
ADMINISTRATIVE RULES MANUAL

2011

OFFICE OF ATTORNEY GENERAL
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The Office of Attorney General is required to review every proposed administrative rule and issue an opinion as to its legality prior to its final adoption.¹ This manual explains the legal requirements involved in the administrative rulemaking process.

Summary of 2011 Legislative Updates Changes

Two bills that were enacted during the 2011 Legislative Session made general changes to the rulemaking process.

House Bill No. 1162 amended four sections of North Dakota Century Code ch. 28-32. This bill first amended the provisions for emergency rulemaking² by requiring agencies engaged in emergency rulemaking to make the interim final rules known to all persons who the agency reasonably believes may have a “substantial interest” in them.³ Further changes to emergency rulemaking requirements include providing notice to the chairman of the Administrative Rules Committee of the emergency status, declared effective date, and grounds for emergency status of the rules. Also, the Legislative Council is required to publish the notice and the emergency rules on its website. House Bill No. 1162 also made changes to the full and abbreviated notices, requiring the full notice to include any emergency status or declared effective date of any emergency rules and requiring, for all rules, that a post office or electronic mail (e-mail) address be provided from which a copy of the rules and regulatory analysis may be requested.⁴ The abbreviated newspaper notice must also identify any emergency status or declared effective date of any emergency rules.

House Bill No. 1162 also added a requirement that when the agency presents rules to the Administrative Rules Committee⁵ it must provide either a fiscal note or a statement that the rules have no fiscal effect. The fiscal note must reflect the effect of the rule changes on state revenues and expenditures, including any funds controlled by the agency. Finally, House Bill No. 1162 provides that rules scheduled for Committee consideration will be held over if no agency representative appears before the Committee.⁶ Further, the rules would be void if they were initially adopted as emergency rules, and the Committee may void, allow to become effective, or hold over for consideration any non-emergency rules for which no representative of the agency has appeared.

The other bill of general applicability to the rulemaking process, House Bill No. 1026, made discretionary the former mandate that each agency include an organizational rule describing the agency’s functions and the general course and method of its operations,

¹ N.D.C.C. § 28-32-14.

² N.D.C.C. § 28-32-03(5).

³ Substantial interest is defined as “an interest in the effect of the rules which surpasses the common interest of all citizens.”

⁴ N.D.C.C. § 28-32-10(1).

⁵ N.D.C.C. § 28-32-08.2.

⁶ N.D.C.C. § 28-32-18(2).

and how the public may obtain information or make submissions or requests items to be submitted for Attorney General review.⁷

Submission to Attorney General's Office

For the Office of Attorney General to properly perform its review of proposed administrative rules, agencies must provide a copy of:

1. the proposed rules;
2. both the full and abbreviated notices of intent to adopt, amend, or repeal rules;
3. the proof of publication, including the three-page summary showing the publication dates in each newspaper and a copy of one notice actually published;
4. documentation showing filing of the notice and proposed rules with the Legislative Council;
5. documentation showing that the full notice and proposed rules were mailed or delivered to each sponsor or co-sponsor of legislation if the proposed rules are implementing legislation enacted during the most recent legislative session, or a statement that the proposed rules do not implement legislation enacted during the most recent legislative session;
6. each written comment, a copy of the written summary of each oral comment, and a copy of the written record of the agency's consideration of all comments, or a statement that there were no written or oral comments;
7. the takings assessment, if one was required, or a statement of the reason that a takings assessment was not required;
8. the regulatory analysis and the date it was available, if one was issued, and if not, the reason a regulatory analysis was not prepared;
9. the fiscal note, or a statement that the rules have no fiscal impact;
10. the small entity regulatory analysis;
11. the small entity economic impact statement, if one was done, or a statement of the reason why an economic impact statement was not required; and

⁷ N.D.C.C. § 28-32-02(2).

12. for emergency rules, a copy of the notice provided to the chairman of the Administrative Rules Committee of the emergency status, declared effective date, and the grounds for emergency status of the rules.

This office will review these materials to determine if the legal requirements have been met.

Procedures for Promulgating Administrative Rules

The following procedures must be followed in promulgating rules under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. In addition to the requirements discussed below, some other points to consider include:

- I. Not all agencies are subject to chapter 28-32, and some agencies are only subject to chapter 28-32 in limited respects. See N.D.C.C. § 28-32-01(2).
- II. Not all agency statements are “rules” under chapter 28-32. Chapter 28-32 applies to statements of general applicability that implement or prescribe law or policy, or the organization, procedure, or practice requirements of the agency, unless one of several exceptions applies. See N.D.C.C. § 28-32-01(11). An imprecise, but more instinctive, way of thinking about this definition is that it covers most procedures you want people to follow or rules and behavior you want to enforce.
- III. The procedure outlined in chapter 28-32 is required to adopt new agency rules. The procedure also applies to amending, repealing or suspending an existing rule. N.D.C.C. § 28-32-01(11). However, a rule may be repealed or amended if its statutory authority has been amended or repealed without following the general requirements of chapter 28-32 if the procedures in N.D.C.C. § 28-32-18.1(2) are followed, as outlined in paragraph 1.2.2 below.
- IV. If a rule is not adopted in substantial compliance with N.D.C.C. ch. 28-32, it will be invalid. However, inadvertent failure to supply any person with notice does not invalidate a rule. N.D.C.C. § 28-32-13. Beware, however; under some federal laws the failure to supply notice may invalidate a rule.
- V. The agency’s attorney should review applicable state and federal laws that may impose additional rulemaking requirements. For example, an agency’s own statutes or applicable federal laws may impose certain requirements in the rulemaking process.
- VI. Rulemaking hearings conducted in accordance with N.D.C.C. ch. 28-32 do not require the use of a hearing officer from the Office of Administrative Hearings. N.D.C.C. § 28-32-01(1). However, the agency may request that a hearing officer

from the Office of Administrative Hearings preside at the rulemaking proceedings.

1. General Requirements

Chapter 28-32 of the Century Code sets forth the general procedure for adopting rules.

1.1. Time period allowed for rule change.

Section 28-32-07, N.D.C.C., provides that any rule change, including a creation, amendment, or repeal, made to implement a statutory change must be adopted and filed with the Legislative Council within nine months of the effective date of the statutory change. The Legislative Council may grant extensions of time.

1.2. Preliminary considerations.

An agency should consider the requirements of the fiscal note, regulatory analysis, the takings assessment, the small entity regulatory analysis and the small entity economic impact statement when drafting rules and must have them prepared, if necessary, before undertaking the promulgation process. The requirements for a fiscal note and regulatory analysis, a takings assessment, a small entity regulatory analysis and a small entity economic impact statement are discussed in detail at paragraphs 2, 3, 4 and 5 below, respectively.

1.2.1. Repeal or waiver of certain rules/adoption of rules by reference.

Sections 28-32-04 and 28-32-05, N.D.C.C., provide that an agency may not adopt rules from federal guidelines which are not relevant to state regulatory programs and shall repeal or amend any irrelevant rules adopted from federal guidelines. In some instances, agencies are required to adopt by reference existing rules. Also, an agency shall seek a waiver from the appropriate United States agency for relief from complying with or adopting non-relevant rules and shall seek authorization from the appropriate United States agency to adopt federal rules by reference.

1.2.2. Amendment or repeal by agreement with Administrative Rules Committee.

Section 28-32-18.1(2), N.D.C.C., permits an agency to amend or repeal a rule without complying with the other requirements of chapter 28-32. The agency must initiate a request to the Administrative Rules Committee, and the agency must provide the

regulated community with reasonable notice of the time and place of the hearing (meeting) at which the request will be considered. Further, the agency and the committee must both agree that i) the “amendment or repeal eliminates a provision which is obsolete or no longer in compliance with law; and ii) that no detriment would result to the substantive rights of the regulated community from the amendment or repeal.”

1.2.3. Emergency Rulemaking.

An agency, with the Governor’s approval, may have a rule declared effective on the date it is first filed with the Legislative Council if the agency finds emergency rulemaking necessary. At least one of four grounds for emergency rulemaking must be found: 1) imminent peril to the public health, safety, or welfare would be abated by emergency effectiveness; 2) a delay in rulemaking is likely to cause a loss of revenues appropriated to support a duty imposed by law on the agency; 3) it is reasonably necessary to avoid a delay in implementing an appropriations measure; or 4) it is necessary to meet a mandate of federal law. The agency must declare the rule to be an “interim final rule” and thereafter give the same opportunity for oral and written comments from the public. The agency then adopts the rule and submits it along with the agency’s reasons for finding an emergency to the Legislative Council. If the rule is substantially similar to the interim final rule, the effective date will be the date of first filing. An interim final rule is effective for 180 days after its declared effective date unless first adopted as a final rule. N.D.C.C. § 28-32-03(6). The agency must take appropriate measures to inform individuals impacted by the interim rules.

1.3. Opportunity for public comment.

An agency must adopt a procedure allowing all interested persons an opportunity to submit comments concerning the proposed rules. In the case of substantive rules, the agency must conduct an oral hearing. The agency must consider all comments received concerning the rules, make a written summary of each oral comment on the rules, and make a written record of its consideration of all comments contained in the rulemaking record. N.D.C.C. § 28-32-15(1).

1.3.1. Notice and hearing.

Section 28-32-10(1), N.D.C.C., discusses the notice requirements for rulemaking procedures. The full notice of the proposed rule must include: i) a short, specific explanation of the proposed rule and its purpose, ii) a determination of whether the proposed

rulemaking is expected to impact the regulated community in excess of \$50,000, iii) a place where interested parties may review the text of the proposed rule; iv) address(es) where written comments may be sent, post office and optionally an e-mail address; v) the deadline for submitting comments; vi) a telephone number and post office or e-mail address for people to call when requesting a copy of the rules and regulatory analysis; and vii) in the case of substantive rules, the time and place of each hearing.

The agency's full notice and a copy of the proposed rules must be filed with the Legislative Council, and the agency must publish an abbreviated newspaper publication notice at least once in each official county newspaper published in North Dakota.

A copy of the full notice and proposed rules must be mailed or delivered to each sponsor or co-sponsor of legislation if the proposed rules are implementing legislation enacted during the most recent legislative session.

The abbreviated newspaper publication of notice must be in a display-type format with a minimum width of one column of approximately two inches [5.08 centimeters] and between three inches [7.62 centimeters] to four inches [10.16 centimeters] in depth with a headline describing the general topic of the proposed rules. The abbreviated notice must also include the address or telephone number to use to obtain a copy of the proposed rules, the address to use and the deadline to submit written comments, and the location, date, and time of the public hearing on the rules.

Both the full notice and the abbreviated notice should also contain a statement that persons requiring special accommodations should contact the agency, in accordance with the Americans with Disabilities Act (ADA).

Further, both the full notice and the abbreviated notice must also identify the emergency status and declared effective date of any emergency rules.

Guidelines adopted by the Administrative Rules Committee state "[t]he notice should state the beginning and ending dates of the period during which written comments on the proposed rules will be accepted." The agency's full notice must also be mailed to each person who requests a copy of the notice. The agency may provide a full notice of the proposed rule to any person who is likely to be interested. The agency must provide a copy of the proposed rules to any person requesting a copy. The agency may charge the

fee established by N.D.C.C. § 44-04-18 for providing copies of the proposed rule. That fee is presently twenty-five cents per impression.

At least 20 days must elapse between the date of the publication of the notice in each county newspaper and the date of the hearing. This period does not include the date of the hearing, but ends on the last day before that date. After the hearing, a comment period of at least 10 days must be allowed. This time period does not include the date of the hearing but does include the last date the comment period is open.

1.3.2 Record keeping.

Section 28-32-15(1), N.D.C.C., requires the agency to file a copy of each written comment and a written summary of each oral comment on the rule with the Legislative Council. Agencies are required to tape record or otherwise preserve a transcript of rulemaking hearings. N.D.C.C. § 28-32-44(6)(g). Further, the requirement for a written summary also logically applies to comments received by telephone.

1.3.3. Consideration of comments.

Section 28-32-11, N.D.C.C., requires an agency to fully consider all oral and written submissions concerning the rules prior to adoption, excepting emergency rulemaking, when this consideration necessarily takes place after the rules become effective. The agency is required to make a written record of its consideration of all comments and data submitted respecting a proposed rule. These comments implicitly may lead to amendments to the proposed rulemaking. The Attorney General has approved post-hearing amendments to proposed rules when the proposed change is a logical extension of the original rulemaking and when the original notice alerts the public that the general subject matter of the post-hearing amendment is under consideration.

1.4 Approval by Attorney General.

Section 28-32-14, N.D.C.C., requires the submission of every proposed rule to the Attorney General for an opinion as to its legality before final adoption. The Attorney General may not approve any rule exceeding the agency's statutory authority or written in a manner that is not concise or easily understandable. The rule may not be approved when the procedural requirements for rule adoption are not substantially met. The

Attorney General may suggest revision of the rule to meet objections to its legality and shall advise an agency of necessary revisions.

Many agencies are governed by a board that meets on a periodic basis and would like to have a new rule become effective as soon as possible between meetings. Oftentimes, such a board will approve a rule after the close of the comment period, contingent upon approval by the Attorney General. In this way, the agency may submit the rule to the Legislative Council if it meets the Attorney General's approval without a need for revision.

1.5. Effective date.

After the rules are approved by the Attorney General and adopted by the agency, the administrative agency must file the Attorney General's Opinion, the rules, any written comments, and the summary of any oral comments with the Legislative Council. N.D.C.C. § 28-32-15(1). The rules become effective according to the following schedule:

- rules filed with Legislative Council from August 2 through November 1 become effective on the next January 1;
- rules filed from November 2 through February 1 become effective on the next April 1;
- rules filed from February 2 through May 1 become effective the next July 1; finally,
- rules filed from May 2 through August 1 become effective the next October 1.⁸

The Administrative rules committee may extend that timeframe by voiding the rules or holding the rules for further consideration.

2. Fiscal Note and Regulatory Analysis

2.1. When a fiscal note is required.

Section 28-32-08.2, N.D.C.C., requires an agency to provide the Administrative Rules Committee with a fiscal note reflecting the effect of the rules changes on state revenues and expenditures, including any effect on funds controlled by the agency, or a statement that the rules have no fiscal effect.

⁸ N.D.C.C. § 28-32-15(2).

2.2 When a regulatory analysis is required.

Section 28-32-08, N.D.C.C., requires an agency to issue a regulatory analysis of its proposed rules under two circumstances. First, agencies must complete a regulatory analysis if within 20 days after the last published notice of the proposed rule hearing, a written request for an analysis is filed by the Governor or a member of the Legislative Assembly. Second, if the proposed rule is expected to have an impact on the regulated community in excess of \$50,000, an analysis must be done. In this case, the analysis must be available on or before the first date of public notice. The regulatory analysis must include quantification of the data to the extent practicable. Also, the agency must provide the regulatory analysis to any person who requests a copy of the analysis. The agency, however, may charge for the actual cost of providing a copy of the analysis.

The Administrative Rules Committee adopted guidelines which state: “[i]n determining whether the rule is expected to have an impact on the regulated community in excess of \$50,000, this standard means a reasonable expectation of a reasonably foreseeable cumulative negative fiscal impact to an identifiable regulated community in excess of \$50,000 in any 12-month period, which would not occur if the rule is not adopted.” Any doubt about issuance of a regulatory analysis should be resolved in favor of issuance.

2.3. What the regulatory analysis must contain.

N.D.C.C. § 28-32-08(2) requires that a regulatory analysis contain the following:

- 2.3.1. A description of the classes of persons likely to be affected by the proposed rule, including classes bearing the cost of the proposed rule and classes benefiting from the proposed rule.
- 2.3.2. A description of the probable impact, including the economic impact, of the proposed rule.
- 2.3.3. The estimated cost to the agency of implementation and enforcement of the proposed rule and any anticipated effect on state revenues.
- 2.3.4. A description of any alternative methods of achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why the methods were rejected in favor of the proposed rule.

2.4. Other issues.

Section 28-32-08(5), N.D.C.C., makes the preparation and issuance of a regulatory analysis mandatory under the circumstances described in paragraph 2.1. However, errors in the analysis are not grounds for declaring a rule invalid.

3. Takings Assessment

3.1. When a takings assessment is required.

Section 28-32-09, N.D.C.C., requires an agency to prepare a written assessment of the constitutional takings implications of a proposed rule if the proposed rule may limit the use of private real property.

3.2. What the assessment must contain.

Section 28-32-09(1), N.D.C.C., requires that the assessment:

3.2.1. Analyze the likelihood that the proposed rule may result in a taking or regulatory taking.

3.2.2. Clearly and specifically identify the purpose of the proposed rule.

3.2.3. Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available to achieve the agency's goals while reducing the impact on private property owners.

3.2.4. Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.

3.2.5. Identify the source of payment within the agency's budget for any ordered compensation.

3.2.6. Certify that the benefits of the proposed rule exceed the estimated compensation costs.

4. Small Entity Regulatory Analysis

4.1. When a small entity regulatory analysis is required.

Agencies that are not statutorily exempted from N.D.C.C. § 28-32-08.1 are required to prepare a small entity regulatory analysis before the adoption of a proposed rule. N.D.C.C. § 28-32-08.1(2).

In addition to the agencies specifically exempt from this requirement by name, N.D.C.C. § 28-32-08.1 does not apply to rules mandated by federal law or to rules by an occupational or professional licensing authority. N.D.C.C. § 28-32-08.1(5), (6). However, this requirement applies to rules that are permissible but not mandated by federal law. Further, an agency must principally act as an occupational or professional licensing authority in order to be entirely exempt from this requirement for that reason. Agencies which serve several distinct functions are required to comply with N.D.C.C. § 28-32-08.1 except when adopting rules that directly implement occupational or professional licensing statutes.

4.2 What the small entity regulatory analysis must contain.

A small entity regulatory analysis must consider each of the following possible ways in which the agency can enact rules that minimize the adverse impact on small entities:

4.2.1. Establishing less stringent compliance or reporting requirements.

4.2.2. Establishing less stringent schedules or deadlines for compliance or reporting requirements.

4.2.3. Consolidating or simplifying compliance or reporting requirements.

4.2.4. Establishing performance standards that replace design or operational standards required in the proposed rule.

4.2.5. Exempting small entities from all or part of the rule's requirements.

5. Small Entity Economic Impact Statement

5.1. When a small entity economic impact statement is required.

Agencies not statutorily exempted from N.D.C.C. § 28-32-08.1 are required to prepare a small entity economic impact before the adoption of any proposed rule if the proposed rule may have an adverse economic impact on small entities. N.D.C.C. § 28-32-08.1(3).

In addition to the agencies specifically exempt from this requirement by name, N.D.C.C. § 28-32-08.1 does not apply to rules mandated by federal law or to rules by an occupational or professional licensing authority. N.D.C.C. § 28-32-08.1(5), (6). However, this requirement applies to rules that are permissible but not mandated by federal law. Further, an agency must principally act as an occupational or professional licensing authority in order to be entirely exempt from this requirement for that reason. Agencies which serve several distinct functions are required to comply

with N.D.C.C. § 28-32-08.1 except when adopting rules that directly implement occupational or professional licensing statutes.

5.2. What the statement must contain.

A small entity economic impact statement must include consideration of the following:

5.2.1. Small entities that may be subject to the proposed rule.

5.2.2. The administrative or other costs required for small entities to comply with the proposed rule.

5.2.3. The probable cost and benefit to private persons and consumers who may be affected by the proposed rule.

5.2.4. The probable effect of the proposed rule on state revenues.

5.2.5. Whether there are any less intrusive or less costly methods of achieving the proposed rule's purpose.

6. Administrative Rules Committee Review

Section 28-32-02(1), N.D.C.C., reserves to the Legislative Assembly the authority to determine when and if rules of the administrative agencies are effective.

6.1. Review of new rulemaking.

Although not required by statute, the Administrative Rules Committee will request that an entity explain the rule changes.

6.1.1. Section 28-32-11, N.D.C.C., requires that each agency have a procedure to allow interested parties to request and receive notice from the agency of the date and place the rule will be reviewed by the Administrative Rules Committee.

6.1.2. Section 28-32-08.1(7), N.D.C.C., requires that each agency provide the committee with copies of any small entity regulatory analysis or economic impact statement prepared by the agency.

6.1.3. Section 28-32-08.2 requires the agency provide a fiscal note or a statement that the rules have no fiscal effect to the Administrative Rules Committee.

6.1.4 Section 28-32-17, N.D.C.C., provides that the committee may file objections to rules it deems unreasonable, arbitrary, capricious, or

beyond the authority delegated to the agency, with the Legislative Council. The Legislative Council must publish the objections in the North Dakota Administrative Code. This section also requires that the agency promulgating the rule respond to the committee's objection within 14 days after the objection is filed. The committee may then withdraw or modify its objection.

After the committee makes an objection, the burden of persuasion is upon the agency in any action for judicial review or for enforcement of the rule to establish the rule was within the authority delegated to the agency. If the agency fails to meet its burden, the court must declare the rule invalid, and award court costs, including attorney's fees, to the prevailing party. N.D.C.C. § 28-32-17(4).

6.2. Finding that rules are void.

6.2.1. The Administrative Rules Committee may find that all or any portion of the rule is void. However, in order to do this the committee initially must consider the rule "not later than the fifteenth day of the month before the date of the administrative code supplement in which the rule change is scheduled to appear." N.D.C.C. § 28-32-18.

6.2.2. The Committee may find a rule void at the meeting at which the rule is initially considered by the committee, or it may delay consideration of the rule for one subsequent meeting.

6.2.3. When finding a rule or a portion of a rule void, the Committee must make any of the following specific findings:

6.2.3.1. An absence of statutory authority.

6.2.3.2. An emergency relating to public health, safety, or welfare.

6.2.3.3. A failure to comply with express legislative intent or to substantially meet the procedural requirements of chapter 28-32 for adoption of the rule.

6.2.3.4. A conflict with state law.

6.2.3.5. Arbitrariness and capriciousness.

6.2.3.6. A failure to make a written record of its consideration of written and oral submissions respecting the rule.

6.2.3.7. A failure of an agency representative to appear before the Committee may result in the rules being voided, held over, or approved, and will result in emergency rules being voided.

6.3. Notice of committee findings.

Within three business days after the Committee finds a rule or part thereof void, the Legislative Council shall provide written notice of the finding and the committee's specific findings to the adopting agency and the chairman of the Legislative Council.

Within 14 days of receipt thereof, the agency may file a petition with the chairman of the Legislative Council for review by the Legislative Council. If a petition is not filed, the rule becomes void on the 15th day after the notice from the office of the Legislative Council to the adopting agency.

If within 60 days after receipt of the petition from an adopting agency the Legislative Council has not disapproved by motion the Committee's finding, the rule is void.

6.4. Amendment or repeal of a rule by agency after consideration by the committee.

Section 28-32-18(3), N.D.C.C., provides that an agency may amend or repeal a rule or create a related rule if, after consideration by the Administrative Rules Committee, the agency and Committee agree that the rule amendment, repeal, or creation, is necessary to address any of the considerations under § 28-32-18(1).

A rule amended, repealed, or created under that subsection is not subject to the other requirements of the chapter relating to adoption and may be published by the Legislative Council as amended, repealed, or created. If requested by the agency or any interested party, the administrative rules committee must reconsider the new version of the rule at a subsequent meeting at which public comment on the agreed rule change must be allowed.

7. Appeal

Section 28-32-42(2), N.D.C.C., allows any interested person who participated in the rulemaking process to appeal the agency's rulemaking action if the appeal is taken within 90 days after the date of publication in the North Dakota Administrative Code. An appeal of an agency's rulemaking action may be taken to the district court of Burleigh County. N.D.C.C. § 28-32-42(3)(b). An action to contest the validity of a rule on the grounds of non-compliance with chapter

28-32 must be commenced within two years after the effective date of the rule. N.D.C.C. § 28-32-13.

7.1. Notice of appeal.

When an appeal is taken, notice of appeal and specifications of error detailing the grounds on which the appeal is taken must be served upon the administrative agency concerned, the Attorney General or an assistant attorney general, and upon the Legislative Council. Those are the only parties that need to be notified of an appeal. N.D.C.C. § 28-32-42(4). Any person who participated in the rulemaking process may participate in the appeal. N.D.C.C. § 28-32-42(5).

7.2. Record on appeal.

Under N.D.C.C. § 28-32-44(6), the record on appeal must consist of the following:

- 7.2.1. All agency notices concerning proposed rulemaking;
- 7.2.2. A copy of the proposed rule upon which written and oral submissions were made;
- 7.2.3. A copy of the rule as submitted for publication;
- 7.2.4. Any opinion letters by the Attorney General regarding the rule's legality or the legality of the agency's rulemaking action;
- 7.2.5. A copy of any interim rule and the agency's findings and statement of the reasons for an interim rule;
- 7.2.6. The regulatory analysis of a proposed rule;
- 7.2.7. The transcript of any oral hearing on a proposed rule;
- 7.2.8. All written submissions made to the agency on a proposed rule;
- 7.2.9. Any staff memoranda or data prepared for agency consideration regarding the proposed rule;
- 7.2.10. Any other document that the agency believes is relevant to the appeal; and
- 7.2.11. Any other document that is not privileged and which is a public record that the appellant requests the agency to include in the record, if relevant to the appeal.

The agency is responsible for maintaining a record of the administrative proceeding and certifying the record on appeal. When an agency receives a notice of appeal, it must notify the appellant of the estimated cost of preparing and filing the record. Within 30 days after the appeal has been taken, or such longer time as directed by the court, and after the appellant has paid the estimated cost, the agency must prepare and file the entire record. N.D.C.C. § 28-32-44(2).

7.3. Scope of and procedure on appeal.

The district court's review of an appeal from an agency's rulemaking action is limited to the record filed with the court. N.D.C.C. § 28-32-47. If an appellant requests documents be included in the record and the agency does not include them, the court, upon application by the appellant, may compel inclusion.

The agency decision must be affirmed unless the court finds any of the following are present:

7.3.1. The provisions of chapter 28-32 have not been substantially complied with in the agency's rulemaking actions.

7.3.2. A rule published as a result of the rulemaking action appealed is unconstitutional on the face of the language adopted.

7.3.3. A rule published as a result of the rulemaking action appealed is beyond the scope of authority of the agency.

7.3.4. A rule published as a result of the rulemaking action appealed is on the face of the language adopted an arbitrary or capricious application of authority granted by statute.

If the court does not affirm the agency action, the court must remand the matter to the agency for disposition in accordance with the order of the court, or the rule or portion of it must be declared invalid for reasons stated by the court.

7.4. Stay of rule's effectiveness.

Section 28-32-48, N.D.C.C., provides that an appeal from a rulemaking action does not stay the effect of the rule unless the court to which the appeal is taken, upon application and after a hearing or submission of briefs, orders a stay.

7.5. Attorney's fees and costs.

Section 28-32-50, N.D.C.C., provides for an award of costs and attorney's fees for agency rulemaking action taken without substantial justification.

8. Private Landowner's Request for Reconsideration

Section 28-32-09(2), N.D.C.C., allows any private landowner who is or may be affected by an existing rule limiting the use of the private landowner's real property to request in writing that the agency reconsider the application or need for the rule. The agency, within 30 days of receiving the request, must consider the request and inform the landowner, in writing, whether the agency intends to keep the rule in place, modify application of the rule, or repeal the rule.

9. Small Entity's Right To Judicial Review

A small entity that is adversely affected by an agency's final rulemaking action is entitled to seek judicial review of the agency's compliance with the small entity regulatory analysis and economic impact statement requirements within one year of the date of the final agency action. N.D.C.C. § 28-32-08.1.

Checklist 1 - Administrative Rules

Emergency Rulemaking: (N.D.C.C. § 28-32-03)

- _____ Has the Governor approved the agency's finding that emergency rulemaking is necessary?
- _____ Was the finding based on one or more of the four reasons found in N.D.C.C. § 28-32-03(2)?
- _____ Has notice of the emergency status, declared effective date, and grounds for emergency rulemaking been provided to the chairman of the Administrative Rules Committee?
- _____ Have all persons with a substantial interest in the emergency rules been provided notice under N.D.C.C. § 28-32-03(5)?

Adoption of Rules by Reference: (N.D.C.C. §§ 28-32-04, 28-32-05)

- _____ Has the agency adopted by reference any applicable existing permit or procedural rules?
- _____ Has the agency sought authorization from the appropriate United States agency to adopt, by reference, any applicable existing permit or procedural rules that may be adopted for use in a new or existing program when the United States agency is delegating or modifying a program?

Regulatory Analysis: (N.D.C.C. § 28-32-08)

- _____ Has the Governor or a member of the Legislative Assembly filed a written request for a regulatory analysis?
- _____ Is the proposed rule expected to have an impact on the regulated community in excess of \$50,000?
- _____ If a regulatory analysis is required, was it available on or before the date of public notice?
- _____ Mail or deliver a copy of the regulatory analysis to any person who requests a copy.

Takings Assessment for Rules Limiting Use of Real Property: (N.D.C.C. § 28-32-09)

- _____ Has the agency assessed the likelihood that the rule will result in a taking; identified the purpose of proposed rule; explained why proposed rule is necessary and why no alternative is available; estimated the cost to the government if a court determines the rule is a taking; identified the source of such payment within the agency's budget; and certified that the benefits exceed the compensation costs? (A "taking" is defined in the statute.)

Small Entity Regulatory Analysis: (N.D.C.C. § 28-32-08.1)

_____ Is the proposed rule mandated by federal law?

_____ If not, is the agency exempt from the requirement of a small entity regulatory analysis?

_____ If not, has the agency prepared a regulatory analysis in which, consistent with public health, safety, and welfare, it considers using regulatory methods to accomplish the statutory objectives while minimizing adverse impact on small entities? Included in the analysis should be consideration of the following methods for reducing a rule's impact on small entities: establishment of less stringent compliance or reporting requirements; establishment of less stringent schedules or deadlines for compliance or reporting requirements; consolidation or simplification of compliance or reporting requirements; establishment of alternative performance standards; and exemption of small entities from all or a part of any requirements.

Small Entity Economic Impact Statement: (N.D.C.C. § 28-32-08.1)

_____ Is the proposed rule mandated by federal law?

_____ If not, is the agency exempt from the requirement of a small entity impact statement?

_____ If not, could the proposed rule have an adverse economic impact on small entities?

_____ If so, did the agency prepare an economic impact statement that includes consideration of the following: the small entities subject to the proposed rule; the administrative of other costs required to comply with the proposed rule; the probable cost and benefit to private persons or consumers who would be affected by the proposed rule; the probable effect of the proposed rule on state revenues; whether there are less intrusive or less costly alternative methods to achieve the purpose of the proposed rule?

Fiscal Note: (N.D.C.C. § 28-32-08.2)

_____ Has the agency provided a fiscal note reflecting the effect of the rule changes on state revenue and expenditures, including any effect on agency funds, or a statement that the rules have no fiscal effect?

Contents of Full Notice: (N.D.C.C. §§ 28-32-10(1)(a), 28-32-12)

_____ Contains a short, specific explanation of both the proposed rule and the purpose of the proposed rule.

- _____ Contains a determination of whether the proposed rule is expected to have an impact on the regulated community in excess of \$50,000.
- _____ Identifies at least one location where the text of proposed rule may be reviewed.
- _____ Provides an address to which written comments may be sent.
- _____ Provides a telephone number and post office or e-mail address at which a copy of the proposed rule and regulatory analysis, if issued, may be requested.
- _____ If the changes are substantive, states the time and place for oral hearing.
- _____ States the deadline for submission of written comments.
- _____ Identifies the emergency status and declared effective date of any emergency rules.

Filing of Notice and Rules: (N.D.C.C. §§ 28-32-03(5), 28-32-10)

- _____ File copy of the agency's full notice with Legislative Council.
- _____ File copy of proposed rules with Legislative Council.
- _____ Mail a copy of the full notice to each person who has made a timely request for a mailed copy of the notice.
- _____ Notified all persons with a substantial interest in emergency rules as identified in N.D.C.C. § 28-32-03(5).
- _____ Mail a copy of the full notice and proposed rules to each sponsor or co-sponsor of the legislation being implemented if the proposed rules are implementing legislation that was enacted during the most recent legislative session.

Publication of Abbreviated Notice: (N.D.C.C. § 28-32-10(1)(a)(b))

- _____ Abbreviated notice identifies post office or electronic address or telephone number to use to obtain a copy of the proposed rules.
- _____ Abbreviated notice includes the address to use and the deadline to submit written comments.
- _____ Abbreviated notice identifies the location, date, and time of the public hearing.
- _____ Identifies the emergency status and declared effective date of any emergency rules.

_____ Publish abbreviated notice at least once in each official county newspaper in North Dakota.

_____ Publication in display-type format with a minimum width of one column of approximately two inches [5.08 centimeters] and between three inches [7.62 centimeters] to four inches [10.16 centimeters] in depth with a headline describing the general topic of the proposed rules.

Timing of Public Hearing: (N.D.C.C. § 28-32-10(5))

_____ Has at least 20 days elapsed between the latest date of publication and the date of the hearing? (The date of publication is counted, but not the date of the hearing.)

Public Comment Period: (N.D.C.C. §§ 28-32-11, 28-32-12)

_____ Has the comment period been open at least 10 days since the conclusion of the rulemaking hearings?

_____ If no hearing was required, has the comment period been open at least 20 days since the latest date of publication?

Written Record: (N.D.C.C. § 28-32-15)

_____ Has the agency made a written summary of each oral comment on the rule?

_____ Has the agency made a written record of its consideration of all written and oral submissions contained in the rulemaking record?

Checklist 2 - Submissions to Attorney General's Office

Submit the Following Documents with a Request for the Attorney General's Opinion as to the Legality of a Proposed Rule: (N.D.C.C. § 28-32-14)

- _____ A copy of both the proposed rules and, if changes to the proposed rules were made after the notice was sent to Legislative Council, a copy of the original proposed rules and a notation regarding what was changed and why.
- _____ A copy of the information concerning emergency rulemaking that was provided to the chairman of the Administrative Rules Committee under N.D.C.C. § 28-32-03(5), or a statement that these are not emergency rules.
- _____ A copy of both the full and abbreviated notices of intent to adopt, amend, or repeal rules.
- _____ A copy of the letter or affidavit stating where and when the notice was published and copies of attachments showing publication dates in all official county newspapers.
- _____ A copy of one of the actual notices as published.
- _____ A copy of the letter filing the notice and proposed rules with Legislative Council.
- _____ A written explanation as to whether the proposed rules are implementing legislation enacted during the most recent legislative session and, if so, a copy of the letter or letters mailing a copy of the full notice and proposed rules to each sponsor or co-sponsor of the legislation.
- _____ A copy of all written comments and the written summary of all oral comments, or a statement that there were no comments.
- _____ A copy of written record of agency's consideration of all comments.
- _____ A copy of the regulatory analysis and the date on which it was available, if one was issued, or a statement of the reasons a regulatory analysis was not required.
- _____ A copy of the takings assessment, if one was required, or a statement of the reasons a takings assessment was not required.
- _____ A copy of the small entity regulatory analysis, if one was required, or a statement of the reasons a small entity regulatory analysis was not required.

_____ A copy of the small entity economic impact statement, if one was required, or a statement of the reasons a small entity economic impact statement was not required.

_____ A copy of the fiscal note or a statement that the rules have no fiscal effect.

_____ The billing code to be used for review of the rules.

Filing Rule with Legislative Council: (N.D.C.C. §§ 28-32-03, 28-32-08.2)

_____ File a copy of each rule adopted, the fiscal note or a statement that the rules have no fiscal effect, a copy of each written comment on the rule, and a copy of the agency's written summary of each oral comment, together with the Attorney General's opinion, with the Legislative Council for publication in N.D.A.C.

Filing Small Entity Regulatory Analysis and Small Entity Economic Impact Statement with the Administrative Rules Committee: (N.D.C.C. § 28-32-08.1)

_____ Provide a copy of the small entity regulatory analysis and small entity economic impact statement, if required, to the administrative rules committee when the committee is considering the associated rules.

Appendices

Below is a brief explanation of the sample documents provided.

Appendix 1: The agency must prepare a full notice of proposed adoption, amendment, or repeal of a rule.⁹ The full notice has several required elements. Appendix 1 is a sample notice that contains blanks where each of the required elements of the notice may be inserted.

Appendix 2: The full notice and a copy of the proposed rules must be filed with the Legislative Council.¹⁰ Appendix 2 is a sample letter filing the notice and the proposed rules with the Legislative Council. Note that the agency must also send a copy of the full notice and the rules to each legislative sponsor or co-sponsor if the rules are implementing legislation enacted in the most recent legislative session.

Appendix 3: The agency must request that the abbreviated notice be published at least once in each official county newspaper in this state.¹¹ Appendix 3 is a sample letter submitting the abbreviated notice to the North Dakota Newspaper Association (NDNA) so that it can be published once in each official county newspaper in North Dakota with the required format. Using the NDNA is convenient but not required. You should carefully review not only the notice proof prior to printing, if you get one, but also the published notice as soon as it is published in order to confirm the accuracy of the information contained in the notice as published.

Appendix 4: Appendix 4 is a sample abbreviated notice. The abbreviated notice must be in a specific format.¹² Please note that at least 20 days must elapse between the publication of the notice and the date of the hearing.¹³

Appendix 5: Most agencies must prepare a regulatory analysis that considers whether the agency can use other regulatory methods to accomplish statutory objectives that minimize adverse impacts on small entities.¹⁴ Appendix 5 is one possible format for that analysis. If proposed rules may have an adverse economic impact on small entities, this statute also requires most agencies to prepare an economic impact statement. Appendix 5 also has a suggested format to use for an economic impact statement.

Appendix 6: Appendix 6 is a suggested public hearing format to assist the agency in conducting the public hearing. Agencies are required to tape record or otherwise preserve a transcript of rulemaking hearings.¹⁵

Appendix 7: Appendix 7 is a sample letter submitting proposed rules to the Attorney General for approval. After the public hearing, the agency must allow a comment period of not less than 10 days during which data, views, or arguments concerning the proposed rulemaking will be received by the agency and made a part of the rulemaking

⁹ N.D.C.C. § 28-32-10(1)(a).

¹⁰ N.D.C.C. § 28-32-10(1)(a).

¹¹ N.D.C.C. § 28-32-10(1)(a).

¹² N.D.C.C. § 28-32-10(1)(b).

¹³ N.D.C.C. § 28-32-10(5).

¹⁴ N.D.C.C. § 28-32-08.1.

¹⁵ N.D.C.C. § 28-32-44(6)(g).

record to be considered by the agency.¹⁶ An agency must provide a specific deadline for the submission of written comments in the full notice, and this deadline and an address to which someone may send the comments must be provided in the abbreviated notice.¹⁷ After the agency has made a written summary of any oral comments and a written record of its consideration of all written and oral submissions contained in the rulemaking record, it must submit the proposed rules and related materials to the Attorney General for an opinion as to their legality.¹⁸ Please remember to include the documentation required for review.

Appendix 8: After the Attorney General approves the proposed rule as to legality (and the agency incorporates any revisions or rewording suggested by the Attorney General), the agency must adopt the proposed rule and submit it to the Legislative Council for publication in the North Dakota Administrative Code.¹⁹ The agency must also provide a copy of each written comment and a summary of each oral comment concerning the proposed rules to the Legislative Council.²⁰ Appendix 8 is a sample letter submitting proposed rules to the Legislative Council for publication.

Please contact the assistant attorney general or special assistant attorney general assigned to your agency if you have any questions concerning the requirements of N.D.C.C. ch. 28-32, or laws that specifically relate to your agency's rulemaking authority.

¹⁶ N.D.C.C. § 28-32-12.

¹⁷ N.D.C.C. § 28-32-10(1).

¹⁸ N.D.C.C. § 28-32-14.

¹⁹ N.D.C.C. § 28-32-15(1).

²⁰ N.D.C.C. § 28-32-15(1).

NOTICE OF INTENT TO
[ADOPT, AMEND, OR REPEAL] ADMINISTRATIVE RULES

TAKE NOTICE that the [Agency] will hold a public hearing to address proposed [new, amendments to, or repeal of] N.D. Admin. Code [title, article, chapter, and section] at [time] on [day], [date], at [address where hearing(s) will be held]. The purpose of the proposed [rule, amendment, or appeal] is [purpose: e.g., implement statutes, comply with federal law, etc.] The proposed [rule, amendment, or repeal] address(es) [specific explanation of each subject of proposed rules]. The proposed [rule, amendment, or repeal] [is or is not] expected to have an impact on the regulated community in excess of \$50,000. [These rules are emergency rules with an effective date of _____.]

The proposed rules may be reviewed at the office of [agency and address]. A copy of the proposed rules and/or a regulatory analysis may be requested by writing the above address [, e-mailing _____] or calling [telephone number]. Written or oral comments on the proposed rules sent to the above address or telephone number and received by [date comment period closes, 10 days after public hearing] will be fully considered.

If you plan to attend the public hearing and will need special facilities or assistance relating to a disability, please contact the [Agency] at the above telephone number or address at least [the amount of prior notice required] prior to the public hearing.

Dated this _____ day of _____.

[Agency Head or Representative]

APPENDIX 2 - Letter to Legislative Council

[DATE]

Mr. John Walstad
Code Revisor
North Dakota Legislative Council
State Capitol
600 East Boulevard, 2nd Floor
Bismarck, ND 58505-0360

Dear Mr. Walstad:

The Notice of Intent to [Adopt, Amend, or Repeal] Administrative Rules and a copy of the proposed rules are enclosed as required by N.D.C.C. § 28-32-10(1).

Sincerely,

Enclosures

APPENDIX 3 - Letter to North Dakota Newspaper Association

[DATE]

North Dakota Newspaper Association
1435 Interstate Loop
Bismarck, ND 58503-0567

Please send the enclosed public notice to each official county newspaper for publication one time as soon as possible. Note that the publication of the notice must be in a display-type format with a minimum width of one column of approximately two inches [5.08 centimeters] and a depth of [between three inches [7.62 centimeters] and four inches [10.16 centimeters]]. Please also note that the notice must include a headline describing the general topic of the proposed rules.

Please send the billings along with the Affidavits of Publication to [Agency Name and Address].

Thank you for your assistance.

Sincerely,

Enclosure

[If the agency does not use the NDNA, then publication requests such as this must be sent by the agency to each of the state's official county newspapers]

APPENDIX 4 - Abbreviated Notice

ABBREVIATED NOTICE OF INTENT TO
[ADOPT, AMEND, OR REPEAL] ADMINISTRATIVE RULES
RELATING TO [SHORT DESCRIPTION OF PROPOSED RULES]

TAKE NOTICE that the [Agency] will hold a public hearing to address proposed changes to the N.D. Admin. Code at [time] on [day], [date], at [address where hearing(s) will be held]. [These rules are emergency rules with an effective dated of _____.]

A copy of the proposed rules may be obtained by [writing the [agency and address] or calling [telephone number] (note only the address or the phone number are required, not both)]. Also, written comments may be submitted to [address (note this is required for this purpose)] until [date comment period closes]. If you plan to attend the public hearing and will need special facilities or assistance relating to a disability, please contact the [agency] at the above telephone number or address at least [the amount of prior notice required] prior to the public hearing.

Dated this _____ day of _____, _____.

[Agency Head or Representative]

APPENDIX 5 - Small Entity Regulatory Analysis and Economic Impact Statement

SMALL ENTITY REGULATORY ANALYSIS

(Discuss each question)

1. Was establishment of less stringent compliance or reporting requirements for small entities considered? To what result?
2. Was establishment of less stringent schedules or deadlines for compliance or reporting requirements considered for small entities? To what result?
3. Was consolidation or simplification of compliance or reporting requirements for small entities considered? To what result?
4. Were performance standards established for small entities for replacement design or operational standards required in the proposed rule? To what result?
5. Was exemption of small entities from all or any part of the requirements in the proposed rule considered? To what result?

SMALL ENTITY ECONOMIC IMPACT STATEMENT

(Discuss each question)

1. Which small entities are subject to the proposed rule?
2. What are the administrative and other costs required for compliance with the proposed rule?
3. What is the probably cost and benefit to private persons and consumers who are affected by the proposed rule?
4. What is the probable effect of the proposed rule on state revenues?
5. Is there any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule?

APPENDIX 6 - Public Hearing

PUBLIC HEARING FORMAT

1. I am _____ and I will be acting as hearing officer for this public hearing.
2. It is now _____ (time) on _____ (date), in the _____(place) so at this time, I open this hearing.
3. This public hearing has been called for the purpose of allowing all interested individuals an opportunity to submit information concerning.

Proposed [new, amendments to or repeal of] N.D. Admin. Code

Article _____ (number) _____ (title)

Section _____ (number) _____ (title)

4. Information gathered at this hearing will be transmitted to the _____ for its deliberation and final decision. [The _____ will not be responding to comments at this hearing. The comments received at this hearing will be considered with any written comments that are received and the _____ will present its consideration of all of the comments in writing. You may request a copy of the written response and one will be provided to you.]
5. This hearing is being taped and we ask everyone to use the podium so that the tape will be of good quality for transcribing purposes. Please identify yourself for the record before you speak.
6. Everyone present will be given an opportunity to speak. If you have a prepared statement, a written copy of your statement is appreciated and will be helpful.
7. A registration sheet has been placed next to the podium. I ask that everyone present please sign this sheet before they leave.
8. At this point, I open the hearing for comments.

Closing

1. Thank you all for coming. All of the information gathered at this hearing will be provided to the _____, which is the decision-making body.
2. The record will be held open for written comment until _____ (date).
3. At this point, I will close the hearing on:

Proposed [new, amendments to or repeal of] N.D. Admin. Code

Article _____ (number) _____ (title)

Section _____ (number) _____ (title)

APPENDIX 7 - Letter to Attorney General

[DATE]

The Honorable Wayne Stenehjem
Attorney General
State Capitol
600 E Boulevard Ave Dept 125
Bismarck, ND 58505-0040

Dear Attorney General Stenehjem:

Enclosed please find the proposed [new, amendments to, or repeal of] N.D. Admin. Code [title, article, chapter] by the [Agency]. The proposed rules have been approved by [Board or Agency]. In accordance with N.D.C.C. § 28-32-14, the [Agency or Board] requests your examination of these rules as to their legality so they may be considered for formal adoption and publication in the North Dakota Administrative Code. The time for review of these rules should be recorded under [billing code].

Attached for purposes of review is a copy of the full and abbreviated Notices of Intent to [Adopt, Amend, or Repeal] Administrative Rules; and Affidavit of Publication from each newspaper in which the notice was published [or Affidavit of Publication from Newspaper Association]; a copy of one of the actual notices as published; [a copy of the letter to each legislator who sponsored or co-sponsored legislation during the most recent legislative session which is being implemented by the proposed rule]; a copy of the letter filing the Notice and Administrative Rules with the Legislative Council; [a copy of the information about emergency rules provided to the chairman of the Administrative Rules Committee]; [a copy of all written comments]; [a copy of the written summary of each oral comment]; [the Agency's written record of consideration of all public comments received]; [a copy of the fiscal note]; [a copy of the regulatory analysis]; [the Agency's small entity regulatory analysis]; [the Agency's small entity economic impact statement]; and [a copy of the takings assessment if needed].

[A fiscal note was not required because these rules have no fiscal effect.]

[No regulatory analysis was required as the proposed rules are not expected to have an impact on the regulated community in excess of \$50,000, and neither the Governor nor any member of the Legislative Assembly requested a regulatory analysis.]

[No takings assessment was required because the rule does not limit the uses of real property.]

[These rules do not implement legislation from the most recent legislative session.] or [These rules implement legislation from the most recent legislative session and the sponsors, (insert names), were each provided a copy of the full notice of intent.]

[No oral or written comments were received on the rules.]

[No small entity economic impact statement was required because (the agency is exempt from the requirement to prepare one); (the proposed rules are mandated by federal law); (none of the proposed rules will have an adverse economic impact on small entities).]

[No small entity regulatory analysis was required because (the agency is exempt from the requirement to prepare one); (the proposed rules are mandated by federal law).]

[These are not emergency rules.]

Sincerely,

Enclosures

APPENDIX 8 - Letter to Legislative Council

[DATE]

Mr. John Walstad
Code Revisor
Legislative Council
600 East Boulevard, 2nd Floor
Bismarck, ND 58505-0360

Dear Mr. Walstad:

Enclosed please find a copy of the [new, amendments to, or repeal of] North Dakota Administrative Code [title, article, or chapter] regarding [topics of rules], and a copy of each written comment and a summary of each oral comment on the rules [or note that no comments were received] and a copy of the fiscal note [or note that the rules have no fiscal effect]. By letter dated [date of Attorney General letter approving rules] the Attorney General approved the proposed rules as to their legality. On [date] the [agency] adopted the rules as approved, and is now submitting the rules for publication in the North Dakota Administrative Code.

Thank you for your attention to this matter.

Sincerely,

Enclosure