

**ADMINISTRATIVE RULES REVIEW - BACKGROUND MEMORANDUM****NORTH DAKOTA ADMINISTRATIVE CODE**

The North Dakota Administrative Code, published by the Legislative Council office 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 121 titles. Ninety-four titles contain rules of administrative agencies. The Dairy Promotion Commission and the Parks and Recreation Department 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.

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 office for publication. Since September 2005, Administrative Code supplements have been published on a calendar quarterly basis as follows:

Filing Date	Committee Meeting Deadline	Effective Date
August 16-November 15	December 15	January 1
November 16-February 15	March 15	April 1
February 16-May 15	June 15	July 1
May 16-August 15	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 The following table shows the number of sections of the North Dakota Administrative Code amended, repealed, created, superseded, reserved, or redesignated during each identified time period: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
December 2000-November 2002	1,417
December 2002-November 2004	2,306
December 2004-October 2006	1,353

For committee review of rules, the Legislative Council staff prepares an Administrative Rules Committee (ARC) 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 Administrative Rules 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

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 currently 87 of these free subscriptions. The Legislative Council is required by Section 28-32-20 to establish prices for paid subscriptions to the Administrative Code. Effective July 1, 2005, prices for paid subscriptions are \$460 for the initial code set and \$260 per year for supplements. These prices were increased in 2005 by \$20 and \$10, respectively, which was the first price increase since 1999. Since 1994 the number of paid subscribers to the North Dakota Administrative Code has declined from 104 to 25. The Legislative Council has tried to avoid increasing prices which might further reduce the number of paid subscribers.

The numbering for the North Dakota Administrative Code is similar to the numbering used for the North

July 2001

## **GUIDELINES UNDER NORTH DAKOTA CENTURY CODE SECTION 28-32-10**

North Dakota Century Code (NDCC) Section 28-32-10(4) directs the Legislative Council to establish standard procedures for all agencies to follow in complying with the provisions of NDCC Section 28-32-10 and a procedure whereby any person may request and receive mailed copies of all filings made by agencies pursuant to Section 28-32-10. A copy of Section 28-32-10 is attached as an appendix. These guidelines are adopted under that directive.

### **CONTENTS OF NOTICE**

The notices provided by the agency with regard to proposed rulemaking must contain the information required by NDCC Section 28-32-10(1).

In 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.

The address for submission of written data, views, or arguments should include the name of the person responsible for receiving this information. The notice should state the beginning and ending dates of the period during which written comments on the proposed rules will be accepted.

### **MAILING OF NOTICE**

Each agency shall maintain a mailing list of persons who will be provided notice of the agency's rulemaking activity. A person desiring inclusion on the agency's mailing list must be included, but the agency may periodically update the list by contacting those on the list to determine whether they remain interested in being included. The mailing list may be subdivided according to subject matter if it is likely that persons on the list would be interested in receiving notice only in regard to rules within a discrete area of the agency's jurisdiction. An agency may charge the actual cost of providing copies of the notice and regulatory analysis and may require that the cost be paid before delivery of the copies.

### **COMMENTS TO PROPOSED RULEMAKING**

Submissions received during the comment period for rulemaking must be made part of the written rulemaking record of the agency.

### **NOTICE OF PROPOSED RULEMAKING SERVICE**

The Legislative Council will mail copies of all notices of proposed rulemaking filed by agencies pursuant to NDCC Section 28-32-10(1)(a) to a subscriber to the notice of proposed rulemaking service. Any person may subscribe to this service upon payment of an annual subscription fee of \$50.

ATTACH:1

**28-32-10. Notice of rulemaking - Hearing date.**

1. An agency shall prepare a full notice and an abbreviated notice of rulemaking.
  - a. The agency's full notice of the proposed adoption, amendment, or repeal of a rule must include a short, specific explanation of the proposed rule and the purpose of the proposed rule, a determination of whether the proposed rulemaking is expected to have an impact on the regulated community in excess of fifty thousand dollars, identify at least one location where interested persons 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 telephone number at which a copy of the rules and regulatory analysis may be requested, and, in the case of a substantive rule, provide the time and place set for each oral hearing. The agency's full notice must be filed with the office of the legislative council, and the agency shall request publication of an abbreviated newspaper publication notice at least once in each official county newspaper published in this state. The notice filed with the office of the legislative council must be accompanied by a copy of the proposed rules.
  - b. 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 a depth of from three inches [7.62 centimeters] to four inches [10.16 centimeters] with a headline describing the general topic of the proposed rules. The notice must also include the telephone number or address 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.
2. The agency shall mail or deliver a copy of the agency's full notice to each member of the legislative assembly whose name appeared as a sponsor or cosponsor of legislation enacted during the most recent session of the legislative assembly which is being implemented by the proposed rule and to each person who has made a timely request to the agency for a copy of the notice. The agency may mail or otherwise provide a copy of the agency's full notice to any person who is likely to be an interested person. The agency shall mail or deliver a copy of the rules to each member of the legislative assembly whose name appeared as a sponsor or cosponsor of legislation enacted during the most recent session of the legislative assembly which is being implemented by the proposed rule and to any person requesting a copy. The agency may charge persons who are not members of the legislative assembly for the actual cost of providing copies of the proposed rule.
3. In addition to the other notice requirements of this subsection, the superintendent of public instruction shall provide notice of any proposed rulemaking by the superintendent of public instruction to each association with statewide membership whose primary focus is elementary and secondary education issues which has requested to receive notice from the superintendent under this subsection and to the superintendent of each public school district in this state, or the president of the school board for school districts that have no superintendent, at least thirty days before the date of the hearing described in the notice. Notice provided by the superintendent of public instruction under this section must be by first-class mail. However, upon request of a group or person entitled to notice under this section, the superintendent of public instruction shall provide the group or person notice by electronic mail.
4. The legislative council shall establish standard procedures for all agencies to follow in complying with the provisions of this section and a procedure to allow any person to request and receive mailed copies of all filings made by agencies pursuant to this section. The legislative council may charge an annual fee as established by the administrative rules committee for providing copies of the filings.
5. At least twenty days must elapse between the date of the publication of the notice and the date of the hearing. Within fifteen business days after receipt of a notice under this section, a copy of the notice must be mailed by the legislative council to any person who has paid the annual fee established under subsection 4.

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--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**

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 Administrative Rules Committee.

North Dakota Century Code Section 54-35-02.5 directs the Legislative Council 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 Legislative Council interim committees. However, because the committee is established by statute, it is not discharged upon making its report to the Legislative Council 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 that 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.

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 in the Legislative Council office. The objection must contain a concise statement of the committee's reasons for its action. The Legislative Council office is to transmit a copy of the objection to the agency adopting the rule in question. The Legislative Council office is also to publish the objection in the next issue of the North Dakota Administrative Code supplement. Within 14 days after the filing of an objection, the adopting agency is to respond in writing to the committee. After

receipt of the response, the committee may withdraw or modify its objection. After the filing of a committee objection, 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.

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 that 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 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 appears. This is part of a significant change in rules review made by enactment of 2005 House Bill No. 1421. 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 a rule. 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 office of the Legislative Council is to provide written notice of the finding to the adopting agency and to the chairman of the Legislative Council. Within 14 days after receipt of the notice, the adopting agency may file a petition with the chairman of the Legislative Council for review by the Legislative Council 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 office of the Legislative Council. If within 60 days after receipt of the petition from the adopting agency the Legislative Council has not disapproved the finding of the Administrative Rules 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 that 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 the agency is not required to commence a new rulemaking proceeding. If a rule change is agreed to by the Administrative Rules Committee and the agency, it must be reconsidered, if requested by the agency or any interested party, at a subsequent Administrative Rules 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 that 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 that 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 that 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 Council to reverse the decision of the committee also applies in the case of a suspension of a rule.

The Legislative Council 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**

North Dakota Century Code Section 28-32-01(2) (with emphasis added to show 2007 legislative changes) 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, ~~and~~ 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.

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.

North Dakota Century Code Section 28-32-07 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. If an agency needs additional time for the rule change, a request for additional time must be made to the Legislative Council. The Legislative Council 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.

Subsections 1 and 2 of NDCC Section 28-32-10 (with emphasis added to show 2007 legislative changes) provide:

1. An agency shall prepare a full notice and an abbreviated notice of rulemaking.
  - a. The agency's full notice of the proposed adoption, amendment, or repeal of a rule must include a short, specific explanation of the proposed rule and the purpose of the proposed rule, a determination of whether the proposed rulemaking is expected to have an impact on the regulated community in excess of fifty thousand dollars, identify at least one location where interested persons 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 telephone number at which a copy of the rules and regulatory analysis may be requested, and, in the case of a substantive rule, provide the time and place set for each oral hearing. The agency's full notice must be filed with the office of the legislative council, and the agency shall request publication of an abbreviated newspaper publication notice at least once in each official county newspaper published in this state. The notice filed with the office of the legislative council must be accompanied by a copy of the proposed rules.
  - b. 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 a depth of from three inches [7.62 centimeters] to four inches [10.16 centimeters] with a headline describing the general topic of the proposed rules. The notice must also include the telephone number or address 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.

2. The agency shall mail or deliver a copy of the agency's full notice to each member of the legislative assembly whose name appeared as a sponsor or cosponsor of legislation enacted during the most recent session of the legislative assembly which is being implemented by the proposed rule and to each person who has made a timely request to the agency for a copy of the notice. The agency may mail or otherwise provide a copy of the agency's full notice to any person who is likely to be an interested person. The agency shall mail or deliver a copy of the rules to each member of the legislative assembly whose name appeared as a sponsor or cosponsor of legislation enacted during the most recent session of the legislative assembly which is being implemented by the proposed rule and to any person requesting a copy. The agency may charge persons who are not members of the legislative assembly fees for the actual cost of providing copies of the proposed rule as allowed under section 44-04-18.

North Dakota Century Code Sections 28-32-11 and 28-32-12 provide:

**28-32-11. Conduct of hearings - Notice of administrative rules committee consideration - Consideration and written record of comments.** The agency shall adopt a procedure whereby all interested persons are afforded reasonable opportunity to submit data, views, or arguments, orally or in writing, concerning the proposed rule, including data respecting the impact of the proposed rule. The agency shall adopt 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. In case of substantive rules, the agency shall conduct an oral hearing. The agency shall consider fully all written and oral submissions respecting a proposed rule prior to the adoption, amendment, or repeal of any rule not of an emergency nature. The agency shall make a written record of its

consideration of all written and oral submissions contained in the rulemaking record respecting a proposed rule.

**28-32-12. Comment period.** The agency shall allow, after the conclusion of any rulemaking hearing, a comment period of at least ten days during which data, views, or arguments concerning the proposed rulemaking will be received by the agency and made a part of the rulemaking record to be considered by the agency.

In addition to other notice requirements, the Superintendent of Public Instruction is required by NDCC Section 28-32-10 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 under this provision must be by first-class mail or by electronic mail if requested by the recipient.

North Dakota Century Code Section 28-32-10 requires the Legislative Council to establish guidelines for agencies to comply with notice requirements of Chapter 28-32. Attached as an appendix is a copy of the guidelines updated by the committee in July 2001.

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.

North Dakota Century Code Section 28-32-14 requires review by the Attorney General of all administrative rules and provides that 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.

Under NDCC Section 28-32-10, the Legislative Council is to establish a procedure to allow any interested person to receive mailed 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 mailed to subscribers within 15 business days after receipt of the notice. The Administrative Rules Committee has set the annual charge for providing copies of the filings of notice of proposed rulemaking at \$50. As of June 1, 1997, there were 31 paid subscribers to this service. As of July 1, 2005, there were 20 paid subscribers to this service.

Some of the reduction in paid subscriptions may be attributable to the fact that notices have been made available on the legislative branch web page since 1998.

North Dakota Century Code Section 28-32-08 requires agency preparation of a regulatory analysis of a proposed rule 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 proposed rule is expected to have an impact on the regulated community in excess of \$50,000. The regulatory analysis is required to contain:

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;
2. A description of the probable impact, including economic impact, of the proposed rule;
3. The probable costs to the agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues; and
4. A description of any alternative methods for 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.

North Dakota Century Code Section 28-32-08.1 provides as follows:

**Rules affecting small entities -  
Analysis - Economic impact statements -  
Judicial review.**

1. As used in this section:
  - a. "Small business" means a business entity, including its affiliates, which:
    - (1) Is independently owned and operated; and
    - (2) Employs fewer than twenty-five full-time employees or has gross annual sales of less than two million five hundred thousand dollars;
  - b. "Small entity" includes small business, small organization, and small political subdivision;
  - c. "Small organization" means any not-for-profit enterprise that is independently owned and operated and is not dominant in its field; and
  - d. "Small political subdivision" means a political subdivision with a population of less than five thousand.
2. Before adoption of any proposed rule, the adopting agency shall prepare a regulatory analysis in which, consistent with public health, safety,

and welfare, the agency considers utilizing regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small entities. The agency shall consider each of the following methods of reducing impact of the proposed rule on small entities:

- a. Establishment of less stringent compliance or reporting requirements for small entities;
  - b. Establishment of less stringent schedules or deadlines for compliance or reporting requirements for small entities;
  - c. Consolidation or simplification of compliance or reporting requirements for small entities;
  - d. Establishment of performance standards for small entities to replace design or operational standards required in the proposed rule; and
  - e. Exemption of small entities from all or any part of the requirements contained in the proposed rule.
3. Before adoption of any proposed rule that may have an adverse impact on small entities, the adopting agency shall prepare an economic impact statement that includes consideration of:
    - a. The small entities subject to the proposed rule;
    - b. The administrative and other costs required for compliance with the proposed rule;
    - c. The probable cost and benefit to private persons and consumers who are affected by the proposed rule;
    - d. The probable effect of the proposed rule on state revenues; and
    - e. Any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule.
  4. For any rule subject to this section, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of this section. A small entity seeking judicial review under this section must file a petition for judicial review within one year from the date of final agency action.
  5. This section does not apply to any agency that is an occupational or professional licensing authority, nor does this section apply to the



following agencies or divisions of agencies:

- a. Council on the arts.
  - b. Beef commission.
  - c. Dairy promotion commission.
  - d. Dry bean council.
  - e. Highway patrolmen's retirement board.
  - f. Indian affairs commission.
  - g. Board for Indian scholarships.
  - h. State personnel board.
  - i. Potato council.
  - j. Board of public school education.
  - k. Real estate trust account committee.
  - l. Seed commission.
  - m. Soil conservation committee.
  - n. Oilseed council.
  - o. Wheat commission.
  - p. State seed arbitration board.
  - q. North Dakota lottery.
6. This section does not apply to rules mandated by federal law.
  7. The adopting agency shall provide the administrative rules committee copies of any regulatory analysis or economic impact statement, or both, prepared under this section when the committee is considering the associated rules.

North Dakota Century Code Section 28-32-09 requires an agency to prepare a written assessment of the constitutional takings implications of a proposed rule that may limit the use of real property. The assessment must:

1. Assess the likelihood that the proposed rule may result in a taking or regulatory taking.
2. Clearly and specifically identify the purpose of the proposed rule.
3. Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available that would achieve the agency's goals while reducing the impact on private property owners.
4. Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.
5. Identify the source of payment within the agency's budget for any compensation that may be ordered.
6. Certify that the benefits of the proposed rule exceed the estimated compensation costs.

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.

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 more strict 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 that 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.

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 that an agency is required to repeal or amend any existing rule adopted from federal guidelines which is not relevant to state regulatory programs.

North Dakota Century Code Section 28-32-06 provides that 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 office of the Legislative Council because the authority for adoption of the rules is repealed or transferred to another agency. The fact that 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.

## 2007 LEGISLATION

Senate Bill No. 2265 changed provisions allowing agencies to charge for copies of documents under NDCC Sections 28-32-08, 28-32-10, and 28-32-19 to eliminate language allowing a charge of actual costs of providing copies and substitute a reference to the provision of law under Section 44-04-18 governing charges for copies of public records, allowing a charge of 25 cents per paper copy.

House Bill No. 1128 added the North Dakota Pipeline Authority to the entities under the Industrial Commission which are exempt from the Administrative Agencies Practice Act.

No other 2007 legislation was enacted affecting the rulemaking provisions of the Administrative Agencies Practice Act. However, two bills considered in 2007 resulted in study directives assigned by the Legislative Council to the Administrative Rules Committee. House Bill No. 1479 requires study of agency exemptions from the Administrative Agencies Practice Act. Senate Bill No. 2060 requires study of laws providing criminal penalties for violation of laws and administrative rules regulating occupations and professions. A separate background for each of these studies has been prepared for committee review.

## 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 2005-06 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 a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. Please provide a copy if one was prepared.
10. 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