplish.

In addition to notifying the Governor, this form can serve several other very important purposes for your project. It helps the agency focus on specific, rather than general, goals. Specific goals, written early in the project, serve as a guide for the agency throughout the entire rule project and help to keep the project on track. Additionally, parts of this form may be used to develop the SONAR. The form must summarize the agency's rulemaking authority, without which the agency cannot proceed. Most importantly, the form sets out the need for the rules, a crucial part of the SONAR. (*See Chapter 4 of this Manual for additional information on the SONAR.*)

It is highly recommended that you make the effort to craft a high-quality Governor's form. Having the need and the goals for your project clearly in mind is necessary but having them also *clearly on paper* is highly desirable and beneficial as you move forward in your rulemaking project. Make sure to leave sufficient time to let the draft rest so you can reflect on the content and amend as needed before submitting the form.

## **2.5 Publish the Request for Comments in the State Register**

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An agency must publish a Request for Comments in the *State Register*.<sup>27</sup>

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<sup>26</sup> GOV-PLCY.

<sup>27</sup> Minn. Stat. § 14.101, subd. 1.

### 2.5.1 Requirements for the Request for Comments in the *State Register*

The Request for Comments must:

1. include a description of the subject matter of the proposal;
2. include the types of groups and individuals likely to be affected;
3. indicate where, when, and how persons may comment on the proposal; and
4. indicate whether and how drafts of any proposal or possible rules may be obtained from the agency.<sup>28</sup>

#### Suggestions:

1. If you will not have a draft for review, it is a very good idea to direct readers to the current rule parts that you plan to revise. If you are writing a new rule, identify the subjects that the rule will address.
2. You might wish to build some leeway into the scope of your subject matter by adding a general phrase such as “other things that arise as time allows” or other agency-specific criteria.
3. You might also wish to solicit comments about applicable regulatory-analysis-related topics and other information that you will need for the SONAR. It may be particularly useful to solicit comments regarding costs for compliance with the proposed rules.
4. eComments: Another possibility to consider is using the eComments system established by OAH for collecting your comments. Whether to do this depends on many agency-specific factors that you must gauge.

If you choose to use the eComments system, you must draft your Request for Comments to reflect this method. For further information on setting up eComments, see section 1.7.2.

### 2.5.2 Form for Request for Comments in the *State Register*

A form for the Request for Comments is in the appendix as **REQUEST**. This form originated from the recommended form in Minnesota Rules, part 1400.2510, and includes practice tips. The *State Register* will format the request according to its publication style and form.

### 2.5.3 Publish in the *State Register*

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.**

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<sup>28</sup> Minn. Stat. § 14.101, subd. 1.

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](#) for publication dates and deadlines.

### 2.5.4 Republishing the Request for Comments

The APA does not account for every rulemaking scenario. When in doubt, refer to Minnesota Statutes, section 14.001, the Statement of Purpose.

For example, if it has been two or more years since you first published a Request for Comments, it can’t hurt to republish the request. While not required to republish, doing so serves the APA’s broader purpose, which is public accountability and transparency. Going above and beyond the requirements in the APA demonstrates your good faith to both the public and OAH.

## 2.6 Additional Notice

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The publication of the Request for Comments in the *State Register* is “[i]n addition to seeking information by other methods designed to reach persons or classes of persons who might be affected by the proposal.”<sup>29</sup>

**Note:** OAH views publication of the Request for Comments in the *State Register* as sufficient to meet the statutory requirement; *additional notice is optional*. Nevertheless, if your rules are potentially controversial or have a substantial impact, you may want to consider holding listening sessions, setting up an advisory group, or sending the Request for Comments to your rulemaking list or parties that may be affected by your rule.

### 2.6.1 Reach affected persons or classes of persons that might be affected

There are probably many ways for an agency to reach affected persons. To reach them, you must first identify who they are. One way is to ask agency staff who are working on the rules or who will work with regulated parties after the rules are adopted to make a list of affected persons or groups. You can also ask affected persons or organizations for the names of others who might be affected by the rules. In some cases, it may be a good idea to mail or email your Request for Comments to all persons on the agency’s rulemaking mailing list, even though the APA does not specifically require this.

Mailing to the agency’s rulemaking mailing list, however, is only a start. You should also be creative in finding other ways to reach affected persons. If it is a small group of persons, perhaps mailing (or emailing) individual letters would be effective. If it is a large group of persons where an individual mailing is too expensive or cumbersome and you don’t have email addresses, then mail to persons who have inquired or shown an interest in the subject matter. Also, you can mail trade or professional associations representing affected persons and request to have a notice published in the newsletters of

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<sup>29</sup> Minn. Stat. § 14.101, subd. 1.

those trade or professional associations. When appropriate, consider sending press releases to general circulation newspapers.

Agencies are also using online resources in creative ways to spread the word, including special email lists and their public websites. They are also developing issue-specific sites for this purpose. There are undoubtedly other reasonable ways to reach affected persons. In deciding what is reasonable, consider the cost and effort of what you might do and the likelihood that this will reach the intended persons. Finally, if your rules will potentially affect persons who do not traditionally interact with government, make an extra effort to reach these persons.

Keep notes and records of your efforts. You must keep a copy of the Request for Comments 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 just the cover plus the pages on which your notice appears.

For any mailed notice, prepare a certificate of mailing. Create a similar certificate for electronic mailings. Attach a copy of the notice to the certificate; see section 2.7.4 about whether to also attach a copy of the mailing list. Get copies of any newsletters or newspapers in which a notice is published. Detail any efforts you made to develop your mailing list or to get a notice published. You can document what you have done by using the generic certificate form that is in the appendix as **CRT-GNRC**.

When you are selecting ways to reach affected persons, you will undoubtedly include friends and supporters of the rules. You might suffer the temptation to ignore likely opponents of the rules—namely, the ones who will make the whole process difficult. **Resist it.** Not wanting to deal with people who might oppose your position is human nature. It is, however, short-sighted to ignore these people during the early stages of rule development, because they will almost certainly raise issues and oppose the rules later. In fact, these are exactly the people you want to notify of the rules as early as possible. They will give you an early insight into their arguments and concerns, which will give you a better chance to address them.

See Chapter 3 for an expanded discussion on getting input from affected persons.

## 2.6.2 Inform the Legislature

Legislative interest in rulemaking has ebbed and flowed, but do not forget the legislature.<sup>30</sup> An agency must notify certain legislators at the time of formally proposing rules. The required legislators to notify include chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rules and chief House and Senate authors of the rulemaking authority (if it is within two years of the effective date of the law granting the authority).

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<sup>30</sup> See Minn. Stat. § 14.116(b), (c) (listing when legislative notice is required).

Even though this requirement applies only when you propose your rules, you may want to notify these legislators and any other interested legislators when publishing your Request for Comments and keep them informed throughout the rulemaking process. Even though individual legislators do not have authority to adopt or dictate the content of rules, their comments should be carefully considered and given great weight, especially if they give insight into the background and development of the underlying legislation.

## 2.7 OAH Prior Approval of Additional Notice Plan (optional)

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An agency may ask OAH for prior approval of its Additional Notice Plan at either one of two times: before publishing the Request for Comments or before publishing its Notice of Intent to Adopt Rules.<sup>31</sup> Why do this now if it is optional? 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 all over again.

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 persons who may be significantly affected by them.

**Note:** Even if you obtain approval of your Additional Notice Plan at this stage, the plan may not be complete. As you go through the process, you may identify other affected parties that should be added to your plan.

**Frequently Asked Question:** How does an agency determine whether to seek approval of its Additional Notice Plan?

**Answer:** The answer is varied. The agency must identify and analyze the relevant factors involved with its rulemaking project. With a simple, straightforward project without many variables, in either public interest or content, the agency might prefer to develop and seek approval of an additional notice plan at the outset. Or there might be a compelling reason or a controversy that suggests getting OAH approval up front would be wise. If rule development, however, is likely to be lengthy and there are many unknowns, engaging OAH's attention at the Request for Comments stage might be a premature, unnecessary expenditure of time and money. If you do not obtain prior approval before publishing the Request for Comments, you can still do so before publishing your Notice of Intent to Adopt Rules.

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<sup>31</sup> Minn. R. 1400.2060, subp. 1.

### 2.7.1 Requesting approval

To request prior approval of your Additional Notice Plan, you must file with OAH:

1. a description of the agency’s proposed Additional Notice Plan;
2. the agency’s proposed Request for Comments on the planned rule; and
3. 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 persons who might be significantly affected by the rules.

OAH has five working days to review and approve or disapprove an Additional Notice Plan. A form for a cover letter to the Chief ALJ requesting prior approval of your Additional Notice Plan and submitting the necessary documents for review is in the appendix as **NP-RQUEST**. This letter is designed to serve as a checklist for meeting the requirements of Minnesota Rules, part 1400.2060, to request prior approval of your Additional Notice Plan.

If you have questions about requesting prior approval of your Additional Notice Plan, you may contact William Moore at William.T.Moore@state.mn.us or (651) 361-7893. For the location of or other information about OAH, refer to **OAH-INF** in the appendix.

### 2.7.2 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.** Give yourself plenty of lead time the first time you use eFiling because at least one agency has run into issues with its firewall preventing access to the website eFiling system, which had to be addressed.

Always check to make sure that the system has uploaded your documents. Saving a screen shot 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.

### 2.7.3 Interpretation of “affected” by the rules

The word “affected” is used in two places in Minnesota Statutes, section 14.101, subdivision 1, governing the Request for Comments. The Request for Comments is published “[i]n addition to seeking information by other methods designed to reach [those] who might be *affected* by the proposal.” And you must include in the Request for Comments a description of “[those] likely to be *affected*.”

Everybody is affected by everything to some degree or another, so where do you draw the line in describing those who may be affected? The requirements related to giving Notice of Intent to Adopt give some insight. This notice must be given to persons or classes of persons who might be *significantly* affected.<sup>32</sup> You would be safe in applying the Request for Comments requirements to those persons *significantly* affected. Basically, this includes those persons who might care enough about the rulemaking that they might want to comment or get involved. It would also include those persons who might complain about the rules after they are in effect.

#### 2.7.4 Evidence of additional notice

OAH likes to see mailing lists. If you are sending notice to organizations or other individuals, email lists or copies of mailing labels are good evidence. If you are sending notice to all licensed parties, you may describe generally that “the agency will be sending notice to all 2,572 licensees.” Agencies also often maintain subscriber-based email lists of people specifically interested in their programs or rulemaking projects. Because these addresses can number in the thousands, you could describe the list generally, noting the total number of subscribers, as is recommended for licensed parties above. Detail any efforts you made to develop your 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.

## 2.8 Setting Up the Files for the Official Record

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Now is a good time to set up or at least begin to consider putting the official rulemaking record together. While concluding the rulemaking process now seems very remote, setting up files that will keep your original documents together and in order will save you time and stress at the end, especially in a lengthy rulemaking. See **RECORD**.

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<sup>32</sup> Minn. Stat. §§ 14.14 subd. 1a, .22, subd. 1.



## Checklist for Chapter 2 – Request for Comments

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Date Completed	Item
_____	<b>2 – Entire chapter reviewed before proceeding</b>
_____	<b>2.1 – Timing requirements met</b> - If newly adopted or amended rule grant, publish w/in 60 days of grant’s effective date.
_____	<b>2.2 – Agency approval to publish the Request for Comments</b> - If agency is a multi-member board that customarily gets board approval, <b>BD-NTC</b> form used.
_____	<b>2.3 – Get a Revisor’s ID Number</b>
_____	<b>2.4 – Governor’s Office Review</b> - <b>GOV-PRLM</b> used.
_____	<b>2.5 – Request for Comments published in <i>State Register</i></b> - <b>2.5.1 – Requirements met for Request for Comments</b> - <b>2.5.2 – Request for Comments drafted</b> - <b>REQUEST</b> form used - <b>2.5.3 – Publish in the <i>State Register</i></b> - <b>ST-REG</b> information sheet used - Deadline for publication met (See <i>State Register</i> website)
_____	<b>2.6 – Additional Notice (Optional)</b> - <b>2.6.1 – Reach affected persons</b> - Keep record of efforts. <b>CRT-GNRC</b> form used. - <b>2.6.2 – Inform the Legislature</b>
_____	<b>2.7 – Prior approval of Additional Notice Plan (Optional)</b> - <b>NP-RQUEST</b> letter used. - OAH eFile account created.

# Chapter 3 - Rule Development

## Introduction

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### General

An agency adopts rules to implement or make specific the law enforced or administered by the agency or to govern its organization or procedure.<sup>33</sup> Rule development is a huge topic, one that could fill an entire manual of its own. Given the focus of this Manual, however, this chapter will hit the high points of rule development. These points include the foundation or basis for the rules, input on rule development, and rule drafting. You should review this chapter before proceeding with your rule.

Consider simultaneously working on sections of the SONAR as rules are being developed. It is especially useful to capture the rationale for new rules or changes to include in the rule-by-rule analysis section of the SONAR. This will save you work later. Remember, though, that if rule language changes, you must update the SONAR.

### Expectations management and staff assignments

Before you start developing and writing the rules, you need to define responsibilities in your agency for the rulemaking project. Clearly establishing who is doing what is imperative. Who will write the various parts of the rules and the SONAR, who will edit and proofread, who will be responsible for compliance with the rulemaking process, who will send and sign notices to the Governor's Office, and who will oversee that each of these things are completed?

Also, consider consulting with in-house counsel or the agency's rules coordinator. In a small agency or program, this planning is easy—you just do everything. Where you have a group of people involved in the rulemaking process, this planning will turn the group into a team.

## 3.1 The Foundation or Basis for the Rules

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These are the things that you should verify before you begin work on your rules.

### 3.1.1 Statutory authority

The basis for every set of rules or rule amendments is statutory authority. Statutory authority can come in the form of a statute or session law that authorizes or directs the adoption of a specific set of rules, or a statute might give an agency general authority to adopt rules to carry out its assigned duties. Without statutory authority, an agency cannot adopt rules.

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<sup>33</sup> Minn. Stat. § 14.02, subd. 4.

### 3.1.2 Limits of statutory authority

When you start a rule project, carefully review your statutory authority. If you have specific statutory authority for your set of rules, follow the direction established by your grant of rulemaking authority and stay within any stated limitations contained in the grant. If you are relying on a general grant of rulemaking authority to adopt rules to carry out duties assigned to the agency, you will find your direction and limitations in the statutes that set out the duties assigned to the agency. In general:

- A rule must not exceed statutory authority conferred to the agency.
- A rule must not conflict with the governing statute or applicable law.
- A rule must have a reasonable relationship to the statutory purpose.
- A rule must not be unconstitutional, arbitrary, or unreasonable.

**Note:** Your statutory authority might derive from more than one source and thus could be complicated. You might need to seek legal advice for building your case or properly describing your authority.

### 3.1.3 Statutory authority expiration

For certain rules, statutory authority expires 18 months after the effective date of the law authorizing the rules.<sup>34</sup> An agency must publish a Notice of Intent to Adopt Rules or a Notice of Hearing within 18 months of the effective date of the law authorizing or requiring the rules. If the agency does not meet this deadline, the rulemaking authority expires.

This provision applies to first-time rule adoptions under the statutory authority and not to amendments or repeals of the rules if the statutory authority was originally used within the time limit. Be aware, however, that if the Legislature amends your long-standing statutory authority, it might trigger this 18-month requirement.

### 3.1.4 Time frame for developing and adopting rules

It takes between six months and two years to develop most sets of rules, and then another four to eight months to complete the rules adoption. If a newly authorized set of rules is complex or controversial enough that you will take more than 18 months to develop the rules, you should work with the legislature to obtain an exception from Minnesota Statutes, section 14.125, if the section applies.

### 3.1.5 Clearly understand the need for your rules

After you determine that you have statutory authority for rulemaking, the most important thing to do is clearly set out why you are writing rules. This will give direction to the entire rulemaking project. A

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<sup>34</sup> Minn. Stat. § 14.125.

statutory mandate to adopt rules will, by itself, establish the legal basis for need in your SONAR, but it will not guide you in developing the rules. In this case, you need to find out the underlying issue that compelled the legislature to mandate the adoption of rules and what the legislature wants the rules to accomplish. If your rules are to implement statutory duties or to address a problem under a statutory duty, then these duties or the issue should be your focus throughout the entire rule project.

As noted in section 2.4, it is highly recommended that you put forth the effort to craft a high-quality Governor's Preliminary Proposal Form before publishing the Request for Comments. Committing your thoughts to writing at the beginning will help you throughout the project to clearly understand the need for your rules and to focus on your goals.

### **3.1.6 Keep your options in mind from the beginning**

As you develop your rules, it is a good idea to keep in mind your future procedural choices for adopting the rule.

You have three choices:

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

While this step might feel remote, knowing how to put your rule development into the context of proposing them for adoption will help you. You can better gauge how your development is progressing so you can guide or determine your path. See Chapters 5, 6, and 7 for additional information about these three options.

## **3.2 Input on Rule Development**

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Getting public input is very important. There are many ways to do this. The following list has many good ideas about getting input on rule development, but it is by no means exhaustive. Rule development is an art, not a science. Be creative in finding ways to get input when developing rules.

### **3.2.1 Agency leadership**

Agency leadership needs to be involved throughout rule development. At the outset of the rule project, the agency leadership should set or approve the direction of the project. To help the agency leadership, prepare an initial proposal directed to them to ensure that they understand and approve the reason for the rule project and any fiscal implications.

Throughout the process, there needs to be communication between the agency leadership and any advisory committee so that each knows the other's positions and so that there are no surprises at the end of the process. It would be a major problem to develop a set of rules and then have your leadership see the proposed rules for the first time and disapprove an important advisory committee recommendation. Additionally, a major decision by your leadership needs to happen early enough in the rule development process so that the advisory committee has a meaningful chance to respond to the leadership's decision.

Make sure that your leadership knows the rulemaking requirements. Even though they make the final decisions about rules, they must do so within their statutory authority and ensure rules are needed and reasonable.

**Note:** At each important approval point in the process, make sure to leave enough time for formal approval by the agency leadership.

**For multimember boards:** When an agency is governed by a multimember board, the opportunities are limited for getting direction and approval on the rules. In most cases, you can discuss the rules with the board or get direction or approvals only at board meetings. It will likely take more time to adopt rules for an agency governed by a multimember board than for an agency headed by a commissioner.

### 3.2.2 The agency's Assistant AG

The role of the agency's Assistant AG varies from agency to agency and for each set of rules. The role is determined by the agency and depends on such things as the availability and experience of the rule writer and the legal issues involved. For agencies without in-house counsel (generally boards), the agency may ask its AG to review for legal issues such as constitutionality, enforceability, and impermissible discretion. In some cases, the agency will ask its AG to be actively involved in drafting the rules, participating in advisory committee activities, and participating in a hearing, if one is required.

### 3.2.3 Request for Comments

The starting point for getting input on rule development is the Request for Comments. The agency must publish the Request for Comments in the *State Register*. In addition, the agency should seek information by other methods designed to reach affected persons.<sup>35</sup>

### 3.2.4 Interested legislators

Interested legislators include any who have expressed an interest in the rule project or in the legislation that authorizes or requires the rulemaking. Interested legislators could also include those listed in Minnesota Statutes, section 14.116. Put interested legislators on your rule project mailing list to keep them informed of the progress of the rule project.

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<sup>35</sup> See chapter 2 for detailed information about the Request for Comments.

Even though individual legislators do not have authority to adopt or dictate the content of rules, their comments should be carefully considered and given great weight, especially if they give insight into the background and development of the underlying legislation.

### 3.2.5 Advisory committee

An agency may decide to appoint an advisory committee to help develop the rules.<sup>36</sup> For controversial or complex rules or for rules that require in-depth knowledge of an industry, advisory committees are highly recommended.

#### *3.2.5.1 Forming an advisory committee:*

- In some cases, advisory committees are mandated by statute and the agency must submit rules to the committee for review and comment before the rules can be proposed for adoption. When you have such an advisory committee, it is usually a good idea to get them involved early.
- Generally, you should keep the advisory committee to a workable size of no more than 15 people. However, your agency may decide that a larger advisory committee is necessary.
- Find out which people or groups are interested in the rulemaking and invite them to be on the advisory committee. Include friends and supporters of the rules and get their advice on record. Include likely opponents of the rules. Put them in the position to hear all sides and keep yourself neutral. Discussion by people with opposing views tends to moderate the views, and all advisory committee members might gain pride of ownership in the rules and become “defenders” of the rules. By including both supporters and opponents, you will ideally be able to resolve the controversial issues, avoid unintended consequences of a proposed rule, and possibly avoid a hearing. At the very least, you will identify controversial issues before the hearing, which allows you to prepare.
- To find out who the interested parties are, ask yourself several questions, including: Who participated in the legislative process when the rulemaking was first authorized? Who will benefit from these rules? Who is going to be upset by these rules? Who would want to know about these rules?
- If there is a potential policy impact on other state agencies, include them on the advisory committee and, as a courtesy, get a response from the other agency before making proposals related to any important issues.
- Have someone from the agency act as the chair for advisory committee meetings. The chair must ensure that issues are raised and discussed in a timely manner and that reluctant or shy parties are encouraged to participate.

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<sup>36</sup> Minn. Stat. § 14.101, subd. 2.

- Open your advisory committee meetings to all. Allow interested parties to attend. If someone who is not on the committee wants to speak, let them.
- Use the advisory committee until your agency adopts the rule.
- Some agencies keep meeting agendas and minutes, post both online, and include them in their SONARs.

**Note:** Choosing members of your advisory committee is an informal process that does not require an application or formal appointment through the Secretary of State.

### *3.2.5.2 Role of advisory committee*

The advisory committee's role is to advise. The committee has the power to inform and persuade the agency, but ultimately, the commissioner or board makes final decisions. Be sure to inform the advisory committee members of their role so they understand their advisory status and do not presume they have the authority to write, adopt, and administer the rules. It's a good idea to remind them of this, maybe as often as every meeting. Tell the advisory committee members that each of them likely represents an interest group and encourage them to maintain communication with the interest group. The appendix has an information sheet, **ADV-COMM**, that you can customize and give to advisory committee members to summarize the rulemaking process and the advisory committee's role.

### *3.2.5.3 Working with an advisory committee*

- It can be difficult to draft rules by committee. You should give the committee a draft of the rules early in the process so they have something to react to, but you might want to wait for one or two meetings before providing the draft. This allows the committee to discuss and identify issues without the structure and limitations imposed by a draft.
- For new rules, it may be helpful to provide an outline of the topic areas.
- For controversial issues, it may be helpful to develop a policy draft (or one-pager) explaining your rationale for the rule. Route these issues and policy drafts through the agency chain of command and discuss them with the advisory committee early in the process.
- Advisory committee members can help to get the word out about the rulemaking. Emphasize their responsibility to the committee as representatives and ask them to spread the word. Repeat this reminder, maybe as often as every meeting.
- In cases where there are opposing views on the rules within the advisory committee, you may want to use a mediator. Contact the Docket Coordinator at Office of Administrative Hearings to find out the availability of mediators. It is important to achieve consensus within the advisory committee as much as is practical, but it is not required to move forward.

- For especially controversial or complex rules, you might want to augment the advisory committee schedule from time to time with town hall meetings or listening sessions on special topics with the public.
- Do not make promises about the content of rules. There can be problems when you promise to include certain language in the rules before the formal adoption process and before all interested parties have had a chance to comment. It is certainly okay to promise that you will carefully consider all comments and suggestions and that you will be straightforward with the advisory committee.

#### *3.2.5.4 Using advisory committee discussions to help you write your SONAR*

Advisory committee discussions are an invaluable source of information for you when writing your SONAR. Tell the advisory committee members that it is important for them to give reasons for their recommendations. Keep notes of advisory committee discussions with the SONAR in mind.

##### **A. Regulatory analysis**

A broadly representative advisory committee is probably your best source of information for doing the regulatory analysis. Ask the advisory committee members to give their opinions on the eight factors that the agency must analyze and on ways that the rules can emphasize superior achievement and maximum flexibility. Run these opinions through your own filter to make sure they make sense and are balanced.

##### **B. Cost analysis**

A broadly representative advisory committee will also probably be your best source of information for doing the cost analysis under Minnesota Statutes, section 14.127. Ask the advisory committee members to give their opinions on the cost of compliance for small businesses and small cities, along with how they made their estimates. Also ask them to verify if there are no costs so that you can report this later in your SONAR (see chapter 4). Again, run these opinions through your own filter to make sure they make sense and are balanced.

#### *3.2.5.5 Thank the advisory committee.*

Be sure to thank the advisory committee members at the end of the committee process for their participation and suggestions and let them know that their work and participation as committee members makes the final rules better and more workable for everyone. Acknowledging their service with certificates of appreciation reinforces your gratitude. Mailing the certificates or having a party to give them out are very gracious ways to bestow them.



### 3.2.6 Written comments

It is important to keep careful track of all comments received so that the agency can consider and respond to any policy issues raised. Another important reason to keep track of the comments is to keep all commenters informed throughout the remainder of the rulemaking process. Log the name, address, summary of the comment, and agency response for all written comments. Put each person who commented on a mailing list for the Notice of Intent to Adopt Rules. Some agencies will send a standard response letter to all persons who comment, thanking them for the comment and telling them that they will be put on the mailing list for the Notice.

**Note:** You don't have to respond to comments received before you formally propose the rule in the *State Register*; these comments aren't part of the formal rulemaking record. But depending on the rule and how many comments you receive; you could include them in the rulemaking record to demonstrate the agency's good-faith effort in engaging stakeholders while developing the rules.

### 3.2.7 Expert opinions

Get expert opinions (for example, economist, mathematician, medical experts, scientists, other subject matter experts, etc.) when it is appropriate to support your rule and the rationale for adopting it.<sup>37</sup>

**Note:** Even if you don't have an advisory committee, you can get expert opinions.

### 3.2.8 Review other similar rules and laws

Review other rules and laws on related or similar topics for drafting examples. Look within your own agency and other agencies that do similar types of rules. Also, you might find rules on your subject matter that have already been drafted and adopted by other states.

### 3.2.9 Review past rulemaking records for policy reasons behind rules

Amending existing rules is often easier than first adopting rules because of the availability of the rulemaking record compiled during the original adoption. The rulemaking record reflects an agency's formulated policy. A rule writer should review all prior rulemaking records to understand the circumstances that created the need for the rules and any amendments and why the rules and amendments were needed and reasonable.

### 3.2.10 Governor

As previously mentioned, the agency must submit the rules to the Governor's Office three times throughout the rulemaking process, including during the draft stage. (See **GOV\_PLCY** in the appendix.)

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<sup>37</sup> Minn. R. 1400.2070, subp. 1(A).

### 3.2.11 The Minnesota Department of Management and Budget (MMB) consultation about local government impact

The APA requires agencies to consult with MMB to help evaluate the fiscal impact and benefits of the proposed rules on local governments. A form for a letter to your Executive Budget Officer (EBO) is in the appendix as **MMB-LTR**. Send this at the same time as you send the Governor's Office the Proposed Rule and SONAR form. Include the same materials that you send the Governor's Office. If you need assistance, contact your EBO to initiate the consultation with MMB.

MMB will confirm the agencies' determinations with its own letter. OAH prefers that agencies include a copy of its letter and any response when it submits its record for OAH review.

You do not need to wait for MMB's response before moving forward with your rulemaking, but you must include it in your submission to OAH.

## 3.3 Rule Drafting

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The following are comments and suggestions about rule drafting.

### 3.3.1 The Revisor's role in rule drafting

- The Office of Revisor of Statutes plays an essential role in rule drafting. Refer to the [Revisor's website](#) for staff and policy assignment areas.
- Before the proposed rules and Notice of Intent to Adopt Rules may be published, the proposed rules must be in the Revisor's format, and there must be a Revisor's certificate saying the rules are approved as to form.
- When amending rules, get an electronic copy of existing rule text by either calling the Revisor's Office or going to the [Revisor's website \(http://www.revisor.leg.state.mn.us/rules/\)](http://www.revisor.leg.state.mn.us/rules/). Do this early in the project.
- When should you first ask the Revisor for a Revisor's draft? In the early stages of developing your rules, you may want your drafts on your own computer so that you can easily work on them and make changes. You should ask the Revisor for a Revisor's draft when the rules are in almost final form. The Revisor's draft is a PDF document, which is more difficult to edit than a Word document on your own computer.
- If you have not worked on rules for a while (or ever), you may contact the Revisor's Office early in the process to get advice on drafting rules; however, you might still want to wait until the rules are in almost-final form to get a Revisor's draft.

- It is not necessary to have approval from the Governor’s Office before beginning work with the Revisor’s Office.
- To get draft rules in the Revisor’s format, you must provide the Revisor the draft language and ask the Revisor to produce a Revisor’s draft. Emailing an electronic copy is the most expedient and common way to provide draft language. The Revisor will input your rules and, as necessary, assign rule part numbers and titles; edit to make sure the rules are in the correct style and format for *Minnesota Rules*; edit for grammar, spelling, and clarity; and point out potential rule-related legal problems, including impermissible discretion. Make sure to compare the Revisor’s draft with the draft you provided so you are aware of any changes the Revisor made and can ensure the Revisor’s editorial changes do not make substantive changes.
- As you work through the rule development process, you may request updated Revisor’s drafts. There is no limit to how many drafts that the Revisor can produce for you—it could be 5, or it could be 50. When your rules are ready to propose, give the Revisor any last changes and ask for a draft approved for publication—this draft will include a certification page with the Revisor attorney’s signature.
- The time it takes to get an initial Revisor’s draft may be anywhere from several days to several weeks, depending on how busy the Revisor is with the legislative session or other projects. A Revisor’s draft approved for publication can generally be produced quickly if there are few changes from the preliminary draft. It is helpful to communicate your anticipated timeline to the Revisor’s Office.
- Use the following Resources from the Revisor when drafting your rules:
  - [Minnesota Rules Drafting Manual with Styles and Forms](#)
  - [Rulemaking in Minnesota: A Guide](#)

### 3.3.2 Draft clearly

When writing a requirement, clearly state who the requirement applies to and what must be done.

- Use active voice: “The licensee must keep the purchase agreement on file.” (This statement clearly identifies the actor responsible for carrying out the duty.).
- Try not to use passive voice: “The purchase agreement must be kept on file by the licensee.” Passive voice is fine if you want to emphasize what is being acted upon. But generally, in legal drafting, active voice should be used because it is clearer, more direct, and more concise.
- Do not use truncated passive: “The purchase agreement must be kept on file.” (Who must do this?). An exception is when the reader doesn’t need to know who is acting or the actor is clear from the context or previous sentences.

- It is acceptable to fix errors or clarify existing text outside of the scope of your rules (such as grammatical changes, formatting, etc.).
- Be consistent in using terms and phrasing similar requirements. Use identical language and construction wherever possible in similar requirements. For example, do not use “machine shop,” “machining business,” and “machining company” in successive paragraphs to describe the same entity. Instead, use one of these terms throughout.
- Write rules clearly so that the public knows what is required and what is prohibited. Start with a noun, add a verb, and see what else you need.
- Avoid using vague terms, known as weasel words, that are commonly flagged by OAH as unduly vague. The following are examples of words that have been cited by an ALJ as vague:
  - Acceptabl\*
  - Adequate\*
  - Applicable
  - Appropriate
  - At least
  - Complete
  - Determine\*
  - Discretion
  - Good faith
  - Including but not limited to
  - Material
  - Materially
  - May
  - Might
  - Pertinent
  - Reasonabl\*
  - Require\*
  - Responsibly
  - Satisfact\*
  - Should
  - Substantial
  - Sufficient
  - Such as
  - Will
  - Willful
  - When practical
- Eliminate jargon and legalese and replace with commonly used and understood terms.
- Break up unnecessarily long sentences. Sentences should average 25 words or less. Use items but avoid going below the subitem level.
- Break up long paragraphs. Paragraphs should average 60 words or less.

### 3.3.3 Draft with enforcement in mind

Write clearly with specific, measurable requirements that your agency can enforce consistently. Obviously, the agency must be able to enforce the rules it adopts. Break requirements into separate subparts or items so that agency staff can easily cite individual infractions for enforcement purposes.

### 3.3.4 Definitions

Define all words used in the rules that do not have common meanings. Compare the definition in similar rules and statutes from your agency and other agencies so that terms are defined consistently

as much as possible. Be consistent in how you use defined words throughout the rules. **And remember**, definitions should not be used to convey policy—that is, don't include substantive requirements in a definition.

Rules are often organized so that definitions are the first section of the rules. You should use a definition, however, only as the need arises; namely, when you are going to use the term in a substantive rule provision. Therefore, write policy first and see what definitions you need to give the policy effect.

### 3.3.5 Layout

When structuring a new set of rules, try to use the Revisor's format of part, subpart, item, and subitem from the very beginning of the project.

For example:

#### **1400.2400 Title**

Subpart 1. **Headnote.** Paragraph

- A. Item A
- B. Item B
- C. Item C

(1) Subitem (1)

- a. Unit a
- b. Unit b

(2) Subitem (2)

- D. Item D

Subp. 2. **Headnote.** Paragraph

The basic structure for the final set of rules is definition, scope, substantive requirements. While drafting the rules, it is often helpful to work backward. First, focus on what must be done (substantive requirements), then determine by whom (scope), and finally, fill in the details (for example, definitions). For more detailed guidance on structuring new rules, see the [Revisor's Rule Drafting Manual](#).

### 3.3.6 Incorporation by reference

An agency may incorporate by reference text from other sources into its rules, such as publications, documents, industry standards, and text from the *Federal Register* or *State Register*. However, text from Minnesota Statutes, Minnesota Rules, United States Statutes at Large, United States Code, Laws of Minnesota, Code of Federal Regulations, and other laws should not be incorporated by reference.

Instead, cross-reference the language in your rule. For example, use “As provided under Code of Federal Regulations, title X...” not “Code of Federal Regulations, title X, is incorporated by reference.”

To incorporate other sources, the Revisor’s Office must determine that the text is conveniently available to the public, and the rule must contain a statement of incorporation. “Conveniently available to the public” means “available for loan or inspection and copying to a person living anywhere in Minnesota through a statewide interlibrary loan system or in a public library without charge, except for reasonable copying fees and mailing costs.” The statement of incorporation must “include the words ‘incorporated by reference’; must identify by title, author, publisher, and date of publication the standard or material to be incorporated; must state whether the material is subject to frequent change; and must contain a statement of availability.”<sup>38</sup>

The Revisor’s Office considers material to be conveniently available to the public if it is available free online or is available through the Minitex interlibrary loan system. If the material you seek to incorporate is not conveniently available, the Revisor will require that you submit two copies of the material to be catalogued at the State Law Library to make it available through Minitex (one for reference and one for circulation).

While statute requires that you state whether the material is “subject to frequent change,” what constitutes “frequent change” is undefined, and there is no significance attached either way. For practical purposes, material that is updated at least annually should be described as “subject to frequent change.”

**Note:** To avoid future problems of interpretation, make sure your rules clearly reflect whether the incorporated-by-reference text is incorporated “as amended” or is subject to the agency’s changes. For example, Minnesota Rules, part 4720.0350 states:

**4720.0350 RULES AND STANDARDS ADOPTED BY REFERENCE.**

The National Primary Drinking Water Regulations in Code of Federal Regulations, title 40, part 141, and sections 142.40 to 142.64, *are incorporated by reference* in parts 4720.0200 to 4720.3970 *and are subject to the alterations and amendments contained in parts 4720.0200 to 4720.3970.* [emphasis supplied]

Also note that incorporating text by reference is *not* an unconditional right. An agency may always cross-reference state and federal law, including future amendments (except where there is clear legislative intent to the contrary, and perhaps whenever the federal Internal Revenue Code is involved). You will have to make your case, however, to the Revisor’s Office for using other sources and incorporating future amendments to them. While further discussion is beyond this Manual’s scope, you should know that there are limits to incorporations of future amendments. Seek legal advice if this issue becomes a sticking point.

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<sup>38</sup> Minn. Stat. § 14.07, subd. 4.

### 3.3.7 Miscellaneous

- At the bottom of each page of a rules draft, print a footer with the date of the draft. This is a good idea because somewhere between the 3rd and 13th draft, you will lose track of what you did when. The footer should be in the general form: “[Topic] Rules Draft Dated [MM/DD/YR] - Page #.” When you are ready to submit your draft rules to the Revisor for a Revisor’s draft, include in the footer that it is the draft submitted to the Revisor.
- Outcome-based rules or performance standards are favored by the legislature over design or operational standards. Outcome-based rules or performance standards are, however, harder to write and enforce. One way to draft outcome-based rules is to start with operational standards, but to allow a variance if the regulated party can ensure the same or better level of safety or emissions or whatever is the purpose of the operational standards.
- *Shall* versus *must*. Disputes over *shall* have rendered it a very unfavorable word for drafting,<sup>39</sup> making “must” the favored word of most plain-language experts. Under statute, *shall* and *must* are defined as “mandatory.”<sup>40</sup>
- The use of “*may*” is restricted to circumstances that require its use, such as when the affected party may choose to comply with one provision or another or where there are criteria relating to a choice. Don’t use “*may*” when the commissioner or agency actor is enforcing a requirement. For example, “The commissioner may certify an applicant if ...” Here, the commissioner has unfettered discretion to choose whether to certify an applicant. Use “*must*” instead.
- Do not restate the statute. This doesn’t meet the definition of a *rule* and could result in conflict between statute and rule if the statute gets amended.
- Unbridled discretion by an agency is prohibited. Phrases such as “other information the commissioner may require” or “at the discretion of the commissioner” are vague and, therefore, give unbridled discretion. The Revisor’s Office will likely flag this for you, and the ALJ will very likely disapprove the rule.
- Variances must be limited to case-by-case situations. If alternatives of general applicability and future effect will be considered; these criteria must be in the rules.
- Check similar rules to standardize the language for similar requirements. Examples of common rule provisions are licensing procedures, variance procedures and criteria, and documentation and record-keeping requirements.

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<sup>39</sup> See the entries in *Black’s Law Dictionary* and *Garner’s Modern English Usage*; Joseph Kimble, *Seeing through Legalese*; Ian Lewenstein, “The Uses and Misuses of *Shall*,” *Bench and Bar of Minnesota*; and Richard Wydick, *Plain English for Lawyers*.

<sup>40</sup> Minn. Stat. § 645.44, subds. 15a, 16.

- If a document is to be incorporated by reference, it must be readily available in the public domain.<sup>41</sup>
- Use singular rather than plural. For example, “an applicant must...” vs. “applicants must...”
- Avoid gender-specific language. Use they/them.
- Rules are regulatory tools, not educational documents. In the language below, the agency is putting an example into rule; this explanatory information is beneficial but should be placed on the agency’s website or in another document.

Subp. 2. **Exclusion of household members is prohibited.** The commissioner must not exclude a household member and the household member’s income and assets from the applicant’s household for the sole purpose of establishing eligibility for the remaining household members except as provided in subpart 1.

**Example:** A household consists of a veteran, spouse, a biological child of the veteran and spouse, and a biological child of the spouse (stepchild of the veteran).

The spouse receives \$500 per month in child support which puts the household over the income limit for income based programs or reduces the amount of assistance the household is eligible for under other programs.

The household cannot exclude the stepchild and the \$500 in child support for the purpose of attaining eligibility or maximizing benefits for the remaining household members.

- Use existing professional accreditation or licensure where possible rather than creating new qualification requirements.
- When drafting, ask:
  - What will it cost?
  - Is the data generated actually used?
  - Is statewide uniformity needed?
  - What is the sanction for not doing this?
  - Can we enforce this?
- Do we need to specify an effective date?
  - Does the statute or other law require it?
  - Does Minnesota Statutes, section 14.128, apply? (See section 4.2.5)

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<sup>41</sup> Minn. Stat. § 14.07, subd. 4.



# Chapter 4 - Developing the Statement of Need and Reasonableness (SONAR)

## Introduction

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This chapter discusses requirements and suggestions for drafting the SONAR. 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 requirements for developing a SONAR.

You will find two SONAR forms in the Manual that need to be read together. The **SONAR** form remains the traditional annotated explanation of how to develop your SONAR, complete with the usual advice and tips. The second version is a newer, fully accessible **SONAR-TEMPLATE**. The **SONAR-TEMPLATE** is a bare-bones outline designed for you to insert your own content, sparing you from having to delete the instructions and reformat it.

## 4.1 Timing

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Agencies must prepare the SONAR on or before the signature date on the Notice of Intent to Adopt Rules. The agency must send a copy of the SONAR to the Legislative Reference Library when the notice is mailed or emailed.<sup>42</sup>

## 4.2 Required Contents

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The SONAR must contain a summary of the evidence and argument that the agency is relying on to justify why the rules are needed and reasonable. The information provided must be sufficiently specific to allow interested persons to prepare testimony or evidence in favor of or in opposition to the proposed rules. An agency should cite to research, studies, or law that the agency anticipates relying on to support the rules. An agency must also include any information required by statute that imposes specific rulemaking requirements on the agency. For a complete list of the required contents of a SONAR, see Minnesota Statutes, sections 14.131 (with a hearing) and 14.23 (without a hearing), and Minnesota Rules, part 1400.2070.

### 4.2.1 Regulatory analysis

The SONAR must contain a regulatory analysis that includes the following information, to the extent that the agency can get this information through reasonable effort:

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<sup>42</sup> Minn. Stat. §§ 14.131, .23; Minn. R. 1400.2070, subp. 3.

1. A description of the classes of persons that will probably be affected by the proposed rules, including those that will bear the costs of the rules and those that will benefit from the rules.
2. An estimate of the probable costs to the agency and other agencies of implementing and enforcing the rules and any anticipated effect of the rules on state revenues.
3. A determination and discussion of whether there are less-costly or less-intrusive methods of achieving the purpose of the rules.
4. A description of any alternative ways to achieve the purpose of the rules that the agency seriously considered and the reasons why they were rejected in favor of the proposed rules.
5. An estimate of the probable costs of complying with the rules, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.
6. An estimate of the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals.
7. An assessment of any differences between the rules and existing federal regulations and analysis of the need for and reasonableness of each difference.
8. An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

#### **4.2.2 Performance-based rules**

The legislature recognizes the important and sensitive role for administrative rules in implementing policies and programs created by the legislature. However, the legislature has found that some regulatory rules and programs have become overly prescriptive and inflexible, thereby increasing costs to the state, local governments, and the regulated community and decreasing the effectiveness of the regulatory program. The SONAR must describe how the agency, in developing the rules, considered and implemented performance-based standards that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.<sup>43</sup>

What does this mean? It depends on the agency. For most agencies, having a variance or waiver procedure can demonstrate flexibility toward the regulated party. Flexibility could also be interpreted as allowing multiple methods toward completing or complying with an agency requirement. For example, a regulated party can choose option 1, 2, or 3 to comply. Or an agency can set a standard and

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<sup>43</sup> Minn. Stat. § 14.002

give the regulated party the discretion on how to meet or exceed the standard. Many times, the agency can tie flexibility to an agency's ability to become a more efficient regulator.

The upshot to meeting this performance-based standard is for an agency to allow regulated parties to creatively find ways to meet the purpose of a rule while also making it less expensive or less burdensome for the agency and the regulated parties.

### 4.2.3 Additional notice

The SONAR must describe the agency's efforts to provide additional notification to persons or classes of persons that may be affected by the proposed rules or explain why these efforts were not made. *See sections 2.7 and 5.8, 6.8, or 7.8 (depending on the type of Notice you choose) for detailed information on developing an Additional Notice Plan.*

### 4.2.4 Consultation with MMB on local government impact

The SONAR must include the agency's consultation with MMB. *See sections 5.4, 6.4, or 7.4 (depending on the type of Notice you choose) for detailed information on this consultation.*

### 4.2.5 Determination about rules requiring local implementation

The agency must determine whether a local government will have to adopt or amend an ordinance or other regulation to comply with a proposed agency rule and submit this determination for ALJ approval. An agency must make this determination before the close of the hearing record, or if there is no hearing, before the agency submits the record to the ALJ.<sup>44</sup>

Although the statute does not require that the SONAR contain this determination, current practice is to include it. Furthermore, including it will ensure that your agency completes the analysis. The statute defines *local government* as "a town, county, or home rule charter or statutory city." For more discussion on this topic, see the **SONAR** form in the appendix.

**Note:** If Minnesota Statutes, section 14.128, applies, you may need to put an effective date in your rules. Read the statute to see how this applies to your rule. You must pay particular attention to this when you adopt the rules to make sure that you have accurately stated the effective date, as circumstances can change during rulemaking, especially if there are delays.

### 4.2.6 Cost of complying for small business or city

#### 4.2.6.1 Definitions

- *Small business:* a business (either for-profit or nonprofit) with less than 50 full-time employees.
- *Small city:* a city with less than ten full-time employees.

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<sup>44</sup> Minn. Stat. § 14.128.

#### *4.2.6.2 Requirements*

The agency must determine if the cost of complying with proposed rules in the first year after the rules take effect will exceed \$25,000 for any small business or small city.<sup>45</sup> There is nothing in the statute that requires the agency's determination to be in the SONAR, but current practice is to include it.

The agency must make its determination before the close of the hearing record, or if there is no hearing, before the agency submits the record to the ALJ. Generally, the determination is made before the SONAR is completed and submitted to the Legislative Reference Library. A signed SONAR cannot be changed, so if the agency receives input during the comment period or the hearing that would persuade the agency to change the determination it made in the SONAR, the agency must explain its rationale.

The best practice is for the agency to supplement the hearing record as best it can with a letter submitted to the ALJ or, for extensive changes, a lengthier explanation that serves as an informal addendum to the SONAR. Consult with your ALJ for guidance and remember to include this supplemental piece in the official rulemaking record.

#### *4.2.6.3 Considerations*

If the costs of complying exceed \$25,000 for the first year after the rules take effect, then any small business or small city can exempt itself from the rules by simply filing a written statement with the agency claiming a temporary exemption from the rules.

There are several safety valves or exceptions to the provisions of Minnesota Statutes, section 14.127, including:

- legislative approval of the rules;
- legislative funding of the compliance costs;
- federal mandate;
- good cause exemption;
- being the PUC; and
- Governor waiver.

Information about any applicable exceptions should be included in the SONAR; for example, if the agency plans to seek a Governor waiver or legislative approval of the rules.

#### **4.2.7 Other required information**

The SONAR must contain an explanation of what effort the agency made to obtain any information that it states could not be ascertained through reasonable effort.

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<sup>45</sup> Minn. Stat. § 14.127.

## 4.2.8 Agency-specific requirements

An agency may have other statutory directives specific to the agency, such as the requirement to analyze the effect of Pollution Control Agency rules on business, commerce, and municipalities. The SONAR is a logical place to include these analyses. The SONAR is also a good place to inform your audience of any other evaluations or considerations that the agency has made related to the rulemaking, even if not required by statute.

Both the Department of Human Services and the Pollution Control Agency have agency-specific policies. For example, the Department of Human Services has an Equity Review Policy that all program areas must apply to legislative and policy initiatives and changes, including rules. The DHS Equity Review Policy requires that “communities experiencing inequities be consulted when programs are designed, implemented, and evaluated.” The purpose of the policy is to reduce inequities by addressing “broad social, economic, and political factors that result in systemic disadvantages as well as the needs, assets, and challenges of communities experiencing inequities.”<sup>46</sup>

The Minnesota Pollution Control Agency has an Environmental Justice Policy that sets an expectation that the agency will give communities of color, Indigenous communities, and low-income communities an opportunity to be meaningfully involved in the “development, adoption, implementation, and enforcement of environmental laws, regulations, and polices,” including rules.<sup>47</sup>

If your agency has done the work, show it! It will provide your audience, including the ALJ, with a deeper understanding of your agency’s values and how they shaped the rules.

## 4.2.9 List of witnesses

The SONAR must include a list of any agency and nonagency witnesses the agency anticipates asking to testify if a hearing is scheduled and a summary or description of their testimony.

## 4.3 Rule-by-Rule Analysis

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The rule-by-rule analysis is the hardest yet most important part of the SONAR. There is no one correct way to write the analysis as long as the agency justifies each provision of the rules and provides a narrative explanation of why each part, subpart, item, and subitem is needed and reasonable. There should be sufficient specificity so that interested persons can fully prepare any testimony or evidence in favor of or in opposition to the proposed rules.

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<sup>46</sup> An example of the Equity Policy Review report can be found in the SONAR for the Department of Human Services’ 2022 Child Care Assistance Program rulemaking.

<sup>47</sup> The Pollution Control Agency’s Environmental Justice Policy is available on its website at <https://www.pca.state.mn.us/about-mpca/mpca-and-environmental-justice>, and an example of including the Environmental Justice Policy report can be found in the SONAR for the Pollution Control Agency’s 2021 Clean Cars rulemaking.

For each requirement in the rules, provide the need, summary, and reasonableness.

1. Statement of Need: why the agency is writing a rule on the topic, what problem needs to be addressed, what thing needs to be done, or why it is important to do something
2. Summary: what the rule requirement does or accomplishes
3. Statement of Reasonableness: why the rule requirement is a reasonable solution to the need or the problem

#### **4.3.1 Statement of need**

The statement of need explains why an agency believes that the proposed rules are necessary to address the agency's regulatory concerns. For rules that will regulate a subject for the first time, the statement of need can often entail a long, involved explanation of a problem and the reasons that the problem needs to be addressed through rules. When established rules are being amended, however, the statement of need may simply list a few aspects of the existing rules that have become outdated or have caused problems and explain why an amendment to the rules is needed.

##### *Examples*

1. If rules are being proposed to adopt federal standards that are required for Minnesota to retain delegations or authorizations to implement federal programs, the statement of need can be a short statement that demonstrates that the state needs to adopt the federal standards to maintain equivalency with the federal standards.
2. If rules are being proposed in direct response to a statutory mandate to create rules, you can adequately establish the need for the rules by merely quoting the statute. It is not necessary and, in many cases, not advisable to go into the reasons the statute was enacted because you would just reopen the debate on the need for the statute, which is something rulemaking is not meant to address. But you can give a short, informative background for context.
3. The statement of need for a technical amendment to rules designed to remove an ambiguity that has come up in applying and enforcing the rules could simply describe a couple of the situations that created confusion due to the ambiguity in the rules. This discussion would show that a clarification is needed. The statement of reasonableness would then explain why the agency's proposed resolution of the ambiguity is reasonable.

#### **4.3.2 Statement of reasonableness**

This part of the SONAR explains why the approach taken in the proposed rules is a good one. When drafting the statement of reasonableness, it is often useful to begin the discussion by briefly paraphrasing the content of the proposed rule section that you are discussing. One of the most

common problems, however, in drafting a SONAR is a failure to go beyond paraphrasing or restating the rules to *explaining why* the agency staff chose to draft the rules with the provisions that they contain.

Virtually every section of a set of proposed rules reflects a decision made by staff as they undertook to solve the regulatory problem that is causing the agency to write the rules. The statement of reasonableness must explain why the agency staff chose this requirement to appear in the rules rather than some other requirement. A general statement of statutory implementation is insufficient.

The statement of the reasons for what agency staff are proposing should not be made up solely of conclusory statements. For example, sometimes a draft SONAR will paraphrase the language of the rules and then state: “After considering various options, the agency decided that this approach is the most reasonable one.” This type of sentence is fine as a topic sentence for a paragraph that then goes on to describe exactly *why* the agency staff decided to proceed the way that they did. It is not, however, sufficient to simply state that the agency has concluded that the rules are reasonable.

**Important:** An independent reader—and the ALJ—needs to see specific reasons and evidence in the SONAR about why staff reached that conclusion.

#### 4.3.3 Justify each requirement in the rules

Make sure to justify each requirement or change in the rules. For requirements so obvious that no one will question them, you can do the justification in a sentence or two. For controversial requirements, you may need a paragraph, a page, or several pages of justification. The amount of justification you put into the SONAR for a specific requirement depends directly on your judgment of the anticipated controversy and the sophistication or complexity of the factors involved in your analysis.

How you write the rule-by-rule analysis is up to you. How your rule is structured and how detailed the rule changes are may dictate the best approach. One common approach to writing the justification is to justify each requirement in the order that it appears in the rule. You would justify each part separately and, usually, each subpart and so on as necessary. Whatever the rule structure, each requirement must be justified.

Another approach is to group justifications for related provisions that are very similar. In this case, you would provide the main part of the justification once and add a sentence or two for each separate provision that ties it to the main justification.

**Note:** The best way to visualize justifying rule requirements is to read other agency SONARs and save language or examples that you in turn can then refer to or use.

#### 4.3.4 Common issues

Issues that come up in drafting many SONARs concern justifying the rule’s applicability section and definitions, dealing with repetitive changes in various rules that are of a similar nature, and repealers.

1. **Applicability section of rules:** The SONAR often describes the applicability section of a set of rules and then states that it is reasonable to identify to whom the rules apply “in order to inform the public.” An applicability section is the first section of almost all proposed rules and contains the most fundamental regulatory decision made in the rules—who must comply with the rules and who is not required to comply with the rules. The section of the SONAR demonstrating the agency’s choice of people that the rules apply to is thus one of the central parts of the SONAR and should be thoroughly explained.
2. **Definitions in rules:** When drafting a section explaining the reasonableness of the definitions in the rule, reviewing prior SONARs will provide some good sample language. More explanation will typically be required for key definitions. But for many definitions, defining the term is reasonable simply because the rules make a distinction between a regulated party that fits under that definition and a regulated party that does not.

For example, if rules are going to regulate a type of pollution source and are going to establish emission limitations that differ for different sizes of pollution source, the definitions might break that source into different size classifications. The SONAR for the definitions of each class of the source may just state that it is reasonable to define this term and distinguish this one size of source from another size of source because the rules establish different emission limitations for those two sizes of source. That statement justifies the reasonableness of defining the term separately.

However, when the SONAR later undertakes to describe *why* the size cutoff was made where it is and why the emission limitations were set where they are (in discussing the emission standards portion of the rules), the agency’s reasons for the size distinctions must be fully explained and supported.

3. **Dealing with repetitive changes:** There are multiple ways to handle explaining the need and reasonableness of repetitive changes throughout the rules. You could add a paragraph to the beginning of the rule-by-rule analysis describing the change and stating that the change has been made “throughout the rules.” You could flesh out the arguments in the analysis of the first rule part containing the change, then refer future rule parts with the same changes back to the original analysis, or you could copy and paste the explanation under each applicable rule part.
4. **Repealers:** Repealers are also rules, so you need to justify them. For large rules with a lot of repealers at the end, relying on reasoning elsewhere in the rules might be tempting. The better practice is to include a cross-reference that clearly ties the repealer back to the discussion that prompts the repeal. This way, the ALJ can easily follow the progression.



## 4.4 Suggestions for Drafting the SONAR

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There is no “cookbook” for drafting a SONAR because of the (1) variety of regulatory needs that cause an agency to propose rules, (2) differing scope of various rules, and (3) variety of reasons that can lead an agency to regulate different parties in different ways.

A SONAR is supposed to explain the circumstances that have created the need for the proposed rules and why the rules are an appropriate solution for meeting the need. A SONAR need not be long, but it must articulate good reasons and evidence for proposing the rules in the way that agency staff has drafted the rules. It must tell a neutral nonexpert reader, such as an ALJ or an interested member of the public, why the agency has taken the approach proposed in the rules.

**Remember:** the SONAR tells your story to the ALJ and the public. Therefore, you want the narrative to flow. Do not make your reader work too hard to understand your points or bog them down with excruciating detail. In other words, use plain language. The following advice reflects well-established best practice for drafting SONARs.

### 4.4.1 Review other SONARs

When you start drafting your proposed rules, find and review other agency SONARs. If you can, look at SONARs for rules that are similar to the rules that you are proposing. For example, if you are proposing rules establishing a standard of performance for one category of pollution source, review the SONAR drafted to support existing rules for a different category of pollution source.

If you are amending rules, it is helpful to review the SONAR that justified the rules that you are amending. Finding SONARs for rules that bear some similarity to the rules that you are proposing will help you determine what level of detail is required to support your proposed rules and what kind of reasoning and evidence will be required.

For SONAR examples, you can search the Legislative Reference Library’s website, which has a vast collection of SONARs available online at <http://www.leg.state.mn.us/lrl/sonar/sonar.aspx>.

### 4.4.2 Get information from an advisory committee to help with the regulatory analysis and the cost determination

The agency must use reasonable methods to get the information required for the regulatory analysis. A broadly representative advisory committee is, in many cases, your best source of information for doing the regulatory analysis. If you decide to use an advisory committee, ask members to identify costs, benefits, parties affected, and other regulatory analysis factors. Also ask advisory committee members for suggestions on performance-based standards.

Similarly, the advisory committee will likely have valuable information and insight into the regulatory analysis and cost determination the agency needs to make under Minnesota Statutes, section 14.127. If the advisory committee comes up with nothing about costs, having them say so adds to your authority as you write the SONAR. If you simply receive no response, that too is significant. Ask these questions early. Make sure that advisory committee opinions reflect all views and include justifications for any proposals.

See section 3.2.5 for additional information on advisory committees.

### **4.4.3 Approaches to drafting the SONAR**

To accomplish the task of drafting a SONAR, the following suggestions might be helpful.

#### *4.4.3.1 Make notes when drafting*

First, when you are drafting the proposed rules, make notes of why you drafted the proposed rules the way that you did. Often, the rule draft will be hammered out informally. The hammering out might take place in discussions with staff who have helpful expertise, policy meetings of agency management or its governing board that determines the agency's direction, and meetings of a technical advisory committee. Therefore, at least noting the reasons that the agency is proceeding in various ways as the proposed rules are developing is very important. Otherwise, you might forget some of the reasons that persuaded you to write the rules the way that you did when you start to draft the SONAR a few months later.

In the time taken to think through and draft proposed rules, your reasoning as the rules' author becomes obvious or you become used to expressing your reasons in a shorthand fashion. Then, when you later begin to draft the SONAR, fully explaining all that reasoning again and presenting it step by step can be difficult. One experienced rule writer's suggestion for keeping track of your notes is to maintain two computer copies of your current rules draft, one on which you keep notes related to the need-and-reasonableness requirements. Often, just a few words or phrases are enough to jog the memory when it comes time to complete the SONAR.

#### *4.4.3.2 Justify the main requirements*

A second approach that might help you draft a SONAR is to start drafting the SONAR by justifying the reasonableness of the sections that form the core requirements of the proposed rules. In other words, you start by justifying the main requirements that you want to impose on the regulated parties. Often, when that more focused work is done, it is easier to draft a short introduction to the SONAR and a short statement of why the rules overall are reasonable. Starting from the core rule requirements and working out from that core to draft a complete SONAR is almost certainly easier than trying to proceed linearly through the SONAR requirements.

#### *4.4.3.3 Draft a statement of need*

Another experienced rule writer's approach is to draft a relatively complete statement of need at the start of the rulemaking project. This will memorialize the problems and reasons that you need to do rules. This also forces you and management to articulate and defend why you are opening the rules, which creates a real sense of purpose and a focus for drafting the rule requirements that will resolve the problems.

#### *4.4.3.4 Refining the SONAR*

The best time to start polishing a SONAR section is when the proposed rule text is in pretty good shape—that is, you've received enough feedback from agency leadership, subject matter experts, and the public and you are confident that only minor tweaks are left. Working and reworking a section of the SONAR is not helpful nor a wise use of resources, especially because it's not uncommon for a midstream policy change to reverse the initial approach.

Conversely, it is important to not finish the proposed rules and then think that you can just sit down and write out the SONAR over the weekend—it takes a lot of time. The SONAR is a lot of painfully dull work, and the act of writing down and explaining the reasons for the chosen approach forces you to think through the rules in a different way than you have thought about them before. This can often lead to changes in the rules' wording, which ultimately helps improve the rules.

## Checklist for Chapter 4 – Statement of Need and Reasonableness (SONAR)

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Date Completed	Item
_____	<b>4 – Entire chapter reviewed before proceeding</b>
_____	<b>4.1 – Timing requirements met</b> - SONAR prepared before publication of Notice of Intent to Adopt Rules in <i>State Register</i>
_____	<b>4.2 – SONAR requirements met</b> - <b>4.2.1 – Regulatory analysis</b> - <b>4.2.2 – Description of consideration and implementation of performance-based standards</b> - <b>4.2.3 – Description of efforts to provide additional notice</b> - <b>4.2.4 – Consultation with MMB on local government impact</b> (see chapters 6, 7, or 8 for details) - <b>4.2.5 – Determination about whether local governments will have to amend an ordinance or regulation to comply with the proposed rules</b> - <b>4.2.6 – Cost of complying for any small business or city</b> - <b>4.2.7 – Other required information</b> - <b>4.2.8 – Agency-specific requirements</b> - <b>4.2.9 – List of witnesses for hearing</b>
_____	<b>4.3 – Rule-by-Rule Analysis</b> - Statement of need and reasonableness for each rule; justify requirement or change for each rule
_____	<b>4.4 – Review suggestions for drafting the SONAR</b> - <b>SONAR</b> and <b>SONAR-TEMPLATE</b> forms used
_____	<b>Determine how to proceed (see introductions in chapters 5, 6, and 7 for explanation)</b> - Publish a Notice of Intent to Adopt Rules without a Hearing (Chapter 5) - Publish a Dual Notice (Chapter 6) - Publish a Notice of Hearing (Chapter 7)

# Chapter 5 - Giving Notice of Intent to Adopt Rules Without a Public Hearing

## Introduction

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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 that 25 people will request a hearing.

This chapter explains how to start the formal rule-adoption process using the **Notice of Intent to Adopt Rules Without 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 easily note when you have completed each of the required steps for giving notice.

## 5.1 Considerations

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### 5.1.1 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.

### 5.1.2 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.

### **5.1.3 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).<sup>48</sup>

### **5.1.4 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.<sup>49</sup> This applies to first-time rule adoptions under the statutory authority and not to subsequent amendments or repeals.

### **5.1.5 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*.”<sup>50</sup>
- “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.”<sup>51</sup>

Everybody is affected by everything to some degree, so where do you draw the line in 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 Notice of Intent to Adopt Rules Without a Public Hearing 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

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<sup>48</sup> Minn. Stat. § 14.101, subd. 1.

<sup>49</sup> Minn. Stat. § 14.125.

<sup>50</sup> Minn. Stat. § 14.111.

<sup>51</sup> Minn. Stat. § 14.14, subd. 1b.

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.<sup>52</sup> 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.

### 5.1.6 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.<sup>53</sup>

**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,<sup>54</sup> 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.

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<sup>52</sup> Water and Wastewater Operators Certification Rules, Chapter 9400, adopted jointly by the Minnesota Department of Health and the Minnesota Pollution Control Agency in 1996.

<sup>53</sup> Minn. R. 1400.2030, subp. 1.

<sup>54</sup> See Minn. Stat. § 645.44, subd. 5.

## 5.2 Get Agency Approval to Give Notice of Intent to Adopt Rules

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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 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**.

## 5.3 Get Governor's Office Approval to Give Notice; Consult with MMB

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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.

### 5.4 Get Revisor's Draft Approved for Publication

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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 in advance to see how long it will take.

## 5.5 Calculate the Date for the End of the 30-day Comment Period

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Consider the following factors when calculating the date for the end of the 30-day comment period:

- **30-day comment period.** The Notice of Intent to Adopt Rules Without a Public Hearing must be published at least 30 days before the end of the comment period.
- **OAH review time.** Before you publish your Notice of Intent to Adopt Rules Without a Public Hearing, you may request OAH to review and approve your Additional Notice Plan. The ALJ has five working days to review and approve or disapprove your Additional Notice Plan.<sup>55</sup> See section 5.7 for information on developing your Additional Notice Plan and getting it approved by OAH.
- **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*.<sup>56</sup>
- **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.**
- **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 calculating the date for the end of the 30-day comment period. If you don’t yet have an approved Revisor’s draft, 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.**

## 5.6 Draft the Notice of Intent to Adopt Rules Without a Public Hearing

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A Notice of Intent to Adopt Rules Without a Public Hearing must contain the information specified in Minnesota Rules, part 1400.2080, subparts 2 and 3. A form for the Notice of Intent to Adopt Rules Without a Public Hearing is in the appendix as **NTC-NH**. **NTC-NH** is designed to be a checklist for meeting the requirements of part 1400.2080.

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<sup>55</sup> Minn. R. 1400.2060, subp. 3.

<sup>56</sup> Minn. Stat. § 14.111.

### 5.6.1 Collecting comments

OAH collects public comments on its [eComments website \(https://minnesotaoah.granicusideas.com\)](https://minnesotaoah.granicusideas.com), 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**.

### 5.6.2 “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.<sup>57</sup>

### 5.6.3 Timing the signatures

Before publication, the Notice of Intent to Adopt Rules Without a Public Hearing must be signed and dated. However, it should not be signed until after you have contacted OAH, obtained an ALJ assignment, and received approval of your Additional Notice Plan (if you are requesting preapproval).

## 5.7 Develop an Additional Notice Plan

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### 5.7.1 Develop an Additional Notice Plan

An agency must “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

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<sup>57</sup> Minn. R. 1400.2110, .2300, subp. 7; Minn. Stat. §§ 14.05, subd. 2, .24.

implement what is called an Additional Notice Plan to reach significantly affected persons 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 persons or classes of persons who might be significantly affected by the proposed rules, (2) select ways (in addition to publishing in the *State Register* and mailing to persons on the agency's rulemaking mailing list) designed to reach these persons or classes of persons, and (3) write down your decisions and the rationale for them.

You should be creative when developing your plan to reach potentially affected persons. 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 persons 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 persons who would be in favor of your rules and persons who would be opposed to the rules. Also, your plan could include notice to trade or professional associations representing potentially affected persons, 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 persons. 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 these people.

Section 5.13 discusses giving notice per your Additional Notice Plan and documenting your efforts.

### **5.7.2 OAH prior approval of Additional Notice Plan**

An agency may ask OAH for prior approval of its Additional Notice Plan.<sup>58</sup> 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 all over again.

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<sup>58</sup> Minn. R. 1400.2060.

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 5.8.3 for instructions on requesting prior approval of your Additional Notice Plan.

## 5.8 Contact OAH

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### 5.8.1 Obtain an ALJ assignment

Prepare almost finished drafts of the Notice (section 5.6) and cover letter to OAH (section 5.8.3). 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. 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 applicable rule-related documents and forms.

### 5.8.2 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](mailto: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.

### 5.8.3 Letter to OAH

Use the cover letter form **NP-RLNTC** to request approval of your Notice of Intent to Adopt Rules without a Hearing and your Additional Notice Plan. If you are not requesting preapproval of your Additional Notice Plan, you **do not** need to request approval of your Notice of Intent to Adopt Rules

without a Hearing. You may skip this step and move on to finalizing the notice and publishing it in the *State Register*.

To request prior approval of your Additional Notice Plan, you must file with OAH:

1. the proposed rules;
2. a draft of the SONAR containing the agency’s proposed Additional Notice Plan;
3. the proposed Notice of Intent to Adopt Rules Without a Public Hearing; and
4. 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 persons who might be significantly affected by the rules.

OAH has five working days to review and approve or disapprove an Additional Notice Plan. A form for the cover letter to the Chief ALJ requesting prior approval of your Additional Notice Plan and submitting the necessary documents for review is in the appendix as **NP-RLNTC**. This letter is designed to serve as a checklist for meeting the requirements to request prior approval of your Additional Notice Plan.

#### **5.8.4 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.<sup>59</sup>

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.

#### **5.8.5 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.

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<sup>59</sup> Minn. Stat. § 14.22, subd. 1(b).

## 5.9 Finalize the Notice of Intent to Adopt Rules Without a Public Hearing

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After your Additional Notice Plan is completed and approved, you need to finalize the Notice of Intent to Adopt Rules Without a Public Hearing. Make any last changes 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.

## 5.10 Email the SONAR to the Legislative Reference Library

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When an agency sends the Notice of Intent to Adopt Rules Without a Public Hearing, the agency must send a copy of the SONAR to the Legislative Reference Library.<sup>60</sup> The library requests that all agencies email SONARs to [sonars@lrl.leg.mn](mailto: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 Notice of Intent to Adopt.

Why send a cover letter with your email transmission? According to the library, it retains the 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.

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

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The Notice of Intent to Adopt Rules Without a Public Hearing 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](#) for publication dates and deadlines.)

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<sup>60</sup> Minn. Stat. § 14.23.

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 just the cover plus the pages on which your Notice appears.

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## 5.12 Send the Notice

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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.<sup>61</sup> 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 persons 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.<sup>62</sup>

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.

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## 5.13 Give Notice per your Additional Notice Plan

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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

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<sup>61</sup> 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.

<sup>62</sup> Minn. Stat. § 14.22, subd. 1(a).



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**.

## 5.14 Give Notice to Legislators

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An agency must notify certain legislators when it mails the Notice.<sup>63</sup> 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](mailto: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.

## 5.15 Meet Any Other Applicable Statutory or Rule Requirements

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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.

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<sup>63</sup> Minn. Stat. § 14.116(b), (c).

## 5.16 Keep Track of Comments

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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.<sup>64</sup>
- 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.<sup>65</sup>
- The agency must place people on the agency's rulemaking mailing list when requested to do so.<sup>66</sup>
- 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.<sup>67</sup>
- If a hearing is not required, the agency must notify people who have requested that the agency notify them on the date that the proposed rules are submitted to the Chief ALJ.<sup>68</sup>

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.

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<sup>64</sup> Minn. R. 1400.2310(J), (P).

<sup>65</sup> Minn. Stat. § 14.22, subd. 1(a).

<sup>66</sup> Minn. Stat. § 14.14, subd. 1a(a).

<sup>67</sup> Minn. Stat. § 14.16.

<sup>68</sup> Minn. Stat. § 14.26, subd. 1.

## 5.17 Proceed According to the Number of Hearing Requests

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### 5.17.1 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—and have—come from other states or countries.

### 5.17.2 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 Attorney General's Office 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.

### 5.17.3 If there are 25 or more hearing requests, start over with the Notice of Hearing procedures

If 25 or more people request a hearing, the agency must hold a hearing (unless enough requests are withdrawn). The agency must (1) hold a hearing by proceeding under the provisions of Minnesota

Statutes, sections 14.14 to 14.20; (2) publish a Notice of Hearing in the *State Register*; and (3) send a copy of the Notice to persons who requested a hearing.<sup>69</sup> In other words, you must start over and give a Notice of Hearing. Use chapter 7 for this.

The only break you get from completing all the Notice of Hearing requirements is that, unless the agency has modified the proposed rules, your published Notice does not need to include the text of the proposed rules but rather only a citation to the *State Register* pages where the text appeared.

#### **5.17.4 If there are fewer than 25 hearing requests, adopt the rules using the no-hearing procedures and submit to OAH for review**

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

**Note:** 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 leadership, those 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 agency can proceed with adopting the rules without a hearing.
- 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.<sup>70</sup> 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 Minnesota Statutes, 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 there will be no hearing and that the agency will proceed with adopting the rules without a hearing. Even though this is not specifically required by Minnesota Statutes, section 14.25, sending Notice of this to these people soon after the end of the comment period is good practice. A form for this Notice is in the appendix as **NTC-NH2**.

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<sup>69</sup> Minn. Stat. § 14.25, subd. 1.

<sup>70</sup> Minnesota Statutes, section 14.25, subdivision 2, sets out the requirements for this Notice.

## Checklist for Chapter 5 – Notice of Intent to Adopt Rules without a Public Hearing

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Date Completed	Item
_____	<b>5 – Entire chapter reviewed before proceeding</b> - Decision made on how to proceed
_____	<b>5.1 – Considerations before proceeding</b> - <b>5.1.1 – Rules and SONAR done</b> - <b>5.1.2 – Allow time to complete steps</b> - <b>5.1.3 – 60 days after Request for Comments published</b> - <b>5.1.4 – With 18 months of new or revised rulemaking authority (if applicable)</b> - <b>5.1.5 – Consideration for rules affecting farming operations</b> - <b>5.1.6 – Counting time</b>
_____	<b>5.2 – Agency approval to give Notice obtained</b> - If agency is a multi-member board, <b>BD-NTC</b> form used
_____	<b>5.3 – Governor’s Office approval obtained</b> - <b>GOV-PRPS</b> used
_____	<b>5.3 – Consult with MMB</b> - <b>MMB-LTR</b> used
_____	<b>5.4 – Revisor’s Draft Approved for Publication obtained (with certificate signed by the Revisor)</b>
_____	<b>5.5 – End of comment period calculated. Factors considered:</b> - <b>30-day comment period</b> (minimum) - <b>OAH review time</b> (5 working days) - <b>Rules affecting farming operations</b> (30 days additional notice) - <b>State Register</b> deadlines - <b>Give yourself enough time</b>
_____	<b>5.6 – Notice of Intent to Adopt Rules without a Public Hearing drafted</b> - <b>NTC-NH</b> form used - Using OAH’s eComments website to collect comments considered - “Substantially different” rules considered
_____	<b>5.7 – Additional Notice Plan developed</b>

## Checklist for Chapter 5 (Continued)

Date Completed	Item
_____	<b>5.8 – OAH contacted</b> <ul style="list-style-type: none"><li>- 5.8.1 – ALJ assigned</li><li>- 5.8.2 – Set up eComments (if using)</li><li>- 5.8.3 – Letter to OAH<ul style="list-style-type: none"><li>- NP-RLNTC letter used for cover letter</li><li>- Request approval of Additional Notice Plan (optional)</li></ul></li><li>- 5.8.4 - Request omission of full text of proposed rules from publication (rare)</li><li>- 5.8.5 – eFile rule-related documents</li></ul>
_____	<b>5.9 – Notice finalized</b> <ul style="list-style-type: none"><li>- Notice signed and dated by: _____.</li></ul>
_____	<b>5.10 – SONAR emailed to Legislative Reference Library</b> <ul style="list-style-type: none"><li>- LRL and CRT-LRL used</li></ul>
_____	<b>5.11 – Notice published in the <i>State Register</i></b> <ul style="list-style-type: none"><li>- ST-REG used</li></ul>
_____	<b>5.12 – Notice sent</b> <ul style="list-style-type: none"><li>- CRT-LIST and CRT-MLNG used</li></ul>
_____	<b>5.13 – Notice given per Additional Notice Plan</b> <ul style="list-style-type: none"><li>- Actions documented and CRT-GNRC used</li></ul>
_____	<b>5.14 – Notice given to Legislators</b> <ul style="list-style-type: none"><li>- LEG and CRT-LEG used</li></ul>
_____	<b>5.15 – Other applicable statute or rule requirements met</b>
_____	<b>5.16 – Comments tracked; lists maintained</b> <ul style="list-style-type: none"><li>- comments on the rules, written or oral</li><li>- hearing requests and hearing request withdrawals</li><li>- requests for free copy of the rules</li><li>- requests to be placed on the agency’s rulemaking mailing list</li><li>- requests for notice of filing with the Secretary of State</li><li>- requests for notice of submission to ALJ</li><li>- COMMENT-TRACKER used</li></ul>

## Checklist for Chapter 5 (Continued)

Date Completed

Item

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### 5.17 – Proceed according to number of hearing requests

- **5.17.3** - If 25 or more, start over with Notice of Hearing procedures (Chapter 7)
- **5.17.4** - If less than 25, proceed to Chapter 8 to adopt rules
  - Notify agency leadership
  - 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-NH2** used.

# Chapter 6 - Giving Dual Notice

## Introduction

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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

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### 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).<sup>71</sup>

### 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.<sup>72</sup> 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*.”<sup>73</sup>
- “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.”<sup>74</sup>

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.

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<sup>71</sup> Minn. Stat. § 14.101.

<sup>72</sup> Minn. Stat. § 14.125.

<sup>73</sup> Minn. Stat. § 14.111.

<sup>74</sup> Minn. Stat. § 14.14, subd. 1b.

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.<sup>75</sup>

**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,<sup>76</sup> 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

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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

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<sup>75</sup> Minn. R. 1400.2030, subp. 1.

<sup>76</sup> See Minn. Stat. § 645.44, subd. 5.

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**

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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

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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

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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.<sup>77</sup>
- **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.<sup>78</sup> You should also submit your Additional Notice Plan for review and approval at this time.<sup>79</sup> 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*.<sup>80</sup>
- **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).

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<sup>77</sup> Minn. Stat. § 14.22, subd. 2.

<sup>78</sup> Minn. R. 1400.2080, subp. 5.

<sup>79</sup> Minn. R. 1400.2060, subp. 3.

<sup>80</sup> Minn. Stat. § 14.111.

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](mailto: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

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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](mailto: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 \(https://minnesotaoah.granicusideas.com\)](https://minnesotaoah.granicusideas.com), 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.<sup>81</sup>

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<sup>81</sup> Minn. R. 1400.2110, .2300, subp. 7; Minn. Stat. §§ 14.05, subd. 2, .24.



### 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

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### 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.<sup>82</sup> 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

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### 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.

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<sup>82</sup> Minn. R. 1400.2060.

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;<sup>83</sup> 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.<sup>84</sup>

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<sup>83</sup> Minn. R. 1400.2080, subp. 5.

<sup>84</sup> Minn. Stat. § 14.22, subd. 1(b).

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

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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

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When an agency sends the Dual Notice, the agency must send a copy of the SONAR to the Legislative Reference Library.<sup>85</sup> The library requests that all agencies email SONARs to [sonars@lrl.leg.mn](mailto: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.

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<sup>85</sup> Minn. Stat. § 14.23.

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*

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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](#) 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

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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.<sup>86</sup> 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.<sup>87</sup>

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<sup>86</sup> 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.

<sup>87</sup> Minn. Stat. § 14.22, subd. 1(a).

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

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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

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An agency must notify certain legislators when it mails the Notice.<sup>88</sup> 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**.

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<sup>88</sup> Minn. Stat. § 14.116.

**Note:** The statute says “send,” but does not specify the method. You may email your Notice to [lcc@lcc.leg.mn](mailto: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

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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

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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.<sup>89</sup>
- 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.<sup>90</sup>
- The agency must place people on the agency’s rulemaking mailing list when requested to do so.<sup>91</sup>
- 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.<sup>92</sup>

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<sup>89</sup> Minn. R. 1400.2310.

<sup>90</sup> Minn. Stat. § 14.22, subd. 1(a).

<sup>91</sup> Minn. Stat. § 14.14, subd. 1a.

<sup>92</sup> Minn. Stat. § 14.16, subd. 1.

- 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.<sup>93</sup>

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

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### 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

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<sup>93</sup> Minn. Stat. § 14.26, subd. 1.



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

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Date Completed	Item
_____	<b>6 – Entire chapter reviewed before proceeding</b> - Decision made on how to proceed
_____	<b>6.1 – Considerations before proceeding</b> - <b>6.1.1 – Rules and SONAR done</b> - <b>6.1.2 – Allow time to complete steps</b> - <b>6.1.3 – 60 days after Request for Comments published</b> - <b>6.1.4 – With 18 months of new or revised rulemaking authority (if applicable)</b> - <b>6.1.5 – Consideration for rules affecting farming operations</b> - <b>6.1.6 – Counting time</b>
_____	<b>6.2 – Agency approval to give Notice obtained</b> - If agency is a multi-member board, <b>BD-NTC</b> form used
_____	<b>6.3 – Governor’s Office approval obtained</b> - <b>GOV-PRPS</b> used
_____	<b>6.3 – Consult with MMB</b> - <b>MMB-LTR</b> used
_____	<b>6.4 – Revisor’s Draft Approved for Publication obtained (with certificate signed by the Revisor)</b>
_____	<b>6.5 – Tentative hearing date and location set. OAH contacted.</b> - <b>6.5.1 – Hearing date chosen. Factors considered:</b> - <b>30-day comment period</b> (minimum) - <b>10 additional days after end of comment period</b> - <b>OAH review time</b> (5 working days) - <b>Rules affecting farming operations</b> (30 days additional notice and, if a public hearing, at least one in agricultural area – unless hearing is virtual) - <b>State Register deadlines</b> - <b>Availability of key agency personnel</b> - <b>Give yourself enough time</b> - <b>6.5.2 – Prehearing comment period considered</b> - Optional for boards – <b>BD-WKSHEET</b> used - <b>6.5.3 – Location arranged; videoconference or virtual considered</b>

**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.

# Chapter 7 - Giving Notice of Hearing

## Introduction

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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.

In 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 **Notice of 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 easily note when you have completed each of the required steps for giving a Notice of Hearing.

## 7.1 Considerations

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### 7.1.1 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.

### 7.1.2 Leave plenty of time for completion of 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.

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

Under Minnesota Statutes, section 14.101, 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).

### 7.1.4 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.<sup>94</sup> This applies to first-time rule adoptions under the statutory authority and not to subsequent amendments or repeals.

### 7.1.5 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*.”<sup>95</sup>
- “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.”<sup>96</sup>

Everybody is affected by everything to some degree, so where do you draw the line in 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 Notice of Hearing 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.

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<sup>94</sup> Minn. Stat. § 14.125.

<sup>95</sup> Minn. Stat. § 14.111.

<sup>96</sup> Minn. Stat. § 14.14, subd. 1b.

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.

### 7.1.6 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.<sup>97</sup>

**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,<sup>98</sup> 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.

## 7.2 Get Agency Approval to Give Notice

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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

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<sup>97</sup> Minn. R. 1400.2030, subp. 1.

<sup>98</sup> See Minn. Stat. § 645.44, subd. 5.



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 multi-member 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**.

## **7.3 Get Governor's Office Approval to Give Notice; Consult with MMB**

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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 regarding 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.

### 7.4 Get a Revisor's Draft Approved for Publication

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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 in advance to see how long it will take.

## 7.5 Set a Tentative Hearing Date and Location; Contact with OAH

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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.

### 7.5.1 Choose a hearing date

Consider the following factors in choosing a hearing date:

- **30-Day comment period.** The Notice of Hearing must be published at least 30 days before the hearing. Also see section 7.5.2 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.
- **OAH review time.** Before you publish your Notice of Hearing, 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.<sup>99</sup> You should also submit your Additional Notice Plan for review and approval at this time.<sup>100</sup> 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*.<sup>101</sup>
- **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.**

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<sup>99</sup> Minn. R. 1400.2080, subp. 5.

<sup>100</sup> Minn. R. 1400.2060, subp. 3.

<sup>101</sup> Minn. Stat. § 14.111.

- **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 regarding 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 post hearing 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.**

### 7.5.2 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**.

### 7.5.3 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.

#### 7.5.4 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.

### 7.6 Draft the Notice of Hearing

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A Notice of Hearing must contain the information in Minnesota Rules, part 1400.2080, subparts 2 and 4. A form for the Notice of Hearing is in the appendix as **NTC-HR**. **NTC-HR** 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 Notice of Hearing:

**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](mailto: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

### 7.6.1 Collecting comments

OAH collects public comments on its [eComments website \(https://minnesotaoah.granicusideas.com\)](https://minnesotaoah.granicusideas.com), 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 7.8.2.

### 7.6.2 “Substantially different” rules

The description of the rules in the Notice might affect whether post-comment 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.<sup>102</sup>

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<sup>102</sup> Minn. R. 1400.2110, .2300, subp. 7; Minn. Stat. §§ 14.05, subd. 2, .24.

### 7.6.3 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.

## 7.7 Develop an Additional Notice Plan

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### 7.7.1 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 persons 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 persons or classes of persons who might be significantly affected by the proposed rules, (2) select ways (in addition to publishing in the *State Register* and mailing to persons on the agency’s rulemaking mailing list) designed to reach these persons or classes of persons, and (3) write down your decisions and the rationale for them.

You should be creative in developing your plan to reach potentially affected persons. If this is a small group of persons, perhaps mailing individual letters would be effective. If this is a large group of persons where an individual mailing is too expensive or cumbersome, then a reasonable plan could be to mail the Notice and rules to persons 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 persons who would be in favor of your rules and persons who would be opposed to the rules. Also, your plan could include notice to trade or professional associations representing potentially affected persons, 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 persons. In deciding what is reasonable, consider the cost and effort of what you might do and the likelihood that you will reach

the intended persons. Finally, if your rules will potentially affect persons who do not traditionally interact with government, make an extra effort to reach these persons.

Section 7.13 discusses giving notice per your Additional Notice Plan and documenting your efforts.

### 7.7.2 OAH Prior Approval of Additional Notice Plan

An agency may ask OAH for prior approval of its Additional Notice Plan.<sup>103</sup> 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 all over again.

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 persons who may be significantly affected by them. See section 7.8.3 for instructions on requesting prior approval of your Additional Notice Plan.

## 7.8 Contact OAH

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### 7.8.1 Obtain an ALJ assignment

After finding one or more workable dates for the hearing, prepare almost finished drafts of the Notice of Hearing (section 7.6) and cover letter to OAH (section 7.8.3). 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.

### 7.8.2 Set up eComments

To 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.

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<sup>103</sup> Minn. R. 1400.2060.



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.

### 7.8.3 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 Notice of Hearing;
2. a copy of the proposed rules approved as to form by the Revisor;
3. a draft or final copy of the SONAR;<sup>104</sup> 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 persons 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.

### 7.8.4 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.<sup>105</sup>

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<sup>104</sup> Minn. R. 1400.2080, subp. 5.

<sup>105</sup> Minn. Stat. § 14.22, subd. 1(b).

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.

### 7.8.5 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 screen shot 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.

## 7.9 Finalize the Notice of Hearing

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After the ALJ approves your hearing date and Notice of Hearing, 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.

## 7.10 Email the SONAR to the Legislative Reference Library

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When an agency sends the Notice of Hearing, the agency must send a copy of the SONAR to the Legislative Reference Library.<sup>106</sup> The library requests that all agencies email SONARs to [sonars@lrl.leg.mn](mailto: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 Notice of Hearing.

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<sup>106</sup> Minn. Stat. § 14.23.

Why send a cover letter with your email transmission? According to the library, it retains the 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.

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

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The Notice of Hearing 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](#) 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 just the cover plus the pages on which your Notice appears.

## 7.12 Send the Notice

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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.<sup>107</sup> 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 you frequently get additions to your mailing list, make sure that you also mail to any persons 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.<sup>108</sup>

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<sup>107</sup> 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.

<sup>108</sup> Minn. Stat. § 14.22, subd. 1(a).

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.

### 7.13 Give Notice per your Additional Notice Plan

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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**.

### 7.14 Give Notice to Legislators

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An agency must notify certain legislators when it mails the Notice.<sup>109</sup> 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.

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<sup>109</sup> Minn. Stat. § 14.116.

You may email your Notice to [lcc@lcc.leg.mn](mailto: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.

## 7.15 Meet Any Other Applicable Statutory or Rule Requirements

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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.

## 7.16 Keep Track of Comments

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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.<sup>110</sup>
- 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.<sup>111</sup>
- The agency must place persons on the agency's rulemaking mailing list when requested to do so.<sup>112</sup>
- After the hearing and at the very end of the rulemaking process, the agency must notify those persons who have requested that the agency notify them on the date the rules are filed with the Secretary of State.<sup>113</sup>

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.

## 7.17 Proceed with the Hearing

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Proceed with the hearing using chapter 9.

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<sup>110</sup> Minn. R. 1400.2310.

<sup>111</sup> Minn. Stat. § 14.22, subd. 1(a).

<sup>112</sup> Minn. Stat. § 14.14, subd. 1a.

<sup>113</sup> Minn. Stat. § 14.16, subd. 1.

## Checklist for Chapter 7 – Giving Notice of Hearing

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Date Completed	Item
_____	<b>7 – Entire chapter reviewed before proceeding</b> - Decision made on how to proceed
_____	<b>7.1 – Considerations before proceeding</b> - <b>7.1.1 – Rules and SONAR done</b> - <b>7.1.2 – Allow time to complete steps</b> - <b>7.1.3 – 60 days after Request for Comments published</b> - <b>7.1.4 – With 18 months of new or revised rulemaking authority (if applicable)</b> - <b>7.1.5 – Consideration for rules affecting farming operations</b> - <b>7.1.6 – Counting time</b>
_____	<b>7.2 – Agency approval to give Notice obtained</b> - If agency is a multi-member board, <b>BD-NTC</b> form used
_____	<b>7.3 – Governor’s Office approval obtained</b> - <b>GOV-PRPS</b> used
_____	<b>7.3 – Consult with MMB</b> - <b>MMB-LTR</b> used
_____	<b>7.4 – Revisor’s Draft Approved for Publication obtained (with certificate signed by the Revisor)</b>
_____	<b>7.5 – Tentative hearing date and location set. OAH contacted.</b> <b>- 7.5.1 – Hearing date chosen. Factors considered:</b> - <b>30-day comment period</b> (minimum) - <b>OAH review time</b> (5 working days) - <b>Rules affecting farming operations</b> (30 days additional notice and, if a public hearing, at least one in agricultural area – unless hearing is virtual) - <b>State Register deadlines</b> - <b>Availability of key agency personnel</b> - <b>Give yourself enough time</b> <b>- 7.5.2 – Prehearing comment period considered</b> - Optional for boards – <b>BD-WKSHEET</b> used

## Checklist for Chapter 7 (Continued)

Date Completed	Item
_____	<ul style="list-style-type: none"><li>- <b>7.5.3 – Location arranged; videoconference or virtual considered</b></li><li>- <b>7.5.4 – OAH contacted</b></li></ul>
_____	<p><b>7.6 – Notice of Hearing drafted</b></p> <ul style="list-style-type: none"><li>- <b>NTC-HR</b> form used</li><li>- <b>7.6.1</b> - Using OAH’s eComments website to collect comments considered</li><li>- <b>7.6.2</b> - “Substantially different” rules considered</li></ul>
_____	<p><b>7.7 – Additional Notice Plan developed</b></p>
_____	<p><b>7.8 – OAH contacted</b></p> <ul style="list-style-type: none"><li>- <b>7.8.1 – ALJ assigned</b></li><li>- <b>7.8.2 – Set up eComments (if using)</b></li><li>- <b>7.8.3 – Letter to OAH</b><ul style="list-style-type: none"><li>- <b>HR-RQST</b> letter used for cover letter</li><li>- Request approval of Additional Notice Plan (optional)</li></ul></li><li>- <b>7.8.4</b> - Request omission of full text of proposed rules from publication (rare)</li><li>- <b>7.8.5 – eFile rule-related documents</b></li></ul>
_____	<p><b>7.9 – Notice finalized</b></p> <ul style="list-style-type: none"><li>- Notice signed and dated by: _____.</li></ul>
_____	<p><b>7.10 – SONAR emailed to Legislative Reference Library</b></p> <ul style="list-style-type: none"><li>- <b>LRL</b> and <b>CRT-LRL</b> used</li></ul>
_____	<p><b>7.11 – Notice published in the <i>State Register</i></b></p> <ul style="list-style-type: none"><li>- <b>ST-REG</b> used</li></ul>
_____	<p><b>7.12 – Notice sent</b></p> <ul style="list-style-type: none"><li>- <b>CRT-LIST</b> and <b>CRT-MLNG</b> used</li></ul>
_____	<p><b>7.13 – Notice given per Additional Notice Plan</b></p> <ul style="list-style-type: none"><li>- Actions documented and <b>CRT-GNRC</b> used</li></ul>
_____	<p><b>7.14 – Notice given to Legislators</b></p> <ul style="list-style-type: none"><li>- <b>LEG</b> and <b>CRT-LEG</b> used</li></ul>
_____	<p><b>7.15 – Other applicable statute or rule requirements met</b></p>

## Checklist for Chapter 7 (Continued)

Date Completed

Item

\_\_\_\_\_

### **7.16 – Comments tracked; lists maintained**

- comments on the rules, written or oral; **COMMENT-TRACKER** used
- 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

**PROCEED TO CHAPTER 9**



# Chapter 8 - Adopting Rules without a Hearing

## Introduction

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This chapter describes what to do after the 30-day comment period has ended and your agency plans to adopt the rules without 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 easily note when you have completed each of the required steps.

### Deadline

Be aware of the statutory deadline requiring that the rules be submitted to OAH within 180 days of the end of the comment period or the rules are automatically withdrawn.<sup>114</sup>

## 8.1 Decide on any Changes to the Rules

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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 the agency considers making a modification to the rules as proposed, assess whether the modification will result in a substantially different rule from those proposed. If a modification does not result in a substantially different rule, make note of the reasons because you must explain this in your Order Adopting Rules. If they do result in substantially different rules, you should seriously consider whether the modification is necessary because you will have to follow the notice procedures under Minnesota rules, part 1400.2110.

If you decide to modify the rules, get agency decision makers to approve not only the changes but also the rationale for the changes. If you choose not to make changes suggested by the public, it is a good idea to brief agency decision makers and request their sign off on decisions not to act.

How you get approval within your agency is as individual as your agency. A cover memo describing the stage of the process and highlighting potentially controversial or newly discovered issues is a good idea. 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 approvals followed by the commissioner signing the Order Adopting Rules.

An agency that is a multimember 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**.

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<sup>114</sup> Minn. Stat. § 14.26, subd. 1.

**Note:** There is no APA requirement mandating that agencies respond to public comments, though case law suggests that agencies should respond to comments on substantive issues.<sup>115</sup> But ignoring comments is unwise; for example, if a commenter brings up a substantive issue with one of your proposed rules that is unaddressed in your SONAR and you ignore it, the ALJ will be left to rule without the benefit of your agency’s rebuttal. An agency must always defend the need and reasonableness of its proposed rules, and not responding to well-reasoned comments greatly undercuts an agency’s defense of its rules. Simply ignoring comments also undercuts the key purposes of the APA of agency accountability and transparency.

## 8.2 Prepare Agency Responses to Comments Received During 30-Day Comment Period

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There are no specific requirements for when and how to respond to comments or what form a response should take, so you have flexibility to craft a solution that works for your project. Ultimately, an agency must explain what evidence it is relying on and how that evidence connects rationally with the agency’s choice of action. You need to address all the topics raised, but you do not have to respond at length to each comment individually if they raise similar issues.

Grouping the comments by subject and responding collectively is a good method for minimizing duplication or volume. It’s also a good idea to identify the rule parts that correspond to the comment, if applicable. Focusing on the controversial or technical issues is efficient. Whatever you can do to help the public and ALJ understand your agency’s rationale will serve your agency well.

You should start drafting your answers as soon as the comments are received. Because you must submit your answers for OAH review, a common practice is to add them to the exhibits that you will submit. [This process appears in section 8.6.] You could either intersperse your response with the comments or create a separate document of responses to file. Minnesota Rules, part 1400.2310, item J<sup>116</sup> gives you a good place to collect your responses organized in a way that makes sense to your readers, especially the ALJ who will be officially reviewing the record.

Additionally, the sample letter for responding to comments made at a hearing **HR-RSPNS** is a useful format to consider adapting for this purpose.

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<sup>115</sup> *Minnesota Environmental Science and Economic Review Bd. v. Minnesota Pollution Control Agency*, 870 N.W.2d 97 (Minn. Ct. App. 2015): An agency must respond to questioning “in order to explain the purpose or intended operation of a proposed rule, or a suggested modification, or for other purpose if material to the evaluation or formulation of the proposed rule.”

<sup>116</sup> Minn. R. 1400.2310(J).

## 8.3 Governor's Office Approval

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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 without a hearing:** the agency must submit the completed Final Rule Form to the Office of the Governor when the agency has decided on the final rules and its SONAR is complete. The agency must wait for the Office's approval before submitting its request to Office of Administrative Hearings (OAH) for rule review and approval. If the ALJ who performs the review makes any substantive recommendations to the rule or finds defects, the agency should resubmit the Final Rule Form, clearly labeling it as a revised form. The agency must explain its response to the ALJ's Report, including any large deletions from the rule. The agency should also submit a copy of the ALJ Report with the revised Final Rule Form. Upon final approval of the rule by the Policy Advisor, the Legislative Coordinator will contact the agency and inform it that it may submit the signed Order Adopting Rules to the 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 7<sup>th</sup> day after the Governor's Office received the above information, the agency should contact the Legislative Coordinator for a status report.

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

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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”).

12/20/21	REVISOR	RSI/EH	AR4726
1	<b>Department of Commerce</b>		
2	<b>Adopted Expedited Rules Relating to Workers' Compensation Ratemaking</b>		

If you are making no changes to the proposed rules, submit this copy to OAH for the official review. 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 for submission to OAH. In your request, indicate when you would like the adopted rules back, and the Revisor will tell you if that is workable.

## 8.5 Draft the Order Adopting the Rules

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The commissioner (or other person authorized to adopt the rules) must sign the Order Adopting Rules.<sup>117</sup> A form for the Order is in the appendix as **ORD-ADPT** and is designed to be a checklist to meet the requirements of Minnesota Rules, part 1400.2090. A form with sample findings for making changes to the proposed rules is in the appendix as **SMPLFNDS**.

Carefully watch your timing for signing the Order Adopting Rules because it is complicated. You'll need to submit an unsigned draft for OAH review because for rules adopted without a hearing, agencies must file “the order adopting the rule that complies with the requirements in part 1400.2090.”<sup>118</sup> [See section 8.6.] However, until the ALJ has issued their report, the rule remains subject to change, which the Governor's Office must approve. To deal with this timing issue, the Governor's Office prefers that agencies submit an unsigned proposed Order for the official review.

While this process doesn't strictly follow the law, it's been common practice for many years. One advantage is that it eliminates the agency having to get its director's or commissioner's signature on the Order more than once. More importantly, it also prevents OAH from receiving the signed Order prematurely and mistakenly putting the final steps in motion without your knowledge, triggering the 14-day veto period before the Governor's Office has approved the final rule.

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<sup>117</sup> Minn. R. 1400.2090.

<sup>118</sup> Minn. R. 1400.2310(N).

Thus, it is important to retain control of this proceeding by using an unsigned draft Order at this stage. Remember that the next step is submitting the file for OAH official review, not signing the Order. Do not worry about getting the signed Order until you have received the ALJ Report.

## 8.6 Submit the File to OAH for Official Review

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After you have received the Governor's Office approval, you may submit your file to OAH. Minnesota Rules, part 1400.2310, items A to P, set out the documents that you must file with OAH for official review of your adopted rules. All documents submitted for ALJ review should be eFiled. **(See section 1.7 for explicit instructions.)**

A sample cover letter to OAH is in the appendix as **NH-RE VW**. Note that paragraphs A to P of the cover letter are keyed to items A to P of part 1400.2310, so the cover letter can serve as a checklist for meeting the requirements of part 1400.2310. As noted earlier, the rules must be submitted to OAH within 180 days of the end of the comment period or the rules are automatically withdrawn.<sup>119</sup>

**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 1400.2310, items A to P. 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. You can adapt the cover-letter text (NH-RE VW) into a template for this purpose. 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.

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<sup>119</sup> Minn. Stat. § 14.26, subd. 1.

Also, consider your timing when eFiling. After you request OAH to assign an ALJ to your rulemaking, it's a good idea to communicate with the assigned ALJ (through William Moore) to notify the ALJ when you will file your record for review. Or you can wait to request OAH to appoint an ALJ only when the file is ready to submit. Because your submission of the rule record triggers a 14-day deadline by which the ALJ must review the record and approve the rule change, the key is to communicate clearly to OAH and any ALJ regarding the expected timing of your submission, and not to keep the ALJ waiting unnecessarily.

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.

Finally, 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.

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## 8.7 Notice of Submission of Rules to OAH

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During the rulemaking process, usually during the 30-day comment period, individuals may request to be informed of when you submit the rules to OAH for the official review. You must provide a Notice of Submission on the same day that the rules are submitted to OAH.<sup>120</sup> If the proposed rules have been modified, the notice must state that fact and that a free copy of the proposed rules, as modified, is available upon request from the agency. Forms for the Notice and for the certificate showing the agency sent out this Notice are in the appendix as **NTC-SBM** and **CRT-SBM**.

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## 8.8 ALJ Report

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The ALJ has 14 days to review the rules for form and legality and issue a report. 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 five working days to do this.<sup>121</sup>

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<sup>120</sup> Minn. Stat. § 14.26, subd. 1.

<sup>121</sup> 1400.2300, subp. 6.

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

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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).<sup>122</sup> 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**.

### 8.9.1 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.

### 8.9.2 Disapproval and you choose to make suggested changes

There are three reasons the ALJ may disapprove your rules under part 1400.2300:

- The ALJ finds a defect in the rule text such as unfettered discretion, overly vague, etc. (subpart 6).
- 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 9).

As mentioned in section 8.8, 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.<sup>123</sup> 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.

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<sup>122</sup> 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.

<sup>123</sup> Minn. R. 1400.2240.

### *8.9.2.1 Making suggested or other changes to address disapproval*

If the ALJ disapproves your rules **and** the agency chooses to make the changes suggested by the ALJ and Chief ALJ or other changes to solve the problems identified in the rules, then the agency should follow the steps under Minnesota Rules, part 1400.2300, subpart 8, for resubmission of the rules to the Chief ALJ.

#### **Notes:**

- You may resubmit your rule anytime within 180 days after the end of the 30-day comment period. If the 180 days expired while your rule was under review by the ALJ, you only have 30 days after receiving the ALJ Report to resubmit your rule.<sup>124</sup>
- You will need Governor’s Office approval (see 8.9.6) and a Revisor’s copy of the changes to resubmit your rule.

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

If the ALJ disapproves your rules under Minnesota Rules, part 1400.2300, 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<sup>125</sup>);
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.

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

If the ALJ disapproves your rules under Minnesota Rules, part 1400.2300, subpart 9, because the agency has not shown the rules 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 House and Senate policy committees with primary jurisdiction over state governmental operations for review.<sup>126</sup> This course requires careful political consideration, and to the editors’ knowledge, has never happened.

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<sup>124</sup> Minn. Stat. § 14.26, subd. 2.

<sup>125</sup> See section 8.9.1.

<sup>126</sup> Minn. Stat. § 14.26, subd. 3(c).



## 8.9.5 Making recommended modifications or modifications other than those recommended

ALJs will sometimes recommend modifications without disapproving the rules. If the agency wants to adopt the rules with recommended modifications or modifications other than those recommended by the ALJ or Chief ALJ, the agency must submit to the Chief ALJ the filings required under Minnesota Rules, part 1400.2300, subparts 8 and 8a, for resubmission. The Chief ALJ has five working days to decide whether the resubmitted rule meets the standards of Minnesota Rules, part 1400.2100, and whether the agency's modifications make the rule substantially different than the proposed rule.<sup>127</sup>

## 8.9.6 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 1400.2300, subpart 4, for how to proceed. Note that statute requires that you publish notice in the *State Register* that you have withdrawn the rules.<sup>128</sup> 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...

<sup>127</sup> Minn. R. 1400.2300, subp. 8a.

<sup>128</sup> Minn. Stat. § 14.05, subd. 3.

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*.<sup>129</sup> 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):

<b>2110.0320</b>	<b>[Withdrawn at ... SR ...]</b>
<b>2110.0330</b>	<b>[Withdrawn at ... SR ...]</b>
<b>2110.390</b>	<b>PHYSICAL REQUIREMENTS.</b>
	Subpart 1. <b>Space.</b>
	A. 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.
	B. The school classrooms must have chairs and <u>table</u> work space for the maximum number of students scheduled for class at any one time.
	<i>[For text of item C, see Minnesota Rules]</i>
	D. The school must <del>comply with the Minnesota State Building Code, the Minnesota State Fire Code</del> <u>meet applicable building codes, fire codes,</u> and zoning codes as determined by local zoning and building officials and the state fire marshal.
	<i>[For text of item E, see Minnesota Rules]</i>
	<i>[For text of subparts 2 <del>and 2a</del> to 6, see Minnesota Rules]</i>
	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

<sup>129</sup> Withdrawing amendments to existing language is tricky; ask the revisor's office for help.

### 8.9.6 Getting Governor's Office approval for resubmission of the rules to OAH

If the ALJ who performs the review makes any substantive recommendations to the rule or finds defects, the agency should resubmit the Final Rule Form, clearly labeling it as a revised form. The agency must explain its response to the ALJ's Report, including any large deletions from the rule. The agency should also submit a copy of the ALJ Report with the revised Final Rule Form. Upon final approval of the rule by the Policy Advisor, the Legislative Coordinator will contact the agency and inform it that it may resubmit the rule to OAH.<sup>130</sup>

## 8.10 Finalize and File the Order Adopting Rules

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After OAH approves your rules, the commissioner (or other authorized person) must sign the Order Adopting Rules.<sup>131</sup> 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.

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<sup>130</sup> See GOV-PLCY in the appendix.

<sup>131</sup> Minn. R. 1400.2090.

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

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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.<sup>132</sup>

### 8.11.1 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*.<sup>133</sup> The Governor's Office will let you know whether the rule or portions of the rule will be vetoed.

### 8.11.2 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.

### 8.11.3 180-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 Report is 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.<sup>134</sup>

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.

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<sup>132</sup> Minn. Stat. § 14.27.

<sup>133</sup> Minn. Stat. § 14.05, subd. 6.

<sup>134</sup> Minn. Stat. §§ 14.126, .19.

#### 8.11.4 *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](#) for publication dates and deadlines.

### 8.12 Prepare and Store the Official Rulemaking Record

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After publishing the Notice of Adoption, you can complete the last official step, which is preparing and storing the Official Rulemaking Record.<sup>135</sup> 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 that 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.

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

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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 people 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. When appropriate, get a complete

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<sup>135</sup> Minn. Stat. § 14.365.

copy of your rules (when available) from the [Revisor's website](#). Your rules will be available after the Revisor has finished editing them.

## **8.14 Notify Agency Decision Makers of the Completion of the Process**

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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 that 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 8 – Adopting Rules without a Hearing

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Date Completed	Item
_____	<b>8 – Entire chapter reviewed before proceeding</b> - Be aware of statutory deadline requiring the rules to be submitted within 180 days of the end of the comment period
_____	<b>8.1 – Decide on any changes to the rules</b> - If agency is a multi-member board, <b>BD-ADPT</b> form used
_____	<b>8.2 – Agency responses to comments prepared</b> - Adapting <b>HR-RSPNS</b> considered
_____	<b>8.3 – Governor’s Office approval obtained</b> - <b>GOV-FNL</b> used
_____	<b>8.4 – Copy of adopted rules obtained from Revisor</b>
_____	<b>8.5 – Order Adopting Rules drafted</b> - <b>ORD-ADPT</b> and <b>SMPLFNDS</b> used
_____	<b>8.6 – File submitted to OAH for official review (eFile)</b> - <b>NH-RE VW</b> used; <b>OAH-INF</b> referred to - Notify ALJ before filing - Submitted within 180 days of the end of the comment period
_____	<b>8.7 – Notice of Submission of Rules to OAH given</b> - <b>NTC-SBM</b> and <b>CRT-SBM</b> used
_____	<b>8.8 – ALJ Report received</b> - Disapprovals noted
_____	<b>8.9 – Rules withdrawn, disapproved, or new modifications made</b> - <b>8.9.1 – Withdrawal of rules</b> - <b>NTC-WITHDRAWAL</b> used - <b>8.9.2 – Suggested changes made</b> - <b>8.9.3 and 8.9.4 – Suggested changes NOT made</b> - <b>8.9.5 – Recommended modifications or other modifications made</b> - <b>8.9.6 – Governor’s Office approval to resubmit rules obtained</b> - <b>GOV-FNL</b> revised and resubmitted

## Checklist for Chapter 8 (Continued)

Date Completed	Item
_____	<b>8.10 – Order Adopting Rules finalized and filed</b> <ul style="list-style-type: none"><li>- Order Adopting Rules signed by: _____</li><li>- Signed order eFiled with OAH</li><li>- Rules filed with Secretary of State</li><li>- Notice of Adoption received from Revisor</li></ul>
_____	<b>8.11 – Notice of Adoption published in the <i>State Register</i></b> <ul style="list-style-type: none"><li>- Notice submitted after agency is certain Governor will not veto rules</li><li>- <b>ST-REG</b> used</li></ul>
_____	<b>8.12 – Official Rulemaking Record prepared</b> <ul style="list-style-type: none"><li>- <b>RECORD</b> used</li></ul>
_____	<b>8.13 – Complete version of entire chapter of new rules obtained</b>
_____	<b>8.14 – Agency decision makers notified of completion of process</b> <ul style="list-style-type: none"><li>- <b>CLOSURE</b> used</li></ul>



# Chapter 9 - Adopting Rules with a Hearing

## Introduction

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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

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### 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.<sup>136</sup> For virtual hearings, make sure you have a webpage dedicated to the hearing with links to the rules and SONAR available for the public.

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<sup>136</sup> Minn. R. 1400.2220, subp. 2.

## 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:

The screenshot shows a web page for the Professional Educator Licensing and Standards Board (PELSB). The breadcrumb trail is: Home > Board > Rulemaking > Licensing and Academic Standards (R 4615). The page title is "Licensing and Academic Standards (R 4615)". The main content area includes a "Rulemaking Record" section with the following text: "PELSB held a virtual rules hearing on the proposed rule changes on Wednesday, August 24, 2022. Administrative Law Judge James Mortenson was the presiding judge. You can watch a [recording](#) of the rules hearing or review a [transcript](#)." Below this is the "OAH Docket Number" section, stating "The OAH docket number for this matter is OAH Docket Number 5-9021-36362." The "Hearing Exhibits" section lists several exhibits with links: Exhibit A: [The Request for Comments \(as published in the State Register on September 23, 2019\)](#); Exhibit B: Not included – a petition for rulemaking; Exhibit C1: [A draft of the proposed rule changes \(dated Dec. 16, 2021\)](#); Exhibit C2: [The Revisor's certificate of approval](#); Exhibit D: [The Statement of Need and Reasonableness \(SONAR\)](#); Exhibit E1: [The Notice of Hearing \(as mailed on May 2, 2022\)](#); Exhibit E2: [The Notice of Hearing \(as published in the State Register on May 2, 2022\)](#).

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 responses for 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 responses on 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**

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### **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**

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### **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 posthearing comment 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 posthearing comment period. No new evidence may be submitted during the rebuttal period.<sup>137</sup>

See **section 9.3.9** related to how to collect the comments that the ALJ received during the posthearing comment period and rebuttal period for timely posting on the agency's website and uploading them to

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<sup>137</sup> Minn. Stat. § 14.15, subd. 1; Minn. R. 1400.2230, subp. 2.

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](mailto: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 posthearing comment period. In addition, particularly if the posthearing comment 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.

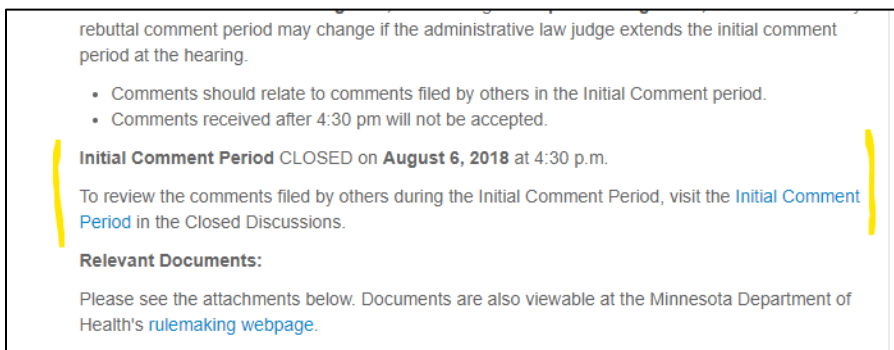
### **9.3.7 Rebuttal period response**

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 posthearing comment period, OAH will send the agency an electronic version of all comments that the ALJ received during the posthearing comment 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 period closes, 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.<sup>138</sup> Further, there is no law requiring that a state agency place hearing exhibits or comments received during the posthearing comment period and 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

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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.<sup>139</sup> 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.<sup>140</sup>

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

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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).<sup>141</sup> 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**.

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<sup>138</sup> Minn. R. 1400.2230, subp. 2.

<sup>139</sup> Minn. Stat. § 14.15, subd. 2.

<sup>140</sup> Minn. R. 1400.2240, subp. 4.

<sup>141</sup> 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.

### 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.<sup>142</sup> 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.<sup>143</sup> 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;

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<sup>142</sup> Minn. R. 1400.2240.

<sup>143</sup> Minn. R. 1400.2240, subp. 4.

2. adopt the portions of the rules that are not substantially different (requires withdrawing rules);<sup>144</sup>
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.<sup>145</sup> 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.<sup>146</sup> 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**.

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<sup>144</sup> Minn. R. 1400.2240, subp. 7.

<sup>145</sup> Minn. Stat. § 14.15, subd. 4.

<sup>146</sup> Minn. R. 1400.2240, subp. 4.

**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.<sup>147</sup> 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.

<sup>147</sup> Minn. Stat. § 14.05, subd. 3.

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*.<sup>148</sup> 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 ...]

**2110.391 PHYSICAL REQUIREMENTS.**

Subpart 1. **Space.**

C. 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.

D. 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]

E. 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]

<sup>148</sup> Withdrawing amendments to existing language is tricky; ask the revisor's office for help.

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

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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 unsigned proposed 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

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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 and formally 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 7<sup>th</sup> 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

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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").

12/20/21	REVISOR	RSI/EH	AR4726
1	<b>Department of Commerce</b>		
2	<b>Adopted Expedited Rules Relating to Workers' Compensation Ratemaking</b>		

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

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After OAH approves your rules, the commissioner (or other authorized person) must sign the Order Adopting Rules.<sup>149</sup> 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.

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<sup>149</sup> Minn. R. 1400.2090.

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

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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.<sup>150</sup> **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*

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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.<sup>151</sup>

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<sup>150</sup> Minn. Stat. § 14.16, subd. 1.

<sup>151</sup> Minn. Stat. § 14.27.

### 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*.<sup>152</sup> 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 Report is 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.<sup>153</sup>

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](#) for publication dates and deadlines.

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<sup>152</sup> Minn. Stat. § 14.05, subd. 6.

<sup>153</sup> Minn. Stat. §§ 14.126, .19.

## 9.12 Prepare and Store the Official Rulemaking Record

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After publishing the Notice of Adoption, you can complete the last official step, which is preparing and storing the Official Rulemaking Record.<sup>154</sup> 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

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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](#). Your rules will be available after the Revisor has finished editing them.

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

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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

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<sup>154</sup> Minn. Stat. § 14.365.

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

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Date Completed	Item
_____	<b>9 – Entire chapter reviewed before proceeding</b>
_____	<b>9.1 – Hearing preparations complete</b> <ul style="list-style-type: none"><li>- <b>9.1.1 – Meetings scheduled; calendar cleared</b></li><li>- <b>9.1.2 – ALJ notified</b></li><li>- <b>9.1.3 – Copies of rules and SONAR made (if holding in-person hearings); rules and SONAR posted on agency webpage</b></li><li>- <b>9.1.4- Documents prepared to submit into the record</b><ul style="list-style-type: none"><li>- Exhibits prepared and labeled according to M.R. 1400.2220, subpart 1.</li><li>- Exhibits posted on agency webpage</li><li>- Exhibits eFiled</li></ul></li><li>- <b>9.1.5 – Summary prepared to read at hearing</b></li><li>- <b>9.1.6 – Agency staff and agency AG prepared for hearing</b><ul style="list-style-type: none"><li>- <b>STAFF-HR</b> used</li></ul></li><li>- <b>9.1.7 – Preliminary responses to prehearing comments prepared</b></li><li>- <b>9.1.8 – Changes to rules decided; ready to announce at hearing</b><ul style="list-style-type: none"><li>- If needed, Governor’s Office review and comment obtained.</li></ul></li><li>- <b>9.1.9 – Room set up for in-person hearing</b></li><li>- <b>9.1.10 – Virtual hearing considerations</b><ul style="list-style-type: none"><li>- “Run through” with ALJ scheduled</li><li>- Consider requiring attendees to register</li><li>- Decide how chat feature will or will not be used</li></ul></li></ul>
_____	<b>9.2 – At the hearing</b> <ul style="list-style-type: none"><li>- <b>9.2.1 – What to say and what not to say</b></li><li>- <b>9.2.2 – Take notes, record meeting, use court reporter</b></li><li>- <b>9.2.3 – Post exhibits on agency website</b></li><li>- <b>9.2.4 – Meet with decision makers ASAP after hearing</b></li></ul>
_____	<b>9.3 – Agency responses to comments prepared</b> <ul style="list-style-type: none"><li>- <b>9.3.1 – Posthearing comment period and rebuttal period</b></li><li>- <b>9.3.2 – OAH eComments site</b></li><li>- <b>9.3.3 – What to include in the comment period</b></li><li>- <b>9.3.4 – Agency preliminary response drafted</b><ul style="list-style-type: none"><li>- <b>HR-RSPNS</b> used</li></ul></li><li>- <b>9.3.5 – Posthearing comments monitored</b></li></ul>

## Checklist for Chapter 9 (Continued)

Date Completed	Item
	<ul style="list-style-type: none"><li>- 9.3.6 – Agency’s preliminary response finalized and signed</li><li>- 9.3.7 – Rebuttal period comments monitored; final response prepared</li><li>- 9.3.9 – Comments received by ALJ during posthearing comment period and rebuttal period placed on agency’s website</li></ul>
_____	<b>9.4 – ALJ Report received</b> <ul style="list-style-type: none"><li>- Disapprovals noted</li></ul>
_____	<b>9.5 – Decide how to proceed; get agency approval</b> <ul style="list-style-type: none"><li>- If agency is a multi-member board, <b>BD-ADPT</b> form used</li><li>- 9.5.1 – Rules approved – proceed with adopting</li><li>- 9.5.2 – Rules disapproved<ul style="list-style-type: none"><li>- Changes made to address disapproval; <b>CHNG-DIS</b> letter used</li><li>- Choosing not to make changes to address disapproval</li><li>- Requesting reconsideration of disapproval; <b>CHNG-DIS</b> letter used</li><li>- Withdrawing rules; <b>NTC-WITHDRAWAL</b> form used</li><li>- Making changes other than those recommended; <b>CHNG-OTH</b> letter used</li></ul></li></ul>
_____	<b>9.6 – Order Adopting Rules drafted</b> <ul style="list-style-type: none"><li>- <b>ORD-ADPT</b> and <b>SMPLFNDS</b> used</li></ul>
_____	<b>9.7 – Governor’s Office approval obtained</b> <ul style="list-style-type: none"><li>- <b>GOV-FNL</b> used</li></ul>
_____	<b>9.8 – Copy of adopted rules obtained from Revisor</b>
_____	<b>9.9 – Order Adopting Rules finalized and filed</b> <ul style="list-style-type: none"><li>- Order Adopting Rules signed by: _____</li><li>- Signed order eFiled with OAH</li><li>- Rules filed with Secretary of State</li><li>- Notice of Adoption received from Revisor</li></ul>
_____	<b>9.10 – Notice of Filing given</b> <ul style="list-style-type: none"><li>- Give notice <i>on the same day</i> that OAH files the rules with Secretary of State</li></ul>

**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



# Chapter 10 - Exempt Rules Under 14.386

## Introduction

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This chapter describes the process for adopting rules using the exempt rulemaking authority under Minnesota Statutes, section 14.386. Agencies may adopt rules using exempt procedures if a law authorizing the rules specifically exempts them from chapter 14 or from the definition of a rule.

## 10.1 Determine Which Procedural Requirements Apply

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There are three types of exempt rules:

### 10.1.1 Exempt under 14.386

The rulemaking authority for some rules exempts the rules from having to go through the usual rulemaking procedures of chapter 14. Most rules that are specifically exempt from the usual rulemaking procedures must still follow some procedures before the rules can take effect.<sup>155</sup> The first part of this chapter describes the process for adopting exempt rules.

### 10.1.2 Completely exempt under 14.386

Some rules are not only exempt from the usual rulemaking procedures of chapter 14 but are also specifically exempt from the procedures of section 14.386 (completely exempt). If this describes your rules, you may adopt your rules with only the requirements set out in your rulemaking authority. The second part of this chapter describes the process for adopting completely exempt rules.

### 10.1.3 Exempt for good cause under 14.388

Some rules are exempted from the normal rulemaking procedures for one or more “good cause” reasons (good-cause exemptions).<sup>156</sup> Chapter 11 describes the process for adopting good-cause-exempt rules.

## 10.2 Draft your Rules

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Draft your rules as you would any rules. **[See Chapter 3.]** Your chain of command should review and support your proposed rules before you proceed. Some agencies have their legal counsel review the proposed rule language and double-check statutory authorities. An agency that is a multi-member board must follow board procedures, which usually means passing a formal resolution authorizing the

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<sup>155</sup> Minn. Stat. § 14.386.

<sup>156</sup> Minn. Stat. § 14.388.

Notice and authorizing a person to sign the Notice. A form for such a board resolution is in the appendix as **BD-NTC**.

Request the Revisor's Office to prepare a preliminary draft of the rules and advise them that your agency is adopting the rules under the exempt procedure in Minnesota Statutes, section 14.386. Review the draft carefully, with the help of your agency's subject matter expert, and request changes as necessary.

## Adopting 14.386 Rules

### 10.3 Preparing your 14.386 Rules for Adoption

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#### 10.3.1 Notify Governor's Office

You must notify the Governor's Office of your exempt rulemaking per the Governor's Office administrative rule review policy, **GOV-PLCY**. By this time, you should have had your rules reviewed and approved by your chain of command. Your next step is to submit the Preliminary Proposal Form **GOV-PRLM** signed by your director or commissioner when you are ready to move the expedited rules forward. The agency does not have to wait for Governor's Office approval to proceed.

If you are uncertain about moving forward without the Governor's approval, you should discuss it with the Governor's Legislative Coordinator, but the Governor's Office's current practice is not to issue formal approval.

**Note:** The Governor's Office Proposed Rule and SONAR form is not used in the exempt rulemaking procedure.

#### 10.3.2 Get approved draft from the Revisor

Request the Revisor's Office to prepare rules approved (certified) as to form. The Revisor's Office will provide you with a certificate stating that the rules are approved for publication. The certified rule is ready for publication.

**Note:** Because exempt rules are published only once in the *State Register*, the revisor draft is entitled "Adopted Exempt Rules Relating to . . ." But the draft is still an RD. See section 2.3 for more information about revisor drafts.

05/06/21

REVISOR

BD/NB

RD4702

1.1 **Department of Human Services**

1.2 **Adopted Exempt Temporary Rules Relating to Child Care Provider Requirements**

1.3 **for Payment from the Child Care Fund**

### 10.3.3 Draft Proposed Order Adopting Rules

After you receive the Revisor’s approved draft, draft your proposed Order Adopting Rules. See **ORD-ADPT(EX)** in the appendix. When drafting your proposed Order, you must include a citation to the rules’ statutory exemption, any argument (if necessary) to support this exemption, and any other information required by law.

Even though there is no SONAR document laying out the agency’s case for exempt rules, it is still a best practice to provide background for the ALJ. Here are two ways to do that:

- Insert in the proposed Order a concise outline of need and reasonableness (like a rule-by-rule analysis) for the proposed rules. This alternative works well for shorter and less-complex rules.
- Prepare a supplemental memorandum as an additional exhibit. This alternative might be well suited for longer or more-complex rules.

## 10.4 Submitting your 14.386 Rules to OAH

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Minnesota Rules, part 1400.2400, subpart 2, lists the documents that you must file with the OAH for official review of your adopted rules. A form for the cover letter to OAH submitting your adopted exempt rules for approval is in the appendix as **EXEMPT-LTR**.

**Note:** OAH does not require that the proposed Order be signed at this point. The recommended practice is to submit an unsigned proposed Order Adopting Rules for the ALJ to approve as to legality. Later in the process, you will have the finalized approved draft signed and then will transmit a copy of the signed Order to OAH.

### 10.4.1 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.**

## 10.4.2 Best Practices for Working Within OAH's eFiling System.

To accommodate eFiling, it's 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 1400.2400, subpart 2. OAH prefers that you consolidate the documents as one PDF document and bookmark them.
- 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. 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.
- Also, consider your timing when eFiling. After you request OAH to assign an ALJ to your rulemaking, it's a good idea to communicate with the assigned ALJ (through William Moore) to notify the ALJ when you will file your record for review. Or you can wait to request OAH to appoint an ALJ only when the file is ready to submit. Because your submission of the rule record triggers a 14-day deadline by which the ALJ must review the record and approve the rule change, the key is to communicate clearly to OAH and any ALJ regarding the expected timing of your submission, and not to keep the ALJ waiting unnecessarily.
- 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.
- Finally, 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.

#### 10.4.4 OAH standards of review

As with any other rules, you must make certain that the proposed rules comply with standards of legality before you submit them to OAH for review.<sup>157</sup> Review these standards in Minnesota Rules, part 1400.2100.

### 10.5 ALJ Review

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The ALJ has 14 days to review and approve or disapprove your rules. If the ALJ approves the rules, OAH will send you a copy of the judge's decision and return your filing.

### 10.6 Procedure for Resubmitting Disapproved Rules

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If the ALJ does not approve your rules, you may resubmit the rules with any necessary changes or challenge the disapproval, or neither. If you decide to do neither, note that your rules cannot take effect unless they are approved.

#### 10.6.1 Resubmitting with corrections

If the ALJ disapproves your rules, the defects noted are correctable, and your agency agrees to the corrections, you can resubmit the corrected rules to OAH for review. You will need an updated Revisor's copy for doing this. The ALJ has five working days to approve or disapprove.

**Note:** This process is different from normal rules, in which corrections and disapproval are both submitted to the Chief ALJ.

#### 10.6.2 Procedure for appealing the ALJ decision

If the ALJ disapproves your rules and the defects noted are ones that cannot be corrected or your agency is unwilling to make the changes, you may ask the Chief ALJ to review the disapproved rules. To take advantage of this avenue for appeal, the agency must make the request within five working days of receiving the ALJ's disapproval. The Chief ALJ then has 14 days to review the request, using the same standards of review as the ALJ.

### 10.7 Adopting your Approved Exempt Rules

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Once the ALJ or Chief ALJ approves your rules, you can officially adopt the rules.

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<sup>157</sup> Minn. R. 1400.2400, subp. 3.

### 10.7.1 Finalize the Order Adopting Rules and have it signed

If you made no changes to your proposed rules, finish the proposed Order Adopting Rules and omit the word “Proposed” from the title. This omission should be the only difference between the proposed Order and your final Order Adopting Rules.

If you made changes to your proposed rules, update your Order Adopting Rules to reflect the changes. The commissioner or director (or other authorized person) must sign it.

### 10.7.2 Determine whether to further notify the Governor’s Office

If you made changes to the proposed rules or controversies have arisen, you might wish to communicate with the Governor’s Office. Per the Governor’s Office administrative rule review policy, **GOV-PLCY**:

**When the agency is adopting exempt rules or good cause exempt rules:** the agency may exercise its judgment about whether to submit a completed Final Rule Form [**GOV-FNL**] to the Office of the Governor. The nature of exempt . . . rules is that there are no policy considerations to make or controversies to address, so waiting for approval is not necessary. If either were to develop, however, the agency should notify the Office. Submitting a completed Final Rule Form is usually a wise precaution against error. When in doubt, the agency may contact the Legislative Coordinator. Agencies should note that exempt rules adopted under Minnesota Statutes, section 14.386 *are* subject to veto. *[emphasis added]*

### 10.7.3 Filing your approved exempt rules

eFile your signed Order Adopting Rules as you would your other documents.

**Note:** OAH, the 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 usually requests the Final Rules from the Revisor’s Office. With exempt rules, however, the agency has already eFiled the certified adopted rule with OAH and the Revisor’s office does not produce any additional documents. So, OAH files the Final Rules with the Secretary of State’s Office.
2. 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.

3. 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.

### 10.7.4 Publish in the *State Register*

Before your rules can take effect, you must publish them in the *State Register*.<sup>158</sup> See **ST-REG** in the appendix for information on how to publish. The rules become effective on the date of publication if a different effective date is not specified in the rule.

### 10.7.5 *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 “Production Schedule” on the [Minnesota State Register website](#) for publication dates and deadlines.

### 10.7.6 Governor veto

After the Governor receives a copy of the adopted rules, the Governor may veto the rules. (Note: rules that are exempt under section 14.386 are subject to the Governor’s veto, unlike good-cause-exempt rules under section 14.388). 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*.<sup>159</sup> The Governor’s Office will let you know whether the rule or portions of the rule will be vetoed.

## 10.8 Notice to Affected Parties

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Providing additional notice is not required when exempt rules are proposed or adopted but is considered a best practice. Notice of your new rules might not reach the affected parties if you rely solely on the *State Register* publication. Because rules are always subject to due-process considerations, you should give notice to these parties in some other way to avoid possible litigation. If you do give additional notice, include a certificate of additional notice as an exhibit in the documents that you file with OAH for approval. Remember though, that because additional notice is not required

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<sup>158</sup> Minn. Stat. § 14.386(a)(4).

<sup>159</sup> Minn. Stat. § 14.05, subd. 6.

for this rulemaking, you have more flexibility in how you provide this notice (for example, you do not have to have this additional notice plan preapproved by an ALJ). For information on developing and using an additional notice plan, see Chapter 5, 6, or 7.

## 10.9 Expiration of Exempt Rules

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Exempt rules expire two years from the date that the rules are published in the *State Register*. Once expired, the law authorizing exemption will also expire, so you will be unable to use the exempt process again.

## 10.10 Official Rulemaking Record

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After exempt rules are adopted, you must keep an Official Rulemaking Record. The requirements for the Official Rulemaking Record are contained in Minnesota Statutes, section 14.365, clauses (1) to (11). 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 section 14.365, so that 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.

# Adopting Completely Exempt Rules under 14.386

## 10.11 Preparing Completely Exempt Rules (Exempted from Chapter 14 and Specifically Exempted from Section 14.386)

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Agencies may adopt completely exempt rules without the procedural requirements for the other two types of exemptions because these types of rules have been exempted from both the regular rulemaking procedures and the exempt procedure in section 14.386. In other words, this complete



exemption means that you are not required to have your drafted rules certified as to form, submitted to OAH, or have the rules published. This complete exemption also means that you do not have to submit your exempt rules to the Governor for a possible veto because the rules are not subject to any provision of the APA, and therefore are not subject to section 14.05, subdivision 6.

### **10.11.1 Practical considerations; Governor's Office**

Chapter 14 does not require that you submit completely exempt rules to the Governor's Office. However, those of you in the executive branch who serve the Governor should note that the Governor's Office administrative rule review policy, **GOV-PLCY**, asks agencies to submit a preliminary proposal form for exempt rules. This can be found in the appendix as **GOV-PRLM**. After you notify the Governor's office, you may go forward without waiting for Governor's Office approval.

### **10.11.2 Specific statutory guidelines**

Make certain that you follow any specific guidelines presented in the statutory authority. For instance, the law authorizing complete exemption might also state that the rules, once drafted, must be published in the *State Register* as public notice that the rules exist.

### **10.11.3 Notice Requirements**

Although you have a complete exemption from rulemaking requirements found in the APA, you should still provide some form of notice to affected parties to avoid a due process challenge. This notice should be appropriate to the rules that you seek to enforce and does not require comment.

### **10.11.4 Legal review**

If the law authorizing this exemption does not give you further guidelines, you might want to do a legal review of your rules to ensure that the rules will survive potential legal challenges. Some agencies might choose to do the review in house, while other agencies might choose to consult with their AG.

### **10.11.5 Order Adopting Rules**

Creating a record for this rulemaking is a good idea. An Order Adopting Rules, even though not required, serves as a record of both the effective date and the statutory authorization for these rules. A commissioner's signature also gives proof that these rules were authorized. See **ORD-ADPT** in the appendix.

**Note:** Because these are completely exempt rules, you will not need to include in your Order any statement of need and reasonableness.

### **10.11.6 Official Rulemaking Record**

While not required for completely exempt rules, your agency should maintain an official record to document how the rules have changed, who worked on the rules, dates for when the rules went into effect, evidence that the rules were adopted by the agency official authorized to adopt rules, and information on how affected parties were notified of the rules. Because you will not have to prepare a Statement of Need and Reasonableness, you might want to include a justification in an Order Adopting Rules, as discussed previously, or provide memos or correspondence to show your reasoning for the rules.

## Checklist for Chapter 10 – Exempt Rules under 14.386

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Date Completed	Item
_____	<b>10 – Entire chapter reviewed before proceeding</b>
_____	<b>10.1 – Determined which procedural requirements apply</b> <ul style="list-style-type: none"><li>- 10.1.1 – Exempt under 14.386</li><li>- 10.1.2 – Completely exempt under 14.386</li><li>- 10.1.3 – Exempt for good cause under 14.388 (See Chapter 11)</li></ul>
_____	<b>10.2 – Rules drafted</b> <ul style="list-style-type: none"><li>- Draft rules as you would any other rules (See Chapter 3)</li><li>- Request preliminary draft from Revisor; tell them the rules are exempt under 14.386</li><li>- If agency is a multi-member board, <b>BD-NTC</b> used</li></ul>
_____	<b>10.3 – Rules prepared for adoption</b> <ul style="list-style-type: none"><li>- 10.3.1 – Governor’s Office notified<ul style="list-style-type: none"><li>- GOV-PRLM used</li></ul></li><li>- 10.3.2 – Revisor’s Draft approved for publication obtained (with certificate signed by Revisor)</li><li>- 10.3.3 – Proposed Order Adopting Rules drafted<ul style="list-style-type: none"><li>- ORD-ADPT(EX) used</li></ul></li></ul>
_____	<b>10.4 – Rules submitted to OAH</b> <ul style="list-style-type: none"><li>- 10.4.1 – eFile rule-related documents; EXEMPT-LTR used</li></ul>
_____	<b>10.5 – ALJ review completed</b> <ul style="list-style-type: none"><li>- ALJ has 14 days to review</li></ul>
_____	<b>10.6 – Resubmitting disapproved rules</b> <ul style="list-style-type: none"><li>- 10.6.1 – Resubmitting with corrections</li><li>- 10.6.2 – Appealing ALJ decision</li></ul>
_____	<b>10.7 – Approved Exempt Rules adopted</b> <ul style="list-style-type: none"><li>- 10.7.1 – Order Adopting Rules finalized and signed<ul style="list-style-type: none"><li>- Order signed by: _____</li></ul></li><li>- 10.7.2 – Determine whether to further notify the Governor’s Office<ul style="list-style-type: none"><li>- GOV-FNL used</li></ul></li></ul>
_____	

## Checklist for Chapter 10 (Continued)

Date Completed	Item
_____	<ul style="list-style-type: none"><li>- <b>10.7.3 – Signed Order Adopting Rules eFiled</b></li><li>- Signed order eFiled with OAH<ul style="list-style-type: none"><li>- Rules filed with Secretary of State</li><li>- Notice of Adoption received from Revisor</li></ul></li></ul>
_____	<b>10.8 – Affected parties notified (Optional)</b>
_____	<b>10.9 – Expiration of Exempt Rules noted</b>
_____	<b>10.10 – Official Rulemaking Record prepared</b> <ul style="list-style-type: none"><li>- <b>RECORD</b> used</li></ul>
_____	<b>10.11 – Preparing Completely Exempt Rules (exempted from Chapter 14 and also specifically exempted from section 14.386)</b> <ul style="list-style-type: none"><li>- <b>10.11.1 – Practical considerations; Governor’s Office notified</b><ul style="list-style-type: none"><li>- <b>GOV-PRLM</b> used</li></ul></li><li>- <b>10.11.2 – Specific statutory guidelines followed</b></li><li>- <b>10.11.3 – Notice to affected parties provided</b></li><li>- <b>10.11.4 – Legal review of rules</b></li><li>- <b>10.11.5 – Consider using ORD-ADPT</b></li><li>- <b>10.11.6 – Official Rulemaking Record created</b></li></ul>

# Chapter 11 – Good Cause Exempt Rules Under 14.388

## Introduction

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This chapter describes the process for rules that are adopted, amended, or repealed under the APA's good-cause-exemption authority.<sup>160</sup> The agency must meet the conditions of section 14.388 to use the procedures of 14.388; the good-cause exemption is an efficient way to clean up rules that fit these conditions.

### 11.1 Determine Whether your Rules Fall Under the Good Cause Exemption

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An agency may use the good cause exemption if it finds that normal rulemaking requirements of chapter 14 are unnecessary, impracticable, or contrary to the public interest when proposing to adopt, amend, or repeal rules in any of these four situations:

1. The rules address a serious and immediate threat to public health, safety, or welfare.
2. The rules comply with a court order or federal law requirement that does not allow for compliance with sections 14.14 to 14.28.
3. The rules incorporate specific changes stated in applicable statutes where no interpretation of law is required. In other words, changes that must or could be made because of a statutory change made by the legislature fall under this exemption. For example, suppose your rules govern the accident-prevention course for senior drivers over the age of 65. Taking the course enables senior drivers to get a discount on their car insurance, per Minnesota Statutes. If the statute were changed to apply to all drivers that are over the age of 55, you would use the good cause exemption to change all the 65s to 55s in your rules. However, if you decide to make further changes to the course curriculum, they would be substantive changes to the rule, and you must use regular rulemaking procedures.
4. The rules make changes that do not alter the sense, meaning, or effect of a rule. For example, industry now uses the term "widgets" for a certain item, but when you adopted the rule, the term used was "gadgets." Because "gadget" has become an obsolete term, you need to change the terms used in your rules to "widgets." You may use the good cause exemption to substitute the term "widget" for "gadget" if this substitution doesn't change the meaning, sense, or effect of the current rule. A change in effect could occur if the term "widget" is broader than the term "gadget" and therefore your rule applies to more widgets than gadgets. In this instance, the effect of your rule changed because it covers more widgets than it covered gadgets, and this result could positively or negatively affect the users of widgets.

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<sup>160</sup> Minn. Stat. § 14.388.

## 11.2 Draft your Rules

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Draft your rules as you would any rules. **[See Chapter 3.]** Your chain of command should review and support your proposed rules before you proceed. Some agencies have their legal counsel review the proposed rule language and double-check statutory authorities. An agency that is a multi-member 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**.

Request the Revisor's Office to prepare a preliminary draft of the rules and advise them that your agency is adopting the rules under the good cause exempt procedure in Minnesota Statutes, section 14.388. Review the draft carefully, with the help of your agency's subject matter expert, and request changes as necessary.

## 11.3 Preparing your Good Cause Exempt Rules for Adoption

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### 11.3.1 Notify Governor's Office

You must notify the Governor's Office of your exempt rulemaking per the Governor's Office administrative rule review policy, **GOV-PLCY**. By this time, you should have had your rules reviewed and approved by your chain of command. Your next step is to submit the Preliminary Proposal Form **GOV-PRLM** signed by your director or commissioner when you are ready to move the expedited rules forward. The agency does not have to wait for Governor's Office approval to proceed.

If you are uncertain about moving forward without the Governor's approval, you should discuss it with the Governor's Legislative Coordinator, but the Governor's Office's current practice is not to issue formal approval.

**Note:** The Governor's Office Proposed Rule and SONAR form is not used in the exempt rulemaking procedure.

### 11.3.2 Get approved draft from the Revisor

Request the Revisor's Office to prepare rules approved (certified) as to form. The Revisor's Office will provide you with a certificate stating that the rules are approved for publication. The certified rule is ready for publication.

**Note:** Because exempt rules are published only once in the *State Register*, the revisor draft is entitled "Adopted Exempt Rules Relating to . . ." But the draft is still an RD.

### 11.3.3 Draft Proposed Order Adopting Rules

After you receive the Revisor’s approved draft, draft your proposed Order Adopting Rules. See **ORD-ADPT(EX)** in the appendix. Your proposed Order must include an explanation of the legality of the rule, an explanation of why the rule meets the good cause exemption requirements (see the four categories of exempt rules in section 11.1), and any other information required by law or rule. Because the law requires notice, you might want to include in the Order a description of your notice and why it satisfies the notice requirement. You may also attach a copy of the notice to the Order.

Even though there is no SONAR document laying out the agency’s case for exempt rules, it is still a best practice to provide background for the ALJ. Here are two ways to do that:

- Insert in the proposed Order a concise outline of need and reasonableness (like a rule-by-rule analysis) for the proposed rules. This alternative works well for shorter and less-complex rules.
- Prepare a supplemental memorandum as an additional exhibit. This alternative might be well suited for longer or more-complex rules.

## 11.4 Prepare and Send the Notice of Submission

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### 11.4.1 Prepare the Notice of Submission

See **NTC-SBM(EX)** in the appendix.

Do the following to help you organize:

1. choose the date for submitting your rules package to OAH and sending your Notice of Submission;
2. prepare an agency webpage, if desired; and
3. make sure that documents you will post online are accessible.

The Notice of Submission must include:

1. the proposed rules in certified Revisor form;
2. an explanation of why the rules meet the requirements of the good cause exemption; and
3. a statement that interested parties have five business days after the date of the notice to submit comments to OAH by United States mail or via the Office of Administrative Hearings [Rulemaking eComments Discussions \(https://minnesotaoah.granicusideas.com/discussions\)](https://minnesotaoah.granicusideas.com/discussions).<sup>161</sup>

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<sup>161</sup> See form NTC-SBM(EX) in the Appendix.

### 11.4.2 Using OAH's eComments website

Minnesota Statutes, section 14.388, subdivision 2, requires the public have an opportunity to submit comments to OAH. Therefore, agencies must notify the public that they may submit public comments using OAH's [eComments website \(https://minnesotaoah.granicusideas.com\)](https://minnesotaoah.granicusideas.com).

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 as well. Public instructions for making comments can be found at <https://mn.gov/oah/forms-and-filing/ecomments/>.

To set up your public eComments site, contact OAH Administrative Rule and Applications Specialist, William Moore, at [William.T.Moore@state.mn.us](mailto:William.T.Moore@state.mn.us) or (651) 361-7893 at least a week before you eFile your notice. Provide the following information:

1. OAH docket number assigned to the rulemaking.
2. The dates 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. Optional: Finalized accessible copies of the documents you want to appear on the OAH eComments webpage, if any.

### 11.4.3 Giving Notice of Submission

On or before the date you submit your rules to OAH for review, you must give notice of your intent to amend your rules.<sup>162</sup> Plus, you must send your Notice through mail or email to everyone on your agency's rulemaking mailing list. There is no penalty for sending the Notice early. Email delivery can be accomplished using a subscription service such as GovDelivery.

You must also notify interested persons. Be creative about finding ways to reach them. The effort you make should be proportional to the potential controversy of the rules. For controversial rules, you might need to compile lengthy mailing lists that you should organize in advance to meet the notice requirements. A list-management service such as GovDelivery is a real timesaver. Preserving evidence of your efforts and list is prudent for preparing a certificate of mailing, if the ALJ requests one. If the proposed rules are not controversial, posting the notice on your agency's website might suffice. If you have concerns, send your notice plan to OAH for review.

A Certificate of Accuracy of the Mailing List and a Certificate of Mailing should 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

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<sup>162</sup> Minn. Stat. § 16E.07, subd. 3.



actions. You may choose to submit these certificates when you file with OAH, or the ALJ might require them as “any other information required by law or rule.”<sup>163</sup>

## 11.5 Submitting your Good Cause Exempt Rules to OAH

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Minnesota Rules, part 1400.2400, subpart 2, lists the documents you must file with the OAH for official review of your adopted rules. A form for the cover letter to OAH submitting your adopted exempt rules for approval is in the appendix as **EXEMPT-LTR**.

**Note:** OAH does not require that the proposed Order be signed at this point. The recommended practice is to submit an unsigned proposed Order Adopting Rules for the ALJ to approve as to legality. Later, you will have the approved draft signed and then you will transmit a copy of the signed Order to OAH.

### 11.5.1 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.**

### 11.5.2 Best Practices for working within OAH’s eFiling system

To accommodate eFiling, it’s 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 1400.2400, subpart 2. OAH prefers that you consolidate the documents as one PDF document and bookmark them. Best practice: Include the replies that the agency sent 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. In Adobe Pro, for example, it is simple to mark and label a bookmark at the first page of each document.

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<sup>163</sup> Minn. R. 1400.2400, subp. 2B(3).

- 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.

Also, consider your timing when eFiling. After you request OAH to assign an ALJ to your rulemaking, it’s a good idea to communicate with the assigned ALJ (through William Moore) to notify the ALJ when you will file your record for review. Or you can wait to request OAH to appoint an ALJ only when the file is ready to submit. Because your submission of the rule record triggers a 14-day deadline by which the ALJ must review the record and approve the rule change, the key is to communicate clearly to OAH and any ALJ regarding the expected timing of your submission, and not to keep the ALJ waiting unnecessarily.

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.

Finally, 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.

### **11.5.3 OAH standards of review**

As with any other rules, you must make certain that the proposed rules comply with standards of legality before you submit them to OAH for review.<sup>164</sup> Review these standards directly in Minnesota Rules, part 1400.2100.

## **11.6 ALJ Review**

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The ALJ has 14 days to review and approve or disapprove your rules. If the ALJ approves the rules, OAH will send you a copy of the judge’s decision and return your filing.

## **11.7 Procedure for Resubmitting Disapproved Rules**

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If the ALJ does not approve your rules, you may resubmit the rules with any necessary changes or challenge the disapproval, or neither. If you decide to do neither, note that your rules cannot take effect unless they are approved.

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<sup>164</sup> Minn. R. 1400.2400, subp. 3.

### 11.7.1 Resubmitting with corrections

If the ALJ disapproves your rules, the defects noted are correctable, and your agency agrees to the corrections, you can resubmit the corrected rules to OAH for review. You will need an updated Revisor’s copy for doing this. The ALJ has five working days to approve or disapprove.

**Note:** This process is different from normal rules, in which corrections and disapproval are both submitted to the Chief ALJ.

### 11.7.2 Procedure for appealing the ALJ decision

If the ALJ disapproves your rules and the defects noted are ones that cannot be corrected or your agency is unwilling to make the changes, you may ask the Chief ALJ to review the disapproved rules. To take advantage of this avenue for appeal, the agency must make the request within five working days of receiving the ALJ’s disapproval. The Chief ALJ then has 14 days to review the request, using the same standards of review as the ALJ.

## 11.8 Adopting your Approved Exempt Rules

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Once the ALJ approves your rules, you may officially adopt the rules.

### 11.8.1 Finalize the Order Adopting Rules and have it signed

If you made no changes to your proposed rules, finish the proposed Order Adopting Rules by removing the word “Proposed” from the title and inserting the number of comments received. These changes should be the only differences between the proposed Order and your final Order Adopting Rules.

If you made changes to your proposed rules, update your Order Adopting Rules to reflect those changes along with removing the word “Proposed” from the title and inserting the number of comments received.

The commissioner or director (or other authorized person) may now sign it.

### 11.8.2 Determine whether to further notify the Governor’s Office

If you made changes to the proposed rules or controversies have arisen, you might wish to communicate with the Governor’s Office. Per the Governor’s Office administrative rule review policy, **GOV-PLCY**:

**When the agency is adopting exempt rules or good cause exempt rules:** the agency may exercise its judgment about whether to submit a completed Final Rule Form **[GOV-FNL]** to the Office of the Governor. The nature of exempt . . . rules is that there are no policy considerations to make or controversies to address, so waiting for approval is not necessary. If either were to

develop, however, the agency should notify the Office. Submitting a completed Final Rule Form is usually a wise precaution against error. When in doubt, the agency may contact the Legislative Coordinator. . . . Good cause exempt rules adopted under Minnesota Statutes, section 14.388 *are not* subject to veto. *[emphasis added]*

### 11.8.3 Filing your approved exempt rules

eFile your signed Order Adopting Rules as you would your other documents.

**Note:** OAH, the 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 usually requests the Final Rules from the Revisor's Office. With exempt rules, however, the agency has already eFiled the certified adopted rule with OAH and the Revisor's office does not produce any additional documents. So, OAH files the Final Rules with the Secretary of State's Office.
2. 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. (**Note: there is no veto period; see exception noted in 11.8.6 for good cause exempt rules**). 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.
3. 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.

### 11.8.4 Publish in the *State Register*

Before your rules can take effect, you must publish them in the *State Register*.<sup>165</sup> See **ST-REG** in the appendix for information on how to publish. The rules become effective on the date of publication if a different effective date is not specified in the rule.

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<sup>165</sup> Minn. Stat. § 14.388, subd. 1, requires the agency to follow the procedures of section 14.386, which includes the publication requirement in paragraph (a), clause (4).

### 11.8.5 *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 “Production Schedule” on the [Minnesota State Register website](#) for publication dates and deadlines.

### 11.8.6 Governor veto

A governor’s veto does not apply to good cause exempt rules adopted under Minnesota Statutes, section 14.388.<sup>166</sup>

## 11.9 Notice to Affected Parties

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Providing additional notice is not required when exempt rules are proposed or adopted but is considered a best practice. Notice of your new rules might not reach the affected parties if you rely solely on the *State Register* publication. Because rules are always subject to due-process considerations, you should give notice to these parties in some other way to avoid possible litigation. If you do give additional notice, include a certificate of additional notice as an exhibit in the documents that you file with OAH for approval. Remember though, that because additional notice is not required for this rulemaking, you have more flexibility in how you provide this notice (for example, you do not have to have this additional notice plan preapproved by an ALJ). For information on developing and using an additional notice plan, see Chapter 5, 6, or 7.

## 11.10 Possible Expiration of Good Cause Exempt Rules

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Rules adopted under clauses (1) and (2) of section 14.388 are effective for two years from the date of publication of the rule in the *State Register*. Rules adopted under clauses (3) and (4) of section 14.388 are effective upon publication in the *State Register* and don’t expire.

## 11.11 Official Rulemaking Record

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After 14.388 rules are adopted, you must keep an Official Rulemaking Record. The requirements for the Official Rulemaking Record are stated in Minnesota Statutes, section 14.365, clauses (1) to (11). 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 section 14.365, so that 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

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<sup>166</sup> See Minn. Stat. § 14.05, subd. 6.

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.

## Checklist for Chapter 11 – Good Cause Exempt Rules under 14.388

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Date Completed	Item
_____	<b>11 – Entire chapter reviewed before proceeding</b>
_____	<b>11.1 – Determined whether rules fall under Good Cause Exemption</b>
_____	<b>11.2 – Rules drafted</b> - Draft rules as you would any other rules (See Chapter 3) - Request preliminary draft from Revisor; tell them the rules are exempt under 14.388 - If agency is a multi-member board, <b>BD-NTC</b> used
_____	<b>11.3 – Rules prepared for adoption</b> - <b>11.3.1 – Governor’s Office notified</b> - <b>GOV-PRLM</b> used - <b>11.3.2 – Revisor’s Draft approved for publication obtained (with certificate signed by Revisor)</b> - <b>11.3.3 – Proposed Order Adopting Rules drafted</b> - <b>ORD-ADPT(EX)</b> used
_____	<b>11.4 – Notice of Submission prepared and sent</b> - <b>11.4.1 – Notice of Submission prepared</b> - <b>NTC-SBM(EX)</b> used - <b>11.4.2 –eComments set up</b> - <b>11.4.3 – Notice of Submission given</b> - <b>CRT-LIST</b> and <b>CRT-MLNG</b> used
_____	<b>11.5 – Rules submitted to OAH</b> - <b>11.5.1 – eFile rule-related documents; EXEMPT-LTR</b> used
_____	<b>11.6 – ALJ review completed</b> - ALJ has 14 days to review
_____	<b>11.7 – Resubmitting disapproved rules</b> - <b>11.7.1 – Resubmitting with corrections</b> - <b>11.7.2 – Appealing ALJ decision</b>
_____	<b>11.8 – Approved Exempt Rules adopted</b> - <b>11.8.1 – Order Adopting Rules finalized and signed</b> - Order signed by: _____

## Checklist for Chapter 11 (Continued)

Date Completed	Item
_____	<ul style="list-style-type: none"><li>- <b>11.8.2 – Determine whether to further notify the Governor’s Office</b></li><li>- <b>GOV-FNL</b> used</li></ul>
_____	<ul style="list-style-type: none"><li>- <b>11.8.3 – Signed Order Adopting Rules eFiled</b></li><li>- Signed order eFiled with OAH</li><li>- Rules filed with Secretary of State</li><li>- Notice of Adoption received from Revisor</li></ul>
_____	<ul style="list-style-type: none"><li>- <b>11.8.4 – Rules published in the <i>State Register</i></b></li><li>- Notice submitted after agency is certain Governor will not veto rules</li><li>- <b>ST-REG</b> used</li></ul>
_____	<b>11.9 – Affected parties notified (Optional)</b>
_____	<ul style="list-style-type: none"><li>- <b>11.10 – Possible expiration of Exempt Rules noted</b></li><li>- Rules adopted under clauses (1) and (2) of section 14.388 are effective for two years from the date of publication in the State Register.</li><li>- Rules adopted under clauses (3) and (4) of section 14.388 are effective upon publication in the State Register.</li></ul>
_____	<ul style="list-style-type: none"><li>- <b>11.11 – Official Rulemaking Record prepared</b></li><li>- <b>RECORD</b> used</li></ul>



# Chapter 12 - Expedited Rules Under 14.389

## Introduction

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This chapter describes the process for rules adopted under the APA's expedited rulemaking authority.<sup>167</sup> Agencies may adopt rules using these expedited procedures only if a law authorizing rules specifically allows using the procedures found in section 14.389.

The statute is silent about the applicability of the 18-month deadline in section 14.125. If it is a rulemaking under a new or amended authority, the best practice is to do the rulemaking in a timely manner, meet that deadline, and avoid any complaints in public comments that would require a response and an ALJ finding.

## 12.1 Draft your Rules

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Draft your rules as you would any rules. **[See Chapter 3.]** Your chain of command should review and support your proposed rules before you proceed. Some agencies have their legal counsel review the proposed rule language and double-check statutory authorities. An agency that is a multi-member 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**.

Request the Revisor's Office to prepare a preliminary draft of the rules and advise them that your agency is adopting the rules under the expedited procedure in Minnesota Statutes, section 14.389. Review the draft carefully, with the help of your agency's subject matter expert, and request changes as necessary. The rule title should say that they are "Proposed Expedited Permanent Rules."

## 12.2 Preparing your Expedited Rules for Comment

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### 12.2.1 Notify Governor's Office

You must notify the Governor's Office of your expedited rulemaking per the Governor's Office administrative rule review policy, **GOV-PLCY**. By this time, you should have had your rules reviewed and approved by your chain of command. Your next step is to submit the Preliminary Proposal Form **GOV-PRLM** signed by your director or commissioner when you are ready to move the expedited rules forward. The agency does not have to wait for Governor's Office approval to proceed.

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<sup>167</sup> Minn. Stat. § 14.389.

If you are uncertain about moving forward without the Governor’s approval, you should discuss it with the Governor’s Legislative Coordinator, but the Governor’s Office’s current practice is not to issue formal approval.

**Note:** The Governor’s Office Proposed Rule and SONAR form is not used in the expedited rulemaking procedure.

### 12.2.2 Get approved draft from the Revisor

Request the Revisor’s Office to prepare rules approved (certified) as to form. The Revisor’s Office will provide you with a certificate stating that the rules are approved for publication. The certified rule is ready for publication.

### 12.2.3 Draft Notice of Intent to Adopt Expedited Rules Without a Hearing

A Notice of Intent to Adopt Expedited Rules must contain the information in Minnesota Rules, part 1400.2085, subparts 2 and 3. A form for the Notice is in the appendix as **NTC-EXPEDITE** and is designed to be a checklist for meeting the requirements of part 1400.2085.

**Note:** You will only need to mention a possible hearing in your Notice if the law authorizing the rules makes specific reference to section 14.389, subdivision 5, rather than a general reference to section 14.389. Please see the draft Notice in the appendix, **NTC-EXPEDITE**, for specific wording on this topic.

### 12.2.4 “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.<sup>168</sup>

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<sup>168</sup> Minn. R. 1400.2110, .2300, subp. 7; Minn. Stat. §§ 14.05, subd. 2, .24.

## 12.3 Giving Notice

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### 12.3.1 Agency mailing list

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.<sup>169</sup> 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 you frequently get additions to your mailing list, make sure that you also mail to any persons 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.<sup>170</sup>

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.

### 12.3.2 Additional notice—discretionary under part 1400.2410, subpart 2, item D

Providing additional notice is not required in expedited procedure, but it is considered a best practice. Notice of your new rules might not reach the affected parties if you rely solely on the *State Register* publication. Because rules are always subject to due-process considerations, you should give notice to these parties in some other way to avoid possible litigation. If you do give additional notice, include a certificate of additional notice as an exhibit in the documents that you file with OAH for approval. Remember though, that because additional notice is not required for this rulemaking, you have more flexibility in how you provide this notice (for example, you do not have to have this additional notice plan preapproved by an ALJ). For information on developing and using an additional notice plan, see Chapter 5, 6, or 7.

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<sup>169</sup> 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.

<sup>170</sup> Minn. Stat. § 14.22, subd. 1(a).

### 12.3.3 Publish in *State Register*

You must publish your Notice in the *State Register* at least **30 days** before the end of your comment period.<sup>171</sup> The published Notice must include the proposed rules, an easily readable and understandable summary of the overall nature and effect of the proposed rule, and a citation to the most specific statutory authority for the rule, including the authority for the rule to be adopted under the expedited process. (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](#) for publication dates and deadlines.)

When you send your documents to the *State Register*, you will also need to provide the *State Register* Editor with your Revisor’s ID number. The editor will request the Revisor’s Office to transmit the approved draft directly to the *State Register* electronically.

### 12.3.4 30-day comment period

You must allow at least 30 days after publication in the *State Register* for comment on the proposed rules.<sup>172</sup> That is the minimum requirement. Consider whether a longer comment period might be beneficial (such as 45 or 60 days). Keep copies of all comments and submissions that you receive and the agency’s responses, because these must be included with the rest of the documents that you file with OAH.<sup>173</sup>

### 12.3.5 Collecting comments

OAH collects public comments on its [eComments website \(https://minnesotaoah.granicusideas.com\)](https://minnesotaoah.granicusideas.com), 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/>.

To set up your public eComments site, contact OAH Administrative Rule and Applications Specialist, William Moore, at [William.T.Moore@state.mn.us](mailto: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. 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*.

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<sup>171</sup> Minn. Stat. § 14.389, subd. 2.

<sup>172</sup> Minn. Stat. § 14.389, subd. 2.

<sup>173</sup> Minn. R. 1400.2085, subp. 2E.

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.

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## 12.4 Modifications to your Expedited Rules

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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 the agency considers making a modification to the rules as proposed, assess whether the modification will result in a substantially different rule from those proposed. If a modification does not result in a substantially different rule, make note of the reasons because you must explain this in your Order Adopting Rules. If they do result in substantially different rules, you should seriously consider whether the modification is necessary because you will have to follow the notice procedures under Minnesota rules, part 1400.2110.

If you decide to modify the rules, get agency decision makers to approve not only the changes but also the rationale for the changes. If you choose not to make changes suggested by the public, it is a good idea to brief agency decision makers and request their sign off on decisions not to act.

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## 12.5 Expedited Rules Subject to Hearing

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If the law authorizing your expedited rules makes specific reference to section 14.389, subdivision 5, rather than a general reference to section 14.389, a hearing is required if you have 50 or more requests for a hearing during the 30-day comment period. If you do not have 50 requests, you may proceed with your rulemaking following the procedures for expedited rules.

If you receive at least 50 requests, and the requests are valid under section 14.25, you must hold a hearing and comply with all the normal requirements for adopting rules after a public hearing found in the APA. These include preparing a SONAR, publishing and mailing a Notice of Hearing, and sending the Notice of Hearing to those persons who requested a public hearing. In other words, this removes the rulemaking from the expedited procedure for the remainder of the rulemaking process. Refer to **Chapter 7**, Giving Notice of Hearing, and **Chapter 9**, Adopting Rules with a Hearing, for more information on what these requirements entail.

### 12.5.1 Withdrawal of hearing requests

If your agency receives 50 or more requests for a hearing but is willing to change the rules to address enough of the requests or can address some requestors' reasons for making a hearing request (such as clearing up a misunderstanding), your agency may be able to avoid going to hearing, if you meet the following requirements:

1. First, you must get enough hearing requests withdrawn to reduce the number of requests to less than 50.
2. Second, you must notify all persons who requested a hearing, in writing, if enough requests are withdrawn to reduce the number of requests below 50 and if the agency has taken any actions to obtain the withdrawals. A form for this notice is in the appendix as **NTC-HRWD** and serves 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**.

## 12.6 Get Governor’s Office Approval

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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**:

**When the agency is adopting expedited rules:** the agency must submit the completed Final Rule Form [**GOV-FNL**] to the Office of the Governor before the agency is submitting its request to Office of Administrative Hearings (OAH) for rule review and approval. The agency must attach a copy of the proposed rules and any justification that the agency has prepared. *The agency must wait for Governor’s Office approval before publishing the notice of adoption.* [emphasis added]

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

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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”).

12/20/21	REVISOR	RSI/EH	AR4726
1	<b>Department of Commerce</b>		
2	<b>Adopted Expedited Rules Relating to Workers' Compensation Ratemaking</b>		

If you are making no changes to the proposed rules, submit this copy to OAH for the official review. 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 for submission to OAH. In your request, indicate when you would like the adopted rules back, and the Revisor will tell you if that is workable.

## 12.8 Draft your *Proposed Order Adopting Rules*

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A form for the Order is in the appendix as **ORD-ADPT** and is designed to be a checklist to meet the requirements of Minnesota Rules, part 1400.2090.

Even though there is no SONAR document laying out the agency's case for expedited rules, it is still a best practice to provide background for the ALJ. Here are two ways to do that:

- Insert in the proposed Order a concise outline of need and reasonableness (like a rule-by-rule analysis) for the proposed rules. This alternative works well for shorter and less-complex rules.
- Prepare a supplemental memorandum as an additional exhibit. This alternative might be well suited for longer or more-complex rules.

**Note:** OAH does not require that the proposed Order be signed at this point. The recommended practice is to submit an unsigned proposed Order Adopting Rules for the ALJ to approve as to legality. Later, you will have the finalized approved draft signed and then will transmit a copy of the signed Order to OAH.

## 12.9 Submit the File to OAH for Official Review

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Minnesota Rules, part 1400.2410, subpart 2, items A to K, list the documents you must file with OAH for official review of your adopted rules. A sample cover letter to OAH is in the appendix as **EXPEDITE-LTR**. This letter is designed to serve as a checklist for meeting the requirements under Minnesota Rules, part 1400.2410.

### 12.9.1 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.**

### 12.9.2 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 1400.2410, subpart 2, items A–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. One system designed to apply such a unique number automatically is called 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. 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.

Also, consider your timing when eFiling. After you request OAH to assign an ALJ to your rulemaking, it’s a good idea to communicate with the assigned ALJ (through William Moore) to notify the ALJ when you will file your record for review. Or you can wait to request OAH to appoint an ALJ only when the file is ready to submit. Because your submission of the rule record triggers a 14-day deadline by which the ALJ must review the record and approve the rule change, the key is to communicate clearly to OAH and any ALJ regarding the expected timing of your submission, and not to keep the ALJ waiting unnecessarily.

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.

Finally, 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.

### **12.9.3 OAH standards of review**

As with any other rules, you must make certain that the proposed rules comply with standards of legality before you submit them to OAH for review.<sup>174</sup> Review these standards directly in Minnesota Rules, part 1400.2100.

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<sup>174</sup> Minn. R. 1400.2410, subp. 3.



## 12.10 Notice of Submission of Rules to OAH

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Individuals may request to be informed of when you submit the rules to OAH for official review. You must provide a Notice of Submission on the same day that the rules are submitted to OAH. Although not specifically mentioned in section 14.389 or the in the Notice of Intent to Adopt Expedited Rules, Minnesota Rules, parts 1400.2410 and 1400.2570, both refer to giving notice that a Department has submitted its expedited rules to OAH for review if a person requests this notice. Forms for this Notice and for the certificate showing the agency sent out this Notice are in the appendix as **NTC-SBM** and **CRT-SBM**.

## 12.11 ALJ Review

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The ALJ has 14 days to review and approve or disapprove your rules. If approved, OAH will send you a copy of the ALJ's decision and return your file to you.

## 12.12 Procedure for Resubmitting Disapproved Rules

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If the ALJ does not approve your rules, you may resubmit the rules with any necessary changes or challenge the disapproval, or neither. If you decide to do neither, note that your rules cannot take effect unless are approved.

### 12.12.1 Resubmitting with corrections

If the ALJ disapproves your rules, the defects noted are correctable, and your agency agrees to the corrections, you can resubmit the corrected rules to OAH for review. You will need an updated Revisor's copy for doing this. The ALJ has five working days to approve or disapprove.

**Note:** This process is different from normal rules, in which corrections and disapproval are both submitted to the Chief ALJ.

### 12.12.2 Governor's Office approval for resubmission

Per the Governor's Office administrative rule review policy, **GOV-PLCY**:

If the ALJ makes any substantive recommendations to the rule or if defects are found, the agency should resubmit the Final Rule Form to the Governor's Office, clearly labeling it as a revised form. The agency must explain its response to the ALJ's Report, including any large deletions from the rule. A copy of the ALJ Report should be submitted to the Governor's Office with the revised Final Rule Form. Upon final approval of the rule by the Policy Advisor, the Legislative Coordinator will contact the agency and inform it that it may publish the expedited rules in the State Register.

### 12.12.3 Procedure for appealing the ALJ decision

If the ALJ disapproves your rules and the defects noted are ones that cannot be corrected or your agency is unwilling to make the changes, you may ask the Chief ALJ to review the disapproved rules. To take advantage of this avenue for appeal, the agency must make the request within five working days of receiving the ALJ's disapproval. The Chief ALJ then has 14 days to review the request, using the same standards of review as the ALJ.

## 12.13 Withdrawal of Rules

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There might be circumstances that require your agency to withdraw the rules or a portion of the rules from review. You can do this, without repercussion, if the remaining rules are not substantially different. To withdraw the rules, you must submit a Notice of Withdrawal, signed by a person authorized to do so. The Notice must contain an explanation of the person's authority to withdraw the rules. Note that Minnesota Statutes, section 14.05, subdivision 3, requires that you publish notice in the *State Register* that you have withdrawn the rules.

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.

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*.<sup>175</sup> 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 ...]

**2110.392 PHYSICAL REQUIREMENTS.**

Subpart 1. **Space.**

E. 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.

F. 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]*

F. 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 ...]

<sup>175</sup> Withdrawing amendments to existing language is tricky; ask the revisor's office for help.

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

## 12.14 Finalize and File the Order Adopting Rules

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After OAH approves your rules, the commissioner (or other authorized person) must sign the Order Adopting Rules. 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.

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

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Before your rules can take effect, you must 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 rules become effective on the day that they are published in the *State Register* if a different effective date is not specified in the rule.

### 12.15.1 Governor veto

The Governor may veto rules adopted under the expedited procedures of section 14.389.<sup>176</sup> To veto the rules, the Governor must submit a notice of the veto to the *State Register* within 14 days of receiving

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<sup>176</sup> Minn. Stat. § 14.05, subd. 6.

the rules from the Secretary of State. A veto is effective when the veto notice is submitted to the *State Register*.<sup>177</sup> The Governor’s Office will let you know whether the rule or portions of the rule will be vetoed.

### 12.15.2 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. If your agency feels it is urgent that the rules become effective ASAP, contact the Governor’s Office to relay your concerns and discuss whether you can move forward with the rules before the end of the 14 days.

### 12.15.3 180-day deadline

The 180-day deadline in Minnesota Statutes, section 14.19, applies to an expedited rulemaking. This deadline requires you to submit a notice of adoption to the *State Register* within 180 days after the issuance of the ALJ decision. Failure to do this will result in your rules being automatically withdrawn, and you must start the process over.

### 12.15.4 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](#) for publication dates and deadlines.

## 12.16 Official Rulemaking Record

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After expedited rules are adopted, you must keep an Official Rulemaking Record. The requirements for the Official Rulemaking Record are stated in Minnesota Statutes, section 14.365, clauses (1) to (11). 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 section 14.365, so that 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.

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<sup>177</sup> Minn. Stat. § 14.05, subd. 6.

**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.

## Checklist for Chapter 12 – Expedited Rules under 14.389

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Date Completed	Item
_____	<b>12 – Entire chapter reviewed before proceeding</b>
_____	<b>12.1 – Rules drafted</b> <ul style="list-style-type: none"><li>- Draft rules as you would any other rules (See Chapter 3)</li><li>- Request preliminary draft from Revisor; tell them the rules are expedited under 14.389</li><li>- If agency is a multi-member board, <b>BD-NTC</b> used</li></ul>
_____	<b>12.2 – Rules prepared for comment</b> <ul style="list-style-type: none"><li>- <b>12.2.1 – Governor’s Office notified</b><ul style="list-style-type: none"><li>- <b>GOV-PRLM</b> used</li></ul></li><li>- <b>12.2.2 – Revisor’s Draft approved for publication obtained (with certificate signed by Revisor)</b></li><li>- <b>12.2.3 – Notice of Intent to Adopt Expedited Rules w/o a Hearing drafted</b><ul style="list-style-type: none"><li>- <b>NTC-EXPEDITE</b> used</li></ul></li></ul>
_____	<b>12.3 – Notice given</b> <ul style="list-style-type: none"><li>- <b>12.3.1 – Notice sent to agency mailing list</b><ul style="list-style-type: none"><li>- <b>CRT-LIST</b> and <b>CRT-MLNG</b> used</li></ul></li><li>- <b>12.3.2 – Additional notice given (optional)</b></li><li>- <b>12.3.3 – Notice published in <i>State Register</i></b><ul style="list-style-type: none"><li>- <b>ST-REG</b> used</li></ul></li><li>- <b>12.3.4 – Allow at least 30-days for comment</b></li><li>- <b>12.3.5 – Consider using OAH’s eComments</b></li></ul>
_____	<b>12.4 – Modifications to your Expedited Rules</b> <ul style="list-style-type: none"><li>- Review comments and decide on modifications</li><li>- Get approval from chain of command</li></ul>
_____	<b>12.5 – Expedited Rules subject to Hearing (if § 14.389, subd. 5 applies)</b> <ul style="list-style-type: none"><li>- If you receive 50 or more requests for a hearing, you must hold a hearing and comply with all normal requirements for adopting rules after a public hearing (See Chapters 7 and 9)</li></ul>
_____	<ul style="list-style-type: none"><li>- <b>12.5.1 – Withdrawal of hearing requests</b><ul style="list-style-type: none"><li>- <b>NTC-HRWD</b> and <b>CRT-HRWD</b> used</li></ul></li></ul>

**Checklist for Chapter 12 (Continued)**

<b>Date Completed</b>	<b>Item</b>
_____	<b>12.6 – Governor’s Office approval received</b> - GOV-FNL used
_____	<b>12.7 – Copy of adopted rules obtained from Revisor</b>
_____	<b>12.8 – Proposed Order Adopting Rules drafted</b> - ORD-ADPT
_____	<b>12.9 – File submitted to OAH for official review (eFile)</b> - EXPEDITE-LTR used - Notify ALJ before filing
_____	<b>12.10 – Notice of Submission of Rules to OAH given</b> - NTC-SBM and CRT-SBM used
_____	<b>12.11 – ALJ review completed</b> - ALJ has 14 days to review
_____	<b>12.12 – Resubmitting disapproved rules</b> - 12.12.1 – Resubmitting with corrections - 12.12.2 – Governor’s Office approval for resubmission - 12.12.3 – Appealing ALJ decision
_____	<b>12.13 – Withdrawal of rules (optional)</b>
_____	<b>12.14 – Order Adopting Rules finalized and filed</b> - Order Adopting Rules signed by: _____ - Signed order eFiled with OAH - Rules filed with Secretary of State - Notice of Adoption received from Revisor
_____	<b>12.15 – Notice of Adoption published in the <i>State Register</i></b> - Notice submitted after agency is certain Governor will not veto rules - ST-REG used - Rules published within 180 days of ALJ review
_____	<b>12.16 – Official Rulemaking Record prepared</b> - RECORD used



# Chapter 13 - Repeal of Obsolete Rules Under 14.3895

## Introduction

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This chapter describes the process for repealing obsolete rules.<sup>178</sup> An agency may repeal obsolete rules using this process if the agency has identified the specific rules in question as obsolete, unnecessary, or duplicative in the agency’s annual obsolete rules report.<sup>179</sup> This authority does not apply if another law specifically requires another process or if 25 or more people submit a written request for a hearing. If either occurs, you must meet the requirements of Minnesota Statutes, sections 14.131 to 14.20, for rules adopted after a hearing or the requirements of sections 14.22 to 14.28 for rules adopted without a hearing.

## 13.1 Eligibility

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Before you may do anything else, you must make sure that your agency has identified the specific rules in question as obsolete, unnecessary, or duplicative in the agency’s annual obsolete rules report.<sup>180</sup> If not, and you wish to go forward before your next report, you may issue an amended report. You must, however, comply with all the requirements of Minnesota Statutes, section 14.05, subdivision 5.

Next, notify the Governor’s Office of your plans. The Governor’s Office administrative rule review policy, **GOV-PLCY**, states:

### **RULE REPEALS**

Agencies do not need to submit rule repeals to the Governor’s Office for approval. However, an agency should send an informational memo identifying the obsolete, unnecessary, or duplicative rule(s) to be repealed, describing the rationale for repeal, and indicating any potential controversies. This memo will serve to notify the Governor’s Office that the agency is seeking to repeal a rule. No approval is necessary, at any stage, in the rule repeal process.

Agencies should note, however, that obsolete rules repealed under Minnesota Statutes, section 14.3895 are subject to veto.

**Note:** The policy asks only for an “informational memo,” and does not mention using the usual form **GOV-PRLM**. But you should use the **GOV-PRLM** form anyway. The form alerts Governor’s Office staff that your submission is rule related and to handle your document accordingly, which lessens the chances that it will be set aside to review later or otherwise go astray. You do not need to wait for approval to go forward.

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<sup>178</sup> Minn. Stat. § 14.3895.

<sup>179</sup> See Minn. Stat. 14.05, subd. 5.

<sup>180</sup> Minn. Stat. § 14.05, subd. 5.

## 13.2 Draft your Rules and Obtain Approval

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Draft your rules as you would any rules. [See Chapter 3.] Even though you are repealing obsolete rules, you will need a Revisor’s draft to do this.

Give your draft 14.3895 rules to the Revisor for approval as to form. The Revisor will enter your rules into the Revisor’s system and edit them to produce an official version for you to adopt. The Revisor will also likely identify cross-references to the rules that you intend to repeal and ask that you provide updated cross-references. Advise the Revisor that these rules are obsolete rule repeals under section 14.3895. This will ensure that the title to the rules receives the obsolete rules repeal designation (see **section 13.16**). You will need draft rules *with a Revisor’s signed certificate* for your OAH submission.

Your chain of command should review and approve your rules before you proceed. An agency that is a multi-member 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**.

## 13.3 Draft your Notice of Intent to Repeal Obsolete Rules

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A Notice of Intent to Repeal Obsolete Rules must contain the information in Minnesota Rules, part 1400.2085, subparts 2 and 3, items B to E. (Although the rule part does not explicitly govern the obsolete process under Minnesota Statutes, section 14.3895, OAH uses the criteria found in the rule part to evaluate the Notice of Intent to Repeal Obsolete Rule.) A form for the Notice is in the appendix as **NTC-OBS** and is designed to be a checklist for meeting the requirements of Minnesota Rules, part 1400.2085.

When drafting the Notice, include an explanation of why the specific rules are obsolete, unnecessary, or duplicative. Also make certain that you describe in an easily readable and understandable summary the overall nature and effect that the proposed repeal will have. This summary is required in the Notice that is published in the *State Register*.

## 13.4 Prepare your Notice Plan

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You must draft a Notice Plan, obtain approval from the Chief ALJ, and follow the Notice Plan.<sup>181</sup> In the Notice Plan, you must make reasonable efforts to notify persons or classes of persons who might be significantly affected by the rule repeal by giving notice of your intention to repeal obsolete rules by such means as newsletters, newspapers, other publications, or through other means of communication.

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<sup>181</sup> See Minn. Stat. § 14.3895, subd. 2.

## 13.5 Get your Notice Plan Approved by Chief ALJ

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You must obtain the Chief ALJ's approval of the Notice Plan before publishing the notice in the *State Register* and implementing the Notice Plan. Submit to the Chief ALJ the following:

1. the proposed obsolete rule to be repealed with Revisor's certification;
2. your proposed notice of intent to repeal obsolete rules; and
3. an explanation as to why your agency believes the Notice Plan complies with Minnesota Statutes section 14.3895, subdivision 2.

A form letter for requesting approval is in the appendix as **NP(O)-RQST**.

### 13.5.1 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 a prudent practice. In addition, save any correspondence or documents you receive from OAH for your own records because those items might not remain in your eFile folder.

## 13.6 Giving Notice

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### 13.6.1 Agency mailing list

You must send your Notice through mail or email to everyone on your agency's rulemaking mailing list and to chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rule repeal.<sup>182</sup> In addition, you must give notice according to the Notice Plan approved by the Chief ALJ as described in **section 13.4**.<sup>183</sup>

This mailing must be done at least **63 days** before the end of the comment period (60 days if done electronically). Email delivery can be accomplished using a subscription service such as GovDelivery.

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

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<sup>182</sup> Minn. Stat. § 14.3895, subd. 3.

<sup>183</sup> Minn. Stat. § 14.3895, subd. 3.

the proposed rules and an announcement that a free copy of the proposed rules is available on request from the agency.<sup>184</sup>

The notice must contain a statement that if 25 or more people submit a written request, the agency will have to meet the requirements of sections 14.131 to 14.20 for rules adopted with a hearing, or 14.22 to 14.28 for rules adopted without a hearing, including the preparation of a statement of need and reasonableness and the opportunity for a hearing.

A suggested letter for mailing the notice to legislators is in the appendix as **LEG(O)**.

When you mail your Notice, prepare a Certificate of Mailing Notice to Persons on Mailing List, a Certificate of Accuracy of the Mailing List, a Certificate of Sending Notice to Legislators, and a Certificate of Giving Notice Pursuant to the Notice Plan. Forms for these certificates can be found in the appendix as **CRT-MLNG**, **CRT-LIST**, **CRT-LEG**, and **CRT-GNRC**.

### **13.6.2 Notice Plan**

Give notice according to your 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**.

### **13.6.3 Publication in the *State Register***

You must publish your Notice and proposed rules in the *State Register* at least **60 days** before the end of your comment period.<sup>185</sup> See **ST-REG** in the appendix for information on how to publish in the *State Register*.

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<sup>184</sup> Minn. Stat. § 14.3895, subd. 3.

<sup>185</sup> Minn. Stat. § 14.3895, subd. 3.

### 13.6.4 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 “Production Schedule” on the [Minnesota State Register website](#) for publication dates and deadlines.

### 13.6.5 60-day comment period (after publication)

You must allow at least 60 days after publication in the *State Register* for comment on the proposed rules. Keep copies of all comments and submissions you receive and the agency’s responses, because these must be included with the rest of the documents that you file with the OAH.<sup>186</sup>

### 13.6.6 Collecting comments

OAH collects public comments on its [eComments website \(https://minnesotaoah.granicusideas.com\)](https://minnesotaoah.granicusideas.com), 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/>.

To set up your public eComments site, contact OAH Administrative Rule and Applications Specialist, William Moore, at [William.T.Moore@state.mn.us](mailto: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. 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.

## 13.7 Modifications to your Repeal of Rules

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During the 60-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 the agency considers making a modification to the rules as proposed, assess whether the modification will result in a substantially different rule from those proposed. If a modification does not result in a substantially different rule, make note of the reasons because you must explain this in your Order Adopting Rules. If they do result in substantially

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<sup>186</sup> Minn. R. 1400.2085, subp. 2E.

different rules, you should seriously consider whether the modification is necessary because you will have to follow the notice procedures under Minnesota rules, part 1400.2110.

If you decide to modify the rules, get agency decision makers to approve not only the changes but also the rationale for the changes. If you choose not to make changes suggested by the public, it is a good idea to brief agency decision makers and request their sign off on decisions not to act. Finally, remember to obtain a certified copy of the modified rules from the Revisor, which will be a markup on the stripped (clean) copy of the rules as originally proposed.

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

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During the 60-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”).

12/20/21	REVISOR	RSI/EH	AR4726
1	<b>Department of Commerce</b>		
2	<b>Adopted Expedited Rules Relating to Workers' Compensation Ratemaking</b>		

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.

## 13.9 Repeal of Obsolete Rules Subject to Hearing

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If 25 or more people submit a written request during the 60-day comment period, the agency must meet the requirements of Minnesota Statutes, sections 14.131 to 14.20, for rules adopted after a hearing or the requirements of sections 14.22 to 14.28 for rules adopted without a hearing. If you do not receive 25 requests, you may proceed with your rulemaking following the procedures for repeal of obsolete rules.

### 13.9.1 Withdrawal of hearing requests

If your agency receives 25 or more requests for a hearing but is willing to change the rules to address enough of the requests, your agency may be able to avoid going to hearing if you meet the following requirements:

1. First, you must get enough hearing requests withdrawn to reduce the number of requests to less than 25; and
2. You must notify all persons who requested a hearing, 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. A form for this notice is in the appendix as **NTC-HRWD** and serves 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**.

## 13.10 Draft your *Proposed Order Adopting Rules*

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In this case, your Order Adopting Rules will repeal the 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.

Even though there is no SONAR document laying out the agency's case for repealing obsolete rules, it is still a best practice to provide background for the ALJ. Here are two ways to do that:

- Insert in the proposed Order a concise outline of need and reasonableness (like a rule-by-rule analysis) for the proposed rules. This alternative works well for shorter and less-complex rules.
- Prepare a supplemental memorandum as an additional exhibit. This alternative might be well suited for longer or more-complex rules.

**Note:** OAH does not require that the proposed Order be signed at this point. The recommended practice is to submit an unsigned proposed Order Adopting Rules for the ALJ to approve as to legality. Later in the process, you will have the finalized approved draft signed and transmit a copy of the signed Order to OAH.

## 13.11 Submit the File to OAH for Official Review

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Minnesota Rules, part 1400.2410, subpart 2, items A to K, list the documents you must file with OAH for official review. A sample cover letter to OAH is in the appendix as **RE VW(O)-LTR**. This letter is designed to serve as a checklist for meeting the requirements set out in Minnesota Rules, part 1400.2410.

To save everyone time, OAH requests agencies to also submit a copy of the obsolete rules report that lists the rules to be repealed.

### 13.11.1 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.**

### 13.11.2 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 1400.2410, subpart 2, items A–K. You can adapt the cover-letter text (REVV(O)-LTR) into a template for this purpose. 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. One system designed to apply such a unique number automatically is called 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. 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.

Also, consider your timing when eFiling. After you request OAH to assign an ALJ to your rulemaking, it's a good idea to communicate with the assigned ALJ (through William Moore) to notify the ALJ when you will file your record for review. Or you can wait to request OAH to appoint an ALJ only when the file is ready to submit. Because your submission of the rule record triggers a 14-day deadline by which the ALJ must review the record and approve the rule change, the key is to communicate clearly to OAH and any ALJ regarding the expected timing of your submission, and not to keep the ALJ waiting unnecessarily.

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.

Finally, 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.

### 13.11.3 OAH standards of review

As with any other rules, you must make certain that the proposed rules comply with standards of legality before you submit them to OAH for review.<sup>187</sup> Review these standards directly in Minnesota Rules, part 1400.2100.

In summary, these standards require that:

1. the agency complies with procedural requirements for repealing obsolete rules;
2. the rules are not substantially different from the proposed rules;
3. the rules do not exceed or conflict with the authority in the enabling law;
4. the rules are not unconstitutional or illegal;
5. the rules do not improperly delegate the agency's powers to another; and
6. the rules fit the definition of a "rule" as defined in statute.

## 13.12 Notice of Submission of Rules to OAH

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Individuals may request to be informed of when you submit the rules to OAH for official review. You must provide a Notice of Submission on the same day that the rules are submitted to OAH. Although not specifically mentioned in section 14.3895, Minnesota Rules, parts 1400.2410 and 1400.2570, both refer to giving notice that a department has submitted expedited rules to OAH for review if a person requests this notice. Because, as noted in section 13.3, OAH uses the notice requirements pertaining to expedited rules when reviewing the contents of a notice of rule repeal, it is prudent to conclude that the requirement about a request to be informed of OAH submittal of expedited rules also pertains to obsolete rules. Forms for this Notice and for the certificate showing the agency sent out this Notice are in the appendix as **NTC-SBM** and **CRT-SBM**.

## 13.13 ALJ Review

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The ALJ has 14 days to review and approve or disapprove your rules. If approved, the OAH will send you a copy of the ALJ's decision and return your file to you.

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<sup>187</sup> See, e.g., Minn. R. 1400.2400, subp. 3 (explicitly stating that certain standards in part 1400.2100 must be met for exempt rules).

## 13.14 Procedure for Resubmitting Disapproved Rules

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If the ALJ does not approve your rules, you may resubmit the rules with any necessary changes. The rules cannot be published or take effect until the rules have been approved.

### 13.14.1 Resubmitting with corrections

If the ALJ disapproves your rules, the defects noted are correctable, and your agency agrees to the corrections, you can resubmit the corrected rules to OAH for review. You will need an updated Revisor's copy for doing this. The ALJ has five working days to approve or disapprove.

**Note:** This process is different from normal rules, in which corrections and disapproval are both submitted to the Chief ALJ.

### 13.14.2 Determine whether to further notify the Governor's Office

If controversies have arisen, you should communicate with the Governor's Office. To do this, submit a completed Final Rule Form [**GOV-FNL**] to the Office of the Governor.

## 13.15 Withdrawal of Rules

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There might be circumstances that require your agency to withdraw the rules or a portion of the rules from review. You can do this, without repercussion, if the remaining rules are not substantially different. To withdraw the rules, you must submit a Notice of Withdrawal, signed by a person authorized to do so. The Notice must contain an explanation of the person's authority to withdraw the rules. Note that Minnesota Statutes, section 14.05, subdivision 3, requires that you publish notice in the *State Register* that you have withdrawn the rules.

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*.<sup>188</sup> 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 ...]

**2110.393** **PHYSICAL REQUIREMENTS.**

Subpart 1. **Space.**

G. 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.

H. 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]

<sup>188</sup> Withdrawing amendments to existing language is tricky; ask the revisor's office for help.

G. 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

## 13.16 File your Approved Obsolete Rules Repeal

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After OAH approves your rules, the commissioner (or other authorized person) must sign the Order Adopting Rules. Go forward with submitting the signed Order to OAH. eFile your signed copy as you would your other documents.

**Note:** OAH, the 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.

## 13.17 Publish the Repeal of Obsolete Rules

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Before the repeal of your rules can take effect, you must publish the rule in the *State Register*. See **ST-REG** in the appendix for information on how to publish in the *State Register*.

Your repeal of obsolete rules takes effect when all the requirements in Minnesota Statutes, section 14.3895, have been met and five working days after the notice of repeal is published in the *State Register* unless a later date is required by law or specified in the rule repeal proposal.

If the final repeal is identical to the action originally published in the *State Register*, publication will simply be in the form of a repealer – this will only be the case if the rule is a strict repealer.

12/01/21	REVISOR	BD/CH	AR4719
1	<b>Department of Agriculture</b>		
2	<b>Adopted Repeal of Obsolete Rules: Grain, Seed, and Wholesale Rules</b>		
3	<b>REPEALER.</b> Minnesota Rules, parts 1500.0201, subpart 2; 1500.0601; 1500.0801;		
4	1500.1900; 1510.0050; 1510.0060; 1510.0070; 1510.0080; 1510.0090; 1510.0100;		
5	1510.0231; 1510.0261; 1510.0271; 1510.0320; and 1562.1100, subparts 1, 2, and 3, are		
6	repealed.		

Otherwise, the agency must publish a copy of the changes in the *State Register* as well. Request the AR draft from the Office of the Revisor of Statutes, who will send the notice directly to the *State Register*.

For rules that aren't a strict repealer and have striking and underscoring, the title will say "exempt permanent" because technically the obsolete process is exempt from most normal rulemaking requirements. The following is an example of an obsolete rule being published the second time in the *State Register* (after being approved by the Chief ALJ):

09/26/22	REVISOR	AGW/EH	AR4769
1.1	<b>Emergency Medical Services Regulatory Board</b>		
1.2	<b>Adopted Exempt Permanent Rules Repealing Ambulance Standards and Radio</b>		
1.3	<b>Frequency Assignments</b>		

### 13.17.1 Governor Veto

The Governor may veto the repeal of obsolete rules adopted under the procedures of section 14.3895.<sup>189</sup> 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*. The Governor's Office will let you know whether the rule or portions of the rule will be vetoed.

### 13.17.2 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. If your agency requires or would significantly benefit from the rule being adopted early in the 14-day veto period, you should contact the Legislative Coordinator at LACA about an expedited approval.

### 13.17.3 180-day deadline

There are two 180-day deadlines that apply to the repeal of obsolete rules.

1. Under Minnesota Statutes, section 14.26, subdivision 1, you must submit the obsolete rules and administrative record to the Administrative Law Judge for review within 180 days of the day the comment period closes.
2. Also, the 180-day deadline in Minnesota Statutes, section 14.19, applies to the repeal of obsolete rules. This deadline requires you to submit a notice of adoption to the *State Register* within 180 days after the ALJ issues the decision.

Failure to meet either of these deadlines will result in your rules being automatically withdrawn, and you must then start the process over.

## 13.18 Official Rulemaking Record

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After obsolete rules are repealed, you must keep an Official Rulemaking Record. The requirements for the Official Rulemaking Record are stated in Minnesota Statutes, section 14.365, clauses (1) to (11). 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 section 14.365, so that 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.

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<sup>189</sup> Minn. Stat. § 14.05, subd. 6.

**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.

## Checklist for Chapter 13 – Repeal of Obsolete Rules under 14.3895

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Date Completed

Item

\_\_\_\_\_

**13 – Entire chapter reviewed before proceeding**

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**13.1 – Eligibility determined**

- Ensure agency has identified the rules in the obsolete rules report
- Governor’s Office notified
  - **GOV-PRLM** used

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**13.2 – Rules drafted; agency approval obtained**

- Draft rules as you would any other rules (See Chapter 3)
- Request preliminary draft from Revisor; tell them the rules are obsolete rule repeals under 14.3895
- If agency is a multi-member board, **BD-NTC** used

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**13.3 – Notice of Intent to Repeal Obsolete Rules drafted**

- **NTC-OBS** used

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**13.4 – Notice plan prepared**

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**13.5 – Notice plan approved by Chief ALJ**

- **NP(O)-RQST** used
- Set up eFile account

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**13.6 – Notice given**

- **13.6.1 – Notice sent to agency mailing list**
  - **CRT-LIST** and **CRT-MLNG** used
  - Legislators notified; **LEG(O)** and **CRT-LEG** used
- **13.6.2 – Additional notice given**
  - Efforts documented; **CRT-GNRC** used
- **13.6.3 – Notice published in *State Register***
  - **ST-REG** used
- **13.6.5 – Allow at least 60-days for comment**
- **12.3.6 – Consider using OAH’s eComments**

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**13.7 – Modifications to your Expedited Rules**

- Review comments and decide on modifications
- Get approval from chain of command
- Obtain certified copy of modified rules from Revisor



## Checklist for Chapter 13 (Continued)

Date Completed	Item
_____	<b>13.8 – Obsolete Rules subject to Hearing</b> - If you receive 25 or more requests for a hearing, you must meet the requirements of §§ 14.131 to 14.20, for rules adopted after a hearing or the requirements of §§ 14.22 to 14.28 for rules adopted without a hearing. - <b>12.5.1 – Withdrawal of hearing requests</b> - <b>NTC-HRWD</b> and <b>CRT-HRWD</b> used
_____	<b>13.9 – Proposed Order Adopting Rules drafted</b> - <b>ORD-ADPT</b>
_____	<b>13.10 – File submitted to OAH for official review (eFile)</b> - <b>REVW(O)-LTR</b> used - Notify ALJ before filing
_____	<b>13.11 – Notice of Submission of Rules to OAH given</b> - <b>NTC-SBM</b> and <b>CRT-SBM</b> used
_____	<b>13.12 – ALJ review completed</b> - ALJ has 14 days to review
_____	<b>13.13 – Resubmitting disapproved rules</b> - <b>13.13.1 – Resubmitting with corrections</b> - <b>13.13.2 – Determine whether to further notify the Governor’s Office</b> - <b>GOV-FNL</b> used
_____	<b>13.14 – Withdrawal of rules (optional)</b>
_____	<b>13.15 – Order Adopting Rules finalized and filed</b> - Order Adopting Rules signed by: _____ - Signed order eFiled with OAH - Rules filed with Secretary of State - Notice of Adoption received from Revisor
_____	<b>13.16 – Repeal of Obsolete Rules published in the <i>State Register</i></b> - Notice submitted after agency is certain Governor will not veto rules - <b>ST-REG</b> used - Rules published within 180 days of ALJ review
_____	<b>13.17 – Official Rulemaking Record prepared</b> - <b>RECORD</b> used