

ADMINISTRATIVE RULES

The Administrative Rules Committee is a statutory committee deriving its authority from North Dakota Century Code (NDCC) Sections 54-35-02.5, 54-35-02.6, 28-32-17, 28-32-18, and 28-32-18.1. The committee is required to review administrative agency rules to determine whether:

- Administrative agencies are properly implementing legislative purpose and intent.
- There is dissatisfaction with administrative rules or statutes relating to administrative rules.
- There are unclear or ambiguous statutes relating to administrative rules.

The committee may recommend rule changes to an agency, formally object to a rule, or recommend to the Legislative Management the amendment or repeal of the statutory authority for the rule. The committee also may find a rule void or agree with an agency to amend or repeal an administrative rule to address committee concerns, without requiring the agency to begin a new rulemaking proceeding.

The Legislative Management delegated to the committee its authority under NDCC Section 28-32-10, to distribute administrative agency notices of proposed rulemaking and to establish standard procedures for agency compliance with notice requirements, its authority under NDCC Section 28-32-07 to approve extensions of time for administrative agencies to adopt rules, and its responsibility under NDCC Section 28-32-42 to receive notice of appeal of an administrative agency's rulemaking action.

The committee is authorized under NDCC Sections 54-06-32 and 54-06-33, to approve rules adopted by Human Resource Management Services authorizing service awards and employer-paid costs of training to employees in the classified service.

Committee members were Representatives Bill Devlin (Chairman), Randy Boehning, Joshua A. Boschee, Robert Frantsvog, Kim Koppelman, Scott Louser, Gail Mooney, Mike Schatz, Mary Schneider, Peter F. Silbernagel, Gary R. Sukut, Blair Thoreson, Nathan Toman, and Robin Weisz and Senators Kelly M. Armstrong, Kyle R. Davison, Jerry Klein, and Connie Triplett.

ADMINISTRATIVE AGENCY RULES REVIEW

Administrative agencies are those state agencies authorized to adopt rules under the Administrative Agencies Practice Act (NDCC Chapter 28-32). A rule is an agency's statement of general applicability that implements or prescribes law or policy or the organization, procedure, or practice requirements of the agency. Properly adopted rules have the force and effect of law. Each rule adopted by an administrative agency must be filed with the Legislative Council office for publication in the North Dakota Administrative Code (NDAC).

Under NDCC Section 54-35-02.6, it is the standing duty of the Administrative Rules Committee to review administrative rules adopted under NDCC Chapter 28-32. This continues the rules review process initiated in 1979.

For rules scheduled for review, each adopting agency is requested to address:

- Whether the rules resulted from statutory changes made by the Legislative Assembly.
- Whether the rules are related to any federal statute or regulation. If so, the agency is requested to indicate whether the rules are mandated by federal law or to explain any options the agency had in adopting the rules.
- A description of the rulemaking procedure followed in adopting the rules, e.g., the time and method of public notice and the extent of public hearings on the rules.
- Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to the rules. Each agency is asked to describe any such concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint and to summarize the comments of any person who offered comments at the public hearings on these rules.
- The approximate cost of giving public notice and holding hearings on the rules and the approximate cost (not including staff time) used in developing and adopting the rules.
- The subject matter of the rules and the reasons for adopting the rules.
- Whether a written request for a regulatory analysis was filed by the Governor or an agency, whether the rules are expected to have an impact on the regulated community in excess of \$50,000, and whether a regulatory analysis was issued. If a regulatory analysis was prepared, a copy is to be provided to the committee.

- Whether a regulatory analysis or small entity economic impact statement was prepared as required by NDCC Section 28-32-08.1. If a small entity impact assessment was prepared, a copy is to be provided to the committee.
- Whether the rules have a fiscal effect on state revenues and expenditures, including any effect on funds controlled by the agency. Copies of any fiscal note are to be provided to the committee.
- Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. If a constitutional takings assessment was prepared, a copy is to be provided to the committee.
- If the rules were adopted as emergency rules under NDCC Section 28-32-03, the agency is to provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support the declaration and a copy of the Governor's approval of the emergency status of the rules.

During committee review of the rules, agency testimony is required and any interested party may submit oral or written comments. If no representative of the agency appears before the committee to provide testimony, the rules are required by statute to be carried over for consideration and may be delayed in taking effect until a representative of the agency appears before the committee.

CURRENT RULEMAKING STATISTICS

The committee reviewed 2,108 rules sections and 2,938 pages of rules that were changed from January 2015 through October 2016. Both the number of sections reviewed and the number of pages of rules were substantially higher than the comparable amount from the previous biennial period. Table A at the end of this report shows the number of rules amended, created, superseded, repealed, reserved, or redesignated for each administrative agency that appeared before the committee.

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 committee. The following table shows the number of NDAC sections amended, repealed, created, superseded, reserved, or redesignated during designated time periods:

Time Period	Number of Sections
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
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
January 2015-October 2016	2,108

For committee review of rules at each meeting, the Legislative Council staff prepares an administrative rules supplement containing all rules changes submitted for publication since the previous committee meeting. The supplement is prepared in a style similar to bill drafts, with changes 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 administrative rules supplements during designated time periods:

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
January 2015-October 2016	2,938

Rule Review Schedule

Since September 2005, NDAC supplements have been published on a calendar quarter basis. The current deadlines and effective dates are as follows:

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

COMMITTEE ACTION ON RULES REVIEWED

Repealing Obsolete Rules

Under NDCC Section 28-32-18.1, an agency may amend or repeal a rule without complying with the normal notice and hearing requirements relating to adoption of administrative rules if the agency initiates the request to the committee, the agency provides notice to the regulated community of the time and place the committee will consider the request, and the agency and the Administrative Rules Committee agree the rule amendment or repeal eliminates a provision that is obsolete or no longer in compliance with law and that no detriment would result to the substantive rights of the regulated community.

Voiding or Carrying Over Rules

Under NDCC Section 28-32-18, the committee may void all or part of a rule if that rule is initially considered by the committee no later than the 15th day of the month before the date of the NDAC supplement in which the rule change appears. The committee may carry over consideration of voiding administrative rules for not more than one additional meeting. This allows the committee to act more deliberately in rules decisions and allows agencies additional time to provide information or to work with affected groups to develop mutually satisfactory rules. The committee may void all or part of a rule if the committee makes the specific finding that with regard to the rule there is:

- An absence of statutory authority;
- An emergency relating to public health, safety, or welfare;
- A failure to comply with express legislative intent or to substantially meet the procedural requirements of NDCC Chapter 28-32 for adoption of the rule;
- A conflict with state law;
- Arbitrariness and capriciousness; or
- A failure to make a written record of an agency's consideration of written and oral submissions respecting the rule under NDCC Section 28-32-11.

Within 3 business days after the committee finds a rule void, the Legislative Council office is required to provide written notice to the adopting agency and the Chairman of the Legislative Management. Within 14 days after receipt of the notice, the agency may file a petition with the Chairman of the Legislative Management for Legislative Management review of the decision of the committee. If the adopting agency does not file a petition, the rule becomes void on the 15th day after the notice to the adopting agency. If within 60 days after receipt of a petition from the agency, the Legislative Management has not disapproved the finding of the committee, the rule is void.

Obsolete Rules Repealed by Committee

The committee approved a request by the Public Employees Retirement System for the repeal of administrative rules regarding the retiree health insurance credit, which were superseded by 2013 legislation.

The committee approved a request from the Secretary of State for the repeal of rules governing a computerized central indexing system that was replaced by the implementation of an updated electronic filing system.

The committee approved two requests from the State Department of Health for the repeal of obsolete administrative rules. The first request related to loan repayment programs rules for various medical professionals, which were superseded by 2015 legislation that established the medical personnel loans repayment program and the physician loan repayment program. The second request related to hazardous waste rules that were obsolete due to a clarification of federal regulations.

Rules Carried Over or Amended by Committee Approval

The committee carried over consideration of a rule of the State Department of Health relating to the release to the department of the name of a resident in basic care who elects to receive hospice care. The committee agreed with the department on an amendment that only would require the basic care facility to notify the department that a resident has elected to receive hospice care.

The committee carried over for consideration a rule of the Real Estate Commission relating to abandoned trust account money. The committee agreed with the Real Estate Commission on an amendment to clarify that earnest money deposits are considered payable or distributable as of the closing date of the purchase agreement.

The committee agreed with the Aeronautics Commission that for consistency throughout the commission's rules, the word "airplane" should be changed to "aircraft" in one section of the commission's adopted rules.

The committee agreed with the Department of Human Services that changing the term "clinical psychologist" to "psychologist" in several rules more accurately identifies the professional authorized to supervise an individual person-centered treatment plan.

The committee carried over consideration of a rule of the State Department of Health because of concerns that requiring a posting of information about departmental projects only on the department's website limited the public's access to information. After receiving further information and clarification from the department, the committee took no further action on the rule.

At its final meeting before preparation of this report to the Legislative Management, the committee approved several motions to carry over consideration of rules of the Industrial Commission. The committee requested the Industrial Commission to provide more information on whether the Industrial Commission has the authority to apply a bond requirement retroactively to existing crude oil and produced water gathering pipelines, and to regulate underground gas gathering pipelines, to require berms on existing well sites, and whether adopting any rules with respect to leakage detection was contrary to legislative intent. The committee will reconsider the rules at its meeting in December 2016.

Rules Voided by Committee

The committee voided a rule adopted by the Education Standards and Practices Board relating to educational requirements for special education majors. The committee expressed a concern the rule may require special education majors to have a second major. The committee agreed with the Education Standards and Practices Board that to clarify the rule for initial licensure of in-state graduates, the rule should be voided.

The committee voided specific portions of rules adopted by the State Board of Dental Examiners relating to the authority of registered dental assistants to perform dental procedures and the level of supervision for registered dental assistants in a public health setting versus in a private dental setting. In voiding the rules, the committee cited the failure of the board to meet the procedural requirements of NDCC Chapter 28-32 and that the adoption of the rules was arbitrary and capricious.

TABLE A

**Statistical Summary of Rulemaking
January 2015 Through October 2016 - Supplements 355 Through 362**

Title	Supplement No.	Agency	Amend	Create	Supersede	Repeal	Special	Reserved	Total
6	360 - APR 16	North Dakota Aeronautics Commission	15	13	0	54	0	0	82
7	362 - OCT 16	Agriculture Commissioner	7	0	0	0	0	0	7
10	355 - JAN 15	Attorney General	11	12	0	0	0	0	23
	359 - JAN 16		55	12	0	1	0	0	68
	362 - OCT 16		6	0	0	3	0	0	9
11	360 - APR 16	Board of Examiners on Audiology and Speech-Language Pathology	9	0	0	0	0	0	9
17	359 - JAN 16	State Board of Chiropractic Examiners	11	1	0	0	0	0	12
18.5	362 - OCT 16	Credit Review Board	0	0	0	33	0	0	33
18.6	362 - OCT 16	North Dakota Mediation Service and Credit Review Board	0	6	0	0	0	0	6
20	356 - APR 15	State Board of Dental Examiners	18	5	0	0	0	0	23
25	355 - JAN 15	State Board of Funeral Service	17	1	0	1	0	0	19
30	359 - JAN 16	Game and Fish Department	2	3	0	0	0	0	5
	360 - APR 16		1	0	0	0	0	0	1
33	355 - JAN 15	State Department of Health	0	1	0	0	0	0	1
	357 - JUL 15		8	11	0	1	0	0	20
	358 - OCT 15		1	0	0	0	0	0	1
	359 - JAN 16		297	226	0	229	0	0	752
	360 - APR 16		12	0	0	2	0	0	14
	361 - JUL 16		14	0	0	0	0	0	14
	362 - OCT 16		15	0	0	0	0	0	15
37	357 - JUL 15	Department of Transportation	1	0	0	0	0	0	1
	360 - APR 16		0	18	0	0	0	0	18
38	359 - JAN 16	Highway Patrol	6	0	0	0	0	0	6
43	362 - OCT 16	Industrial Commission	28	5	0	0	0	0	33
45	356 - APR 15	Insurance Commissioner	0	5	0	0	0	0	5
	358 - OCT 15		9	1	0	0	0	0	10
	359 - JAN 16		41	6	0	0	0	0	47
48	360 - APR 16	State Board of Animal Health	0	0	0	113	0	0	113
48.1	360 - APR 16	State Board of Animal Health	0	90	0	0	0	0	90
54	362 - OCT 16	Board of Nursing	2	0	0	0	0	0	2
61	360 - APR 16	State Board of Pharmacy	12	5	0	0	0	0	17
61.5	359 - JAN 16	North Dakota Board of Physical Therapy	17	0	0	0	0	0	17
62	357 - JUL 15	State Board of Plumbing	2	0	0	0	0	0	2
63	360 - APR 16	Board of Podiatric Medicine	5	0	0	0	0	0	5
66	360 - APR 16	State Board of Psychologist Examiners	21	0	0	0	0	0	21
67	359 - JAN 16	Superintendent of Public Instruction	17	0	0	1	0	0	18
	362 - OCT 16		0	1	0	32	0	0	33
67.1	355 - JAN 15	Education Standards and Practices Board	1	0	0	0	0	0	1
69	356 - APR 15	Public Service Commission	19	1	0	0	0	0	20
	362 - OCT 16		1	0	0	0	0	0	1
69.5	355 - JAN 15	North Dakota Racing Commission	3	0	0	0	0	0	3
	360 - APR 16		20	11	0	0	0	0	31
70	358 - OCT 15	State Real Estate Commission	6	0	0	0	0	0	6
	359 - JAN 16		1	0	0	0	0	0	1
71	360 - APR 16	Retirement Board	27	2	0	0	0	0	29
72	360 - APR 16	Secretary of State	7	0	0	0	0	0	7
75	357 - JUL 15	Department of Human Services	7	0	0	0	0	0	7
	359 - JAN 16		0	3	0	0	0	0	3
	360 - APR 16		114	2	0	2	0	0	118
	360 - APR 16		13	18	0	0	0	0	31
	362 - OCT 16		20	1	0	0	0	0	21
81	360 - APR 16	Tax Commissioner	31	8	0	22	0	0	61
82	360 - APR 16	Board of Trustees of the Teachers' Fund for Retirement	6	1	0	0	0	0	7
87	360 - APR 16	State Board of Veterinary Medical Examiners	1	0	0	0	0	0	1
89	355 - JAN 15	State Water Commission	68	9	0	12	0	0	89
92	360 - APR 16	Workforce Safety and Insurance	14	0	0	0	0	0	14
99	360 - APR 16	State Gaming Commission	87	10	0	0	0	0	97
101	355 - JAN 15	Real Estate Appraiser Qualifications and Ethics Board	8	0	0	0	0	0	8
Total			1,114	488	0	506	0	0	2,108