# Chapter 1 - Rulemaking in General

## Introduction

This chapter briefly describes the legal basis for rulemaking and the history of the Minnesota Administrative Procedure Act (APA),[[1]](#footnote-1) 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.”[[2]](#footnote-2) According to the order, “Plain Language is a communication which an audience can understand the first time they read or hear it.”[[3]](#footnote-3)

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.

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](https://centerforplainlanguage.org/), [Clarity](https://www.clarity-international.org/), or the Michigan Bar Journal’s [Plain Language column](https://www.michbar.org/generalinfo/plainenglish/home#:~:text=Plain%20Language%20Column%20The%20monthly%20Plain%20Language%20column,column%20in%20any%20journal.%20Chronological%20Index%20of%20Columns).

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

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](https://www.revisor.mn.gov/revisor/pubs/arule_drafting_manual/ruleguide.htm), 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](https://www.revisor.mn.gov/static/office/1997_RuleDraftManual.a285c37112da.pdf)*,* 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](http://mitchellhamline.edu/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

### 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.”[[4]](#footnote-4)

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.[[5]](#footnote-5) 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.[[6]](#footnote-6)

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.[[7]](#footnote-7)

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.”[[8]](#footnote-8) 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.

### 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.[[9]](#footnote-9)

### 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.”[[10]](#footnote-10)

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.[[11]](#footnote-11) When counting time, the day that an action occurs—such as mailing a notice—does not count and the last day counts.[[12]](#footnote-12)

**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.[[13]](#footnote-13)

Example: For a seven-day period, a period starting on a Monday ends the next Monday. If that Monday were a state holiday,[[14]](#footnote-14) the period would end on Tuesday.

**Working day**. Working days do not include Saturdays, Sundays, and state holidays.[[15]](#footnote-15)

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

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 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.[[16]](#footnote-16) 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

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

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

The Governor may veto rules.[[17]](#footnote-17) 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.

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

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.[[18]](#footnote-18)

### 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.”)
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)](eComments%20website%20%28https%3A//minnesotaoah.granicusideas.com%29), as well as through U.S. Mail, eFiling, personal delivery, or fax. Public instructions for making comments can be found at <https://mn.gov/oah/forms-and-filing/ecomments/>.

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 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

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.[[19]](#footnote-19)

**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.[[20]](#footnote-20)

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.[[21]](#footnote-21) You must also copy the Legislative Reference Library, as required by statute.[[22]](#footnote-22)

### 1.8.3 Obsolete rules report

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

* 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](https://www.lrl.mn.gov/mndocs/mandates).

### 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

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 or Brittany Wysokinski at 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

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 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 or via Teams chat
	* Mary H. Lynn, Pollution Control Agency: mary.lynn@state.mn.us; 651-757-2439
	* Josh Skaar, Department of Health: josh.skaar@state.mn.us; 651-368-0751

## 1.11 Training for Agency Rulemaking Staff

The Interagency Rulemaking Committee provides annual training to state employees involved in rulemaking.[[23]](#footnote-23) 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](https://www.health.state.mn.us/data/rules/manual/index.html).

## 1.12 Information on the Cost of Rulemaking

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 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

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
* Ian Lewenstein, BMS, ian.lewenstein@state.mn.us
* Brittany Wysokinski, DLI, brittany.wysokinski@state.mn.us
1. Minnesota Statutes, chapter 14. *See also* Minnesota Rules, chapter 1400 (Office of Administrative Hearings’ rules implementing the APA). [↑](#footnote-ref-1)
2. [Executive Order 19-29](https://mn.gov/governor/assets/2019_04_05_EO_19-29_tcm1055-379049.pdf). [↑](#footnote-ref-2)
3. 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.” [↑](#footnote-ref-3)
4. Minn. Stat. § 14.02, subd. 4. [↑](#footnote-ref-4)
5. Minn. Stat. § 14.03, subd. 3(a)(1). [↑](#footnote-ref-5)
6. *See also* Minn. Stat. § 14.07, subd. 3(1): the revisor must “minimize duplication of statutory language.” [↑](#footnote-ref-6)
7. OAH Docket Number 7-2700-13138-1. *See also* RD2951; OAH Docket Number 10-2700-12042-1. [↑](#footnote-ref-7)
8. Minn. R. 1721.0490, subp. 2. [↑](#footnote-ref-8)
9. *See* Minn. Stat. § 14.03. [↑](#footnote-ref-9)
10. Minn. Stat. § 14.06(a). [↑](#footnote-ref-10)
11. *See* Minn. R. 1400.2030, subp. 1. [↑](#footnote-ref-11)
12. Minn. R. 1400.2030, subp. 1. [↑](#footnote-ref-12)
13. Minn. R. 1400.2030, subp. 1. [↑](#footnote-ref-13)
14. *See* Minn. Stat. § 645.44, subd. 5 (listing state holidays). [↑](#footnote-ref-14)
15. Minn. R. 1400.2030, subp. 1. [↑](#footnote-ref-15)
16. This has been changing at the federal level with recent Supreme Court decisions. [↑](#footnote-ref-16)
17. Minn. Stat. § 14.05, subd. 6. [↑](#footnote-ref-17)
18. *See* Minn. Stat. § 14.16, subd. 3. [↑](#footnote-ref-18)
19. Minn. Stat. § 14.14, subd. 1a. [↑](#footnote-ref-19)
20. Minn. Stat. § 14.366. [↑](#footnote-ref-20)
21. Minn. Stat. § 14.116(a). [↑](#footnote-ref-21)
22. Minn. Stat. § 3.195, subd. 1(a). [↑](#footnote-ref-22)
23. *See* Minn. Stat. § 43A.04, subd. 11. [↑](#footnote-ref-23)