ADMINISTRATIVE RULES REVIEW - BACKGROUND MEMORANDUM

NORTH DAKOTA ADMINISTRATIVE CODE

The North Dakota Administrative Code, published by the Legislative Council pursuant to North Dakota Century Code (NDCC) Section 28-32-19, contains all rules adopted by administrative agencies subject to NDCC Chapter 28-32 (the Administrative Agencies Practice Act). The North Dakota Administrative Code consists of 124 titles. Ninety-four titles contain rules of administrative agencies. Sixteen agencies voluntarily publish their rules in the Administrative Code, although these agencies are excluded from the definition of administrative agency.

North Dakota was the first state in the Union to adopt an Administrative Procedure Act, enacting the first version of present NDCC Chapter 28-32 in 1941 based partly on an earlier tentative draft of what became the 1946 Model State Administrative Procedure Act approved by the Commissioners on Uniform State Laws.

Under NDCC Section 28-32-20, the North Dakota Administrative Code is distributed free to each county auditor, Supreme Court justice, district court judge, and to certain state agencies. There are 56 of these free subscriptions. The Legislative Council is required by Section 28-32-20 to establish prices for paid subscriptions to the Administrative Code. These prices were $460 for a new "starter" code set and $260 per year for supplements. From 1994 to 2011 the number of paid subscribers to the Administrative Code declined from 104 to 14. Beginning with the July 2010 publication, the Administrative Code has been published in a CD-ROM format, eliminating the ring binders and replacement pages previously used. This allowed subscriber costs to be reduced to $60 per year, with no need to buy a full "starter" set of the code.

The numbering for the North Dakota Administrative Code is similar to the numbering used for the North Dakota Century Code. However, while Century Code sections are designated by numbers having three parts separated by hyphens, Administrative Code section numbers consist of four parts separated by hyphens--the first part designates the agency (title), the second part designates the major activity or division within the agency (article), the third part designates the subject within the major activity (chapter), and the fourth part designates the rule (section).

STATUTORY PROVISIONS FOR RULES REVIEW

Before 1977, agencies were authorized to adopt administrative rules, but there was no compilation or central source for administrative rules. In 1977 the Legislative Assembly enacted NDCC Section 28-32-19 (originally Section 28-32-03.1), which requires the Legislative Council to compile and publish the North Dakota Administrative Code. From July 1978 to September 2005, Administrative Code supplements were published the month after rules were filed with the Legislative Council for publication. Since September 2005, Administrative Code supplements have been published on a calendar quarterly basis. The current deadlines and effective dates are:

Filing Date	Committee Meeting Deadline	Effective Date
August 2-November 1	December 15	January 1
November 2-February 1	March 15	April 1
February 2-May 1	June 15	July 1
May 2-August 1	September 15	October 1

Although rules differ in length and complexity, comparison of the number of administrative rules sections affected during biennial periods is one method of comparing the volume of administrative rules reviewed by the Administrative Rules Committee since its creation in 1979. The following table shows the number of sections of the North Dakota Administrative Code amended, repealed, created, superseded, reserved, or redesignated during each identified time period:

Time Period	Number of Sections
July 1979-October 1980	1,440
November 1980-August 1982	916
September 1982-November 1984	1,856
December 1984-October 1986	1,280
November 1986-October 1988	2,681
November 1988-October 1990	2,325
November 1990-October 1992	3,079
November 1992-October 1994	3,235
November 1994-October 1996	2,762
November 1996-October 1998	2,789
November 1998-November 2000	2,074

Time Period	Number of Sections
December 2000-November 2002	1,417
December 2002-November 2004	2,306
December 2004-October 2006	1,353
January 2007-October 2008	1,194
January 2009-October 2010	1,451
January 2011-October 2012	907
January 2013-October 2014	1,383

For committee review of rules, the Legislative Council prepares an Administrative Rules Committee supplement containing all rules changes submitted for publication since the previous committee meeting. The supplement is prepared in a style similar to bill drafts--changes are indicated by overstrike and underscore. Comparison of the number of pages of rules amended, created, or repealed is another method of comparing the volume of administrative rules reviewed by the committee. The following table shows the number of pages in committee supplements during each designated time period:

Time Period	Supplement Pages
November 1992-October 1994	3,809
November 1994-October 1996	3,140
November 1996-October 1998	4,123
November 1998-November 2000	1,947
December 2000-November 2002	2,016
December 2002-November 2004	4,085
December 2004-October 2006	1,920
January 2007-October 2008	1,663
January 2009-October 2010	2,011
January 2011-October 2012	2,399
January 2013-October 2014	2,116

In 1979 the Legislative Assembly enacted the statutes providing for legislative review of administrative rules. In 1995 the Legislative Assembly enacted statutory authority for the Administrative Rules Committee to void administrative rules on specific grounds. In 2005 the Legislative Assembly enacted a bill providing that, except for emergency rules, administrative rules do not become effective until after they have been reviewed by the committee.

North Dakota Century Code Section 54-35-02.5 directs the Legislative Management to appoint biennially an Administrative Rules Committee and to designate the Chairman of the committee. The committee is to operate according to the statutes and procedures governing the operation of the Legislative Management interim committees. However, because the committee is established by statute, the committee is not discharged upon making its report to the Legislative Management at the end of the interim and the committee could be called to meet at any time, including during a legislative session.

North Dakota Century Code Section 54-35-02.5 provides it is the standing duty of the committee to review administrative rules adopted under Chapter 28-32. Section 54-35-02.5 requires the committee membership to include at least one member from each standing committee of the House of Representatives or Senate in the most recently completed regular legislative session.

Objection to Rules

In 1981 the Legislative Assembly enacted NDCC Section 28-32-17 (originally Section 28-32-03.3) authorizing the Administrative Rules Committee to make formal objections to agency rules. If the committee objects to a rule because the committee determines the rule to be unreasonable, arbitrary, capricious, or beyond the authority delegated to the adopting agency, the committee may file that objection in certified form with the Legislative Council. The effect of the filing of a committee objection is that the burden of persuasion is upon the agency in any action for judicial review or for enforcement of the rule to establish that the rule is within the procedural and substantive authority delegated to the agency. If the agency fails to meet its burden of persuasion, the court is to declare the rule invalid, and judgment is to be rendered against the agency for court costs, including a reasonable attorney's fee.

Voiding of Rules

In 1995, legislation was enacted to expand the authority of the Administrative Rules Committee in reviewing rules. North Dakota Century Code Section 28-32-18 allows the committee to find all or any portion of a rule is void if the committee makes the specific finding that there is:

1. An absence of statutory authority.
2. An emergency relating to public health, safety, or welfare.
3. A failure to comply with express legislative intent or to substantially meet the procedural requirements of Chapter 28-32 regarding adoption of the rule.
4. A conflict with state law.
5. Arbitrariness and capriciousness.
6. A failure to make a written record of its consideration or written and oral submissions respecting the rule during the hearing process and comment period.

North Dakota Century Code Section 28-32-18 allows the Administrative Rules Committee to find a rule void if the rule is initially considered by the committee not later than the 15th day of the month before the date of the North Dakota Administrative Code supplement in which the rule change is scheduled to appear. If the rule is initially considered within the required timeframe, the committee may carry consideration of a rule to one subsequent committee meeting for purposes of the decision on whether to void the rule. A 2011 change--House Bill No. 1162--provided if no agency representative appears at the scheduled meeting, the rules are automatically held over for consideration and if no representative appears at the subsequent meeting the rules are void if they are emergency rules and otherwise the committee may void, approve, or carry over consideration of the rules. A rule carried over for consideration is delayed in taking effect until the first day of the calendar quarter following the meeting at which the rule is reconsidered.

If the Administrative Rules Committee finds a rule to be void, the Legislative Council is to provide written notice of the finding to the adopting agency and to the Chairman of the Legislative Management. Within 14 days after receipt of the notice, the adopting agency may file a petition with the Chairman of the Legislative Management for review by the Legislative Management of the decision of the committee. If the adopting agency does not file a petition for review, the rule becomes void on the 15th day after the adopting agency received the notice from the Legislative Council. If within 60 days after receipt of the petition from the adopting agency the Legislative Management has not disapproved the finding of the committee, the rule is void.

North Dakota Century Code Section 28-32-18 allows a rule change to be made after consideration of rules by the Administrative Rules Committee if the agency and committee agree the rule change is necessary to address any of the considerations for which the committee may find a rule to be void. This allows an agency to change an administrative rule when the committee expresses concerns and in those circumstances the agency is not required to commence a new rulemaking proceeding. If a rule change is agreed to by the committee and the agency, the rule must be reconsidered, if requested by the agency or any interested party, at a subsequent committee meeting and public comment on the agreed rule change must be allowed.

Because the Legislative Assembly recognized there are constitutional questions about the Administrative Rules Committee voiding rules, an alternative amendment to NDCC Section 28-32-18 will take effect if the North Dakota Supreme Court rules the authority to void rules is unconstitutional. The alternative amendment is the same in all respects as the amendment allowing the committee to find rules void except under the alternative amendment the committee may not find a rule to be void but may suspend a rule or portion of a rule. The effect of a suspension is the rule becomes ineffective temporarily and will become permanently ineffective unless it is ratified by both houses of the Legislative Assembly during the next legislative session. The amendment requires the agency seeking ratification of a suspended rule to introduce a bill for that purpose. The authority of the Legislative Management to reverse the decision of the committee also applies in the case of a suspension of a rule.

The Legislative Management has assigned the Administrative Rules Committee the responsibility under NDCC Sections 28-32-07, 28-32-10, and 28-32-42 to approve extensions of time for administrative agencies to adopt rules, establish standard procedures for administrative agency compliance with notice requirements for proposed rulemaking, establish a procedure to distribute copies of administrative agency filings of notice of proposed rulemaking, and receive notice of appeal of an administrative agency's rulemaking action.

RULEMAKING PROCEDURES

Agency and Rule Defined

North Dakota Century Code Section 28-32-01(2) defines administrative agency as:

[E]ach board, bureau, commission, department, or other administrative unit of the executive branch of state government, including one or more officers, employees, or other persons directly or indirectly purporting to act on behalf or under authority of the agency. An administrative unit located within or subordinate to an administrative agency must be treated as part of that agency to the extent it purports to exercise authority subject to this chapter. The term administrative agency does not include:

a. The office of management and budget except with respect to rules made under section 32-12.2-14, rules relating to conduct on the capitol grounds and in buildings located on the capitol grounds under section 54-21-18, rules relating to the classified service as authorized under section 54-44.3-07, and rules relating to state purchasing practices as required under section 54-44.4-04.

b. The adjutant general with respect to the department of emergency services.

c. The council on the arts.

d. The state auditor.

e. The department of commerce with respect to the division of economic development and finance.

f. The dairy promotion commission.

g. The education factfinding commission.

h. The educational technology council.

i. The board of equalization.

j. The board of higher education.

k. The Indian affairs commission.

l. The industrial commission with respect to the activities of the Bank of North Dakota, North Dakota housing finance agency, public finance authority, North Dakota mill and elevator association, North Dakota farm finance agency, the North Dakota transmission authority, and the North Dakota pipeline authority.

m. The department of corrections and rehabilitation except with respect to the activities of the division of adult services under chapter 54-23.4.

n. The pardon advisory board.

o. The parks and recreation department.

p. The parole board.

q. The state fair association.

r. The attorney general with respect to activities of the state toxicologist and the state crime laboratory.

s. The board of university and school lands except with respect to activities under chapter 47-30.1.

t. The administrative committee on veterans' affairs except with respect to rules relating to the supervision and government of the veterans' home and the implementation of programs or services provided by the veterans' home.

u. The industrial commission with respect to the lignite research fund except as required under section 57-61-01.5.

v. The attorney general with respect to guidelines adopted under section 12.1-32-15 for the risk assessment of sexual offenders, the risk level review process, and public disclosure of information under section 12.1-32-15.

w. The commission on legal counsel for indigents.

x. The attorney general with respect to twenty-four seven sobriety program guidelines and program fees.

y. The industrial commission with respect to approving or setting water rates under chapter 61-40.

North Dakota Century Code Section 28-32-01(11) defines a rule as:

[T]he whole or a part of an agency statement of general applicability which implements or prescribes law or policy or the organization, procedure, or practice requirements of the agency. The term includes the

adoption of new rules and the amendment, repeal, or suspension of an existing rule. The term does not include:

a. A rule concerning only the internal management of an agency which does not directly or substantially affect the substantive or procedural rights or duties of any segment of the public.

b. A rule that sets forth criteria or guidelines to be used by the staff of an agency in the performance of audits, investigations, inspections, and settling commercial disputes or negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if the disclosure of the statement would:

   (1) Enable law violators to avoid detection;

   (2) Facilitate disregard of requirements imposed by law; or

   (3) Give a clearly improper advantage to persons who are in an adverse position to the state.

c. A rule establishing specific prices to be charged for particular goods or services sold by an agency.

d. A rule concerning only the physical servicing, maintenance, or care of agency-owned or agency-operated facilities or property.

e. A rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its subdivisions, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property.

f. A rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital.

g. A form whose contents or substantive requirements are prescribed by rule or statute or are instructions for the execution or use of the form.

h. An agency budget.

i. An opinion of the attorney general.

j. A rule adopted by an agency selection committee under section 54-44.7-03.

k. Any material, including a guideline, interpretive statement, statement of general policy, manual, brochure, or pamphlet, which is explanatory and not intended to have the force and effect of law.

Rulemaking Deadline

North Dakota Century Code Section 28-32-07 provides 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. If an agency needs additional time for the rule change, a request for additional time must be made to the Administrative Rules Committee. The committee may extend the time within which the agency must adopt the rule change if the request by the agency is supported by evidence that the agency needs more time through no deliberate fault of its own.

Rulemaking Notice

An agency is required by NDCC Section 28-32-10 to prepare a full notice and an abbreviated notice of rulemaking. The full notice must include a specific explanation of the proposed rule, include a determination of whether the proposed rule is expected to have an impact on the regulated community in excess of $50,000, identify at least one location where interested parties may review the text of the proposed rule, provide the address to which written comments concerning the proposed rule may be sent, provide the deadline for submission of written comments, provide a copy of a telephone number at which a copy of the rules and regulatory analysis may be requested, and provide the time and place set for oral hearing. House Bill No. 1024 (2013) added a requirement the full notice must include the bill number and subject matter of any legislation from the most recent legislative session which is being implemented by the proposed rule change. The full notice must be filed with the Legislative Council. A copy of the full notice must be mailed or emailed by the agency to each legislator who sponsored or cosponsored a bill being implemented by the proposed rules.

The abbreviated notice must be published at least once in each official county newspaper published in the state at least 20 days before the hearing on the rules.

In addition to other notice requirements, the Superintendent of Public Instruction is required to provide notice of any proposed rulemaking to each statewide association with a focus on education issues which has requested to receive notice and to the superintendent of each public school district or the president of the school board, if the district has no superintendent. Notice by the Superintendent of Public Instruction must be by first-class mail or by email, if requested by the recipient.

A 2011 change--House Bill No. 1162--provided for emergency rules the agency shall attempt to provide notice to persons who the agency can reasonably be expected to believe may have a substantial interest in them, meaning an interest that surpasses the common interest of all citizens. The bill also requires the notice to identify the emergency status and effective date, notice be given to the Chairman of the Administrative Rules Committee, and the Legislative Council publish the notice and pending rules on its website.

The Legislative Management is required by NDCC Section 28-32-10 to establish guidelines for agencies to comply with notice requirements under Chapter 28-32. Attached as an appendix is a copy of the guidelines updated by the committee in July 2001.

Hearings

An agency is required by NDCC Section 28-32-11 to adopt a procedure to afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing, concerning a proposed rule, including data respecting the impact of the proposed rule. The agency is required to consider fully and make a written record of its consideration of all written and oral submissions respecting a proposed rule before the adoption, amendment, or repeal of any rule not of an emergency nature. An agency is required by Section 28-32-11 to adopt a procedure to allow interested parties to request and receive notice directly from the agency of the date and place proposed rules will be reviewed by the Administrative Rules Committee.

Comments

Agencies are required by NDCC Section 28-32-12 to allow a comment period of at least 10 days after the conclusion of a rulemaking hearing during which the agency will receive written data, views, or arguments concerning the proposed rule. Written comments received by the agency must be made a part of the rulemaking record to be considered by the agency before final action on the rule.

Emergency Rules

North Dakota Century Code Section 28-32-03 allows an agency, with approval of the Governor, to adopt rules on an emergency basis because of imminent peril to the public health, safety, or welfare; because a delay is likely to cause a loss of revenues appropriated to support a duty imposed by law upon the agency; when reasonably necessary to avoid a delay in implementing an appropriations measure; or when necessary to meet a mandate of federal law. An emergency rule may be declared effective no earlier than the date of filing notice of rulemaking with the Legislative Council. An emergency rule becomes ineffective if it is not adopted as a final rule within 180 days after its declared effective date.

House Bill No. 1162 (2011) required an agency making emergency rules to attempt to provide notice of the emergency rules to persons the agency can reasonably be expected to believe may have a substantial interest in the rules, meaning an interest in the effect of the rules which surpasses the common interest of all citizens. The bill also requires the agency to notify the Chairman of the Administrative Rules Committee of emergency rules and their effective date and grounds for emergency status. The Legislative Council is required to place the notice of emergency rules on its website.

Attorney General Review

North Dakota Century Code Section 28-32-14 requires review by the Attorney General of all administrative rules and provides the Attorney General may not approve a rule as to legality when the rule exceeds the statutory authority of the agency, the rule is written in a manner that is not concise or easily understandable, or procedural requirements for adopting the rule are not substantially met.

Rule Notice Service

Under NDCC Section 28-32-10, the Legislative Council is to establish a procedure to allow any interested person to receive copies of every rulemaking notice filed with the Legislative Council, and the Administrative Rules Committee may establish a fee to receive these notices. The notice must be sent to subscribers within 15 business days after receipt. The committee set a $50 annual charge for providing notice of proposed rulemaking. As of June 1, 1997, there were 31 paid subscribers to this service. As of July 1, 2009, there were 14 paid subscribers to this service. Some of the reduction in paid subscriptions may be attributable to the fact

notices have been made available on the legislative branch webpage since 1998. With the availability of an RSS feed to receive rulemaking notices, there have not been any paid subscribers since January 2013.

Regulatory Analysis

An agency is required to prepare a regulatory analysis under NDCC Section 28-32-08 if within 20 days after the notice date for a rule hearing a written request for the analysis is filed by the Governor or a member of the Legislative Assembly or if the impact of the proposed rule on the regulated community is expected to exceed $50,000. The regulatory analysis must describe persons who probably will be affected by the rule, including classes that will bear costs and classes that will benefit from the proposed rule. The analysis must describe probable economic impact of the proposed rule and probable cost to the agency to implement and enforce the rule.

Fiscal Notes

House Bill No. 1162 (2011) required an agency, when rules are presented for Administrative Rules Committee review, to provide either a fiscal note or a statement that the rules have no fiscal effect. Fiscal effect means an effect on state revenues and expenditures, including any effect on funds controlled by the agency.

Rules Affecting Small Entities

Before adoption of any rule that may adversely impact small entities, the adopting agency must prepare an economic impact statement. A small entity includes a small business, small nonprofit organization, and small political subdivision.

Constitutional Takings Assessment

An agency is required to prepare a written assessment of constitutional takings implications of a proposed rule that may limit the use of real property under NDCC Section 28-32-09. The agency is required to assess the likelihood that the rule will result in a taking or regulatory taking of property and explain why no alternative action is available that would reduce impact on private property owners.

Under NDCC Section 28-32-09, any private landowner affected by a rule that limits the use of the landowner's private real property may file a written request for reconsideration of the application or need for the rule. Within 30 days of receiving the request, the agency must consider the request and provide a written response to the landowner of whether the agency intends to keep the rule in place, modify the rule, or repeal the rule.

Air Quality Rules

North Dakota Century Code Section 23-25-03.3 prohibits the State Department of Health from adopting air quality rules or standards affecting coal conversion and associated facilities, petroleum refineries, or oil and gas production and processing facilities which are stricter than federal rules or standards under the Clean Air Act. The statute also prohibits the department from adopting air quality rules or standards affecting such facilities when there are no corresponding federal rules or standards unless the rules or standards are based on a risk assessment that demonstrates a substantial probability of significant impacts to public health or property, a cost-benefit analysis that affirmatively demonstrates the benefits of the more stringent or additional state rules and standards will exceed the anticipated costs, and the risk assessment and the cost-benefit analysis is independently peer-reviewed by qualified experts selected by the Air Pollution Control Advisory Council.

Federal Guidelines

North Dakota Century Code Section 28-32-04 prohibits agencies from adopting rules from federal guidelines that are not relevant to state regulatory programs. The section also provides an agency is required to repeal or amend any existing rule adopted from federal guidelines which is not relevant to state regulatory programs.

Force of Law

North Dakota Century Code Section 28-32-06 provides administrative rules have the force and effect of law until amended or repealed by the agency, declared invalid by a final court decision, suspended or found to be void by the Administrative Rules Committee, or determined repealed by the Legislative Council because the authority for adoption of the rules is repealed or transferred to another agency. The fact administrative rules have the "force and effect of law" is significant. The North Dakota Supreme Court has held that administrative practice or policy of an agency subject to the North Dakota Administrative Agencies Practice Act is invalid unless it has been adopted as an administrative rule in compliance with the Act. *Little v. Spaeth*, 394 N.W.2d 700 (1986). A more difficult question arises in considering the force and effect of rules adopted by an agency excluded from coverage under the Administrative Agencies Practice Act. In *Jensen v. Little*, 459 N.W.2d 237 (1990), a State Penitentiary inmate challenged the validity of the Penitentiary drug testing program and penalties as being adopted in violation

of the Administrative Agencies Practice Act. The Supreme Court observed that the Department of Corrections and Rehabilitation was at that time a part of the office of the Director of Institutions and that the Director of Institutions was excluded from the definition of administrative agency and not subject to the Administrative Agencies Practice Act. Although the court did not directly address the effect of rules adopted by an agency outside the Administrative Agencies Practice Act, and in a footnote urged the Director and Warden to adopt more formal approval procedures for Penitentiary rules to diminish future challenges to the rules, the court tacitly upheld the Penitentiary rules by allowing the penalty to stand.

GUIDELINES

As pointed out earlier in this memorandum, attached as an appendix is a copy of guidelines for agencies to follow in publishing notice of rulemaking. The committee may wish to consider whether to recommend legislation to incorporate all or part of the guidelines in statute.

POSSIBLE RULE REVIEW

During the 2013-14 interim, as rules were scheduled for review, each adopting agency was requested to provide the committee with written information in this format:

1. Whether the rules resulted from statutory changes made by the Legislative Assembly.
2. Whether the rules are related to any federal statute or regulation. If so, please indicate whether the rules are mandated by federal law or explain any options your agency had in adopting the rules.
3. A description of the rulemaking procedure followed in adopting the rules, e.g., the type of public notice given and the extent of public hearings held on the rules.
4. Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules. If so, describe the concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint. Please summarize the comments of any person who offered comments at the public hearings on these rules.
5. The approximate cost of giving public notice and holding any hearing on the rules and the approximate cost (not including staff time) of developing and adopting the rules.
6. An explanation of the subject matter of the rules and the reasons for adopting those rules.
7. Whether a regulatory analysis was required by NDCC Section 28-32-08 and whether that regulatory analysis was issued. Please provide a copy.
8. Whether a regulatory analysis or economic impact statement of impact on small entities was required by NDCC Section 28-32-08.1 and whether that regulatory analysis or impact statement was issued. Please provide copies.
9. Whether these rules have a fiscal effect on state revenues and expenditures, including any effect on funds controlled by your agency. If so, please provide copies of a fiscal note.
10. Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. Please provide a copy if one was prepared.
11. If these rules were adopted as emergency (interim final) rules under NDCC Section 28-32-03, provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support that declaration and provide a copy of the Governor's approval of the emergency status of the rules.

ATTACH:1