



Shaping the SONAR: Meaningful Regulatory Review under Minn. Stat. § 14.131

Presenters



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Purposes of the Administrative Procedures Act

➤ Minn. Stat. § 14.001:

- (1) to provide **oversight** of powers and duties delegated to administrative agencies;
- (2) to increase **public accountability** of administrative agencies;
- (3) to ensure a **uniform minimum procedure**;
- (4) to increase **public access** to governmental information; and
- (5) to increase **public participation** in the formulation of administrative rules.

General SONAR Requirements:

Minn. R. 1400.2070

- **Summarize the evidence** and argument that the agency is relying on to justify both the need for and the reasonableness of the proposed rules, and state how the evidence rationally relates to the choice of action taken
- **Explain the circumstances** that created the need for the rulemaking and why the proposed rulemaking is a reasonable solution for meeting the need
- **Be sufficiently specific** so that interested persons will be able to fully prepare any testimony or evidence in favor of or in opposition to the proposed rules

The SONAR as the Story of Your Rule

- Minnesota Rulemaking Manual: “The SONAR tells your story to the ALJ and the public...**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.”
- Review prior SONARs, but don’t automatically adopt prior language.
- “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.”

The SONAR Supports Meaningful Engagement and Accountability

“‘[N]otice and comment procedures exist for good reason: to ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rulemaking before an informed and skeptical public.’”

In re PERA Salary Determinations Affecting Retired and Active Employees of City of Duluth, 820 N.W.2d 563 (Minn. Ct. App. 2012) (quoting *Swenson v. Emerson Elec. Co.*, 374 N.W.2d 690 (Minn. 1985)).

Statement of Need and Reasonableness

The agency must prepare, review, and make available for public review a statement of the need for and reasonableness of the rule

The statement of need and reasonableness must be prepared under rules adopted by the chief administrative law judge

It must include the following to the extent the agency, through reasonable effort, can ascertain this information...

8 Regulatory Factors: Minn. Stat. § 14.131

- 1) The **classes of persons** who probably will be affected by the proposed rule
- 2) The probable **costs** to the agency and to any other agency
- 3) Whether there are **less costly methods** or less intrusive methods for achieving the purpose
- 4) Any **alternative methods** for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule
- 5) The probable **costs of complying** with the proposed rule, 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) The probable **costs or consequences of not adopting** the proposed rule
- 7) An assessment of any **differences** between the proposed rule and existing federal regulations and a specific 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.

Minnesota Rulemaking Manual

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.

Classes of Persons: Minn. Stat. § 14.131(1)

- A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule
- Keep in mind: This is not just about the regulated parties.
- *Minnesota Auto Dealers Ass'n v. Minn. Pollution Control Agency*, A-22-0796, Order (Sept. 20, 2022) (denying motion to dismiss and finding auto dealers had standing to bring a pre-enforcement challenge to the MPCA's Clean Cars rule even though they were not directly regulated by the rule)

Probable Costs to Agencies: Minn. Stat. § 14.131(2)

- The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues
- Consider how the agency will implement and enforce the proposed rule: staffing, developing guidance, public outreach
- Will other agencies have costs associated with the rule? Seek feedback and information from other agencies

Less Costly or Less Intrusive Methods: Minn. Stat. § 14.131(3)

- Whether there are **less costly** methods or **less intrusive** methods for achieving the purpose of the proposed rule
- Even if the agency is directed by the legislature to do rulemaking on a topic, the agency may still be choosing among alternatives.

Alternative Methods: Minn. Stat. § 14.131(4)

- Any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule
- Explain your reasoning to the public and your regulated community
- Build credibility in support of the choices the agency made

Probable Costs of Complying: Minn. Stat. § 14.131(5)

- The **probable costs** of complying with the proposed rule, 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
- Minnesota Rulemaking Manual: “The advisory committee will likely have valuable information and insight into the regulatory analysis and cost determination...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.”

Probable Costs of Not Adopting the Rule: Minn. Stat. § 14.131(6)

- 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
- Address regulatory gaps
- Articulate the benefit of rule adoption for the public

Differences Between the Proposed Rule and Federal Regulations: Minn. Stat. § 14.131(7)

- An assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference
- Keep in mind: Minn. R. 1400.2100 requires disapproval when the rule:
 - Exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law
 - Is unconstitutional or illegal

An Assessment of the Cumulative Effect: Minn. Stat. § 14.131(8)

- An assessment of the **cumulative effect** of the rule with other federal and state regulations related to the specific purpose of the rule
- The impact that results from incremental impact of the proposed rule in addition to other rules, regardless of what state or federal agency has adopted the other rules
- Cumulative effects can result from individually minor but collectively significant rules adopted over time.

A Note on Analysis of Costs: Proposed Legislation

- HF 936 would have amended Minn. Stat. § 14.002 to provide that: “state agencies may only adopt rules for which benefits exceed costs.”
- Required cost-benefit analysis with preliminary and final projections and provided criteria for a determination of deficient analyses

Agencies Must Address all Regulatory Factors in Some Way

- Minnesota Rulemaking Manual: “Be sure to address all eight required elements because not addressing one could result in a procedural deficiency in your rule. If one or more are not relevant to your rule, explain why.”
- The ALJ is not able to supply the analysis.
- *Builders Ass’n of Twin Cities v. Minn. Dep’t of Labor and Industry*, 872 N.W.2d 263 (Minn. Ct. App. 2015) (where agency did not address costs to small business or city under Minn. Stat. § 14.127 and the ALJ determined the record did not show that such entities would bear costs, holding that the agency was required to provide analysis and court stated it was “troubled” by ALJ approach).

Procedural Deficiency: Is it Prejudicial?

A mere allegation of prejudice is not sufficient to invalidate a rule. Instead, a **party must show** that a deficiency in a SONAR caused **actual prejudice**...Thus, a deficient SONAR only causes prejudice when it does not adequately preview the agency's intentions, evidence, and rationale so as to afford parties the opportunity to meaningfully participate in the rulemaking process. When a SONAR provides sufficient information for interested parties to meaningfully participate in the rulemaking process, there is no prejudice.

Builders Ass'n of Twin Cities v. Bd. of Elec., 985 N.W.2d 350 (Minn. Ct. App. 2021).

Harmless Error: Minn. Stat. § 14.15

The ALJ shall disregard any error or defect in the proceeding due to the agency's failure to satisfy any procedural requirement imposed by law or rule if:

- (1)** the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or
- (2)** the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

Curing Defects: Your Affirmative Presentation of Facts

- Minn. Stat. § 14.14, subds. 2, 2a: Requiring an affirmative presentation of facts and providing parameters for the hearing.
- The public hearing is the agency's opportunity to expound upon the information in the SONAR. *Builders Ass'n*, 985 N.W.2d 350.
- The ALJ/CAH may request that the agency file additional materials. The ALJ may see a gap that the agency has not identified.



Thank you!