731042

4/copies

STATE OF MINNESOTA

SENATE COUNSEL

JOHN A. ELLEFSON
PETER S. WATTSON
LARRY R. FREDRICKSON
THOMAS J. TRIPLETT
THOMAS S. DEANS
ANNE C. HEINS
JAMES E. DINERSTEIN
GARY R. JOHNSON
PATRICIA R. JOHNSON
A. ANN C. WILLIAMS
JAY C. BENANAV
JAMES M. RUSH

480 STATE OFFICE BUILDING
ST. PAUL 55155
(612) 296-2511

February 3, 1977

TO: Members of the Senate Governmenatl Operations Committee

FROM: Thomas J. Triplett, Senate Counsel

RE: Administrative Procedure Act

Attached is an article I prepared relating to Minnesota's Administrative Procedure Act. This article was written for lawyers and therefore may seem overly complex in some areas. However, the first two sections of the memo should give you a feel for the impact of the 1975 amendments to the APA.

The Tuesday, February 8, Governmental Operations Committee meeting will consider the APA.

TJT:ld

Attachment

Rule-Making by Minnesota State Agencies: Practice and Procedure

by Thomas J. Triplett*

Introduction

Rule-making by Minnesota state agencies has mushroomed in recent years. Sixty-three major state departments, divisions and boards have promulgated rules which are currently in force, and at least a dozen others have explicit statutory authority to do so. These rules comprise over 6,000 pages in the Manual of State Agency Rules and cover a wide spectrum of topics of interest to Minnesota citizens and business associations. This proliferation of existing rules, and recent amendments to rule-making procedures guaranteeing increased rule-making in the future, means that a practitioner must not only be familiar with a particular agency's rule-making powers and the exercise of those powers, but he should also know the procedures by which these rules are promulgated.

This chapter will focus on the law under which the vast majority of these rules are promulgated - Minnesota's Administrative Procedure Act (APA).[1] In addition to providing some background information relating to the APA, this chapter will set forth the schedule which state agencies must satisfy in order to promulgate a rule.[2] Hopefully, this schedule will assist practitioners in knowing when they may participate in the process or upon what grounds they may challenge the validity of a rule. The chapter will conclude with a brief discussion of post-promulgation opportunities to challenge a rule or to seek its amendment.

I. Applicability of the APA

A. Background.

A comprehensive, formal procedure for the promulgation of rules by Minnesota state agencies was first enacted in Laws 1957, Chapter 806. This

initial effort was amended several times with the most significant revision being Laws 1975, Chapter 380. The purpose of the 1975 amendments was threefold: to clarify the type of agency statements included within the term "rule," to improve pre-hearing notice and the opportunity of interested parties to participate in the rule-making process, and to insure that the agency established the necessity for and reasonableness of the rule in a rational, objective manner.[3]

B. Agencies Affected by the APA.

Section 15.0411, Subdivision 2, defines "agency" as including "any state officer, board, commission, bureau, division, department, or tribunal, other than a court, having a statewide jurisdiction and authorized by law to make rules or to adjudicate contested cases." Exceptions from this broad definition include legislative and judicial branch agencies, the state Corrections Board and Board of Pardons, the Departments of Employment Services and Military Affairs, the Bureau of Mediation Services, the Worker's Compensation Board of Appeals and the worker's compensation division of the Department of Labor and Industry. Section 15.0413, Subdivision 3 specifies that even though "rule-making" by these excluded agencies need not follow APA procedures, the rules must still be filed with the Secretary of State and published in the State Register before becoming effective.

In addition to the exclusion of entire agencies from the APA, other agencies have parts of their rule-making activities excluded. These are identified in Section 15.0411, Subdivision 3, and include rules concerning only the internal management of a state agency, rules of the Commissioner of Corrections relating to institutions and inmates under his control, rules of the Game and Fish Division of the Department of Natural Resources, rules concerning weight limitations on state highways, and opinions of the Attorney General.[4]

Aside from the above exceptions, all executive branch agencies come within the APA. Generally, this includes those agencies having rule-making power and denominated "department" or "board." Agencies denominated "council," "committee" or "task force" will not have rule-making authority.[5]

C. Types of Agency Activities Affected.

Not all activities of the covered agencies are affected by the APA. As pointed out above, statements relating exclusively to internal management need not be promulgated as APA rules. Similarly, those agencies having emergency rule-making powers are exempt from most of the APA in respect to those rules.[6] Finally, agency statements or activities which are defined as "contested cases" are not to be promulgated pursuant to the rule-making portions of the APA.[7]

Before the 1975 amendments, "rule" was defined with some exceptions as "every regulation . . . adopted by an agency . . . to implement or make specific the law enforced or administered by it . . ."[8] Since the term "regulation" was never defined, the definition was essentially meaningless. One result of this definition was the tendency of some state agencies to avoid APA procedures in rule-making. Agencies would publish "guidelines," "standards," "policies" or "official procedures" without giving notice or holding public hearings in the manner required by the APA.[9] Although not promulgated pursuant to the APA, agencies would often treat these "informal" rules as having the full force and effect of law.

To remedy this tendency toward informal rule-making the 1975 amendments redefined a rule as being any "agency statement of general applicability and

future effect," subject to the exclusions identified above.[10] Although this redefinition was more objective and therefore a significant improvement over prior law, it did not completely resolve two other definitional problems. First, the new definition did not assist in differentiating between rules and contested cases.[11] Second, it did not substantially reduce confusion over the extent of rule-making authority vested in each agency.

D. Authority to Promulgate Rules.

The APA contains no provisions conferring rule-making power in substantive areas of the law.[12] In fact, two sections of the APA strongly imply that an agency must have independent statutory authority to promulgate rules before APA provisions apply. "Agency" for purposes of the APA is defined as including only those agencies "authorized by law to make rules or to adjudicate contested cases."[13] The hearing examiner, in his report on a rule-making proceeding, must take "notice of the degree to which the agency has (i) documented its statutory authority to take the proposed action . . . ."[14]

The 21 state departments appear to have general rule-making authority. Minnesota Statutes, Section 15.06, empowers each department head "to prescribe rules and regulations, not inconsistent with law, for the conduct of his department or agency and other matters within the scope of the functions thereof . . . ." Only six of the 21 state departments have express rule-making authority in their enabling legislation covering all matters within their jurisdiction.[15] Thus, it is probable that at least some of the remaining departments have relied on Section 15.06 as a basic grant of rule-making authority.

A possible source of general rule-making authority for non-department agencies is the theory that an agency which has discretionary authority must also have the implicit power to promulgate rules relating to the exercise of that authority. This theory is in part grounded on procedural due process considerations and in part on the constitutional requirement that the Governor - and through him his executive branch subordinates - "take care that the laws be faithfully executed."[16] In order to fulfill this duty in respect to laws that are not precise on their face (but which are not unconstitutionally vague), a department head may argue that he has authority, if not the mandate, to promulgate procedural or clarifying rules. As one commentator has suggested:

> Any officer who has discretionary power necessarily also has the power to state publicly the manner in which he will exercise it, and any such public statement can be adopted through a rule-making procedure, whether or not the legislative body has separately conferred a rulemaking power on the officer.[17]

E. Summary

Aside from the exceptions identified in Section 15.0411 and occasional enabling legislation for state agencies, all state departments and boards having rule-making authority are bound by the APA. Requirements of the APA must be followed by an affected agency in respect to all of its statements which have "general applicability and future effect." The APA contains language suggesting that the APA itself is not to be deemed rule-making authority on matters of substantive law and that agencies need explicit statutory authority to promulgate statements having general applicability and future effect. Although most state departments and boards have some express rule-making authority in their enabling legislation, it is obvious that many rules have been promulgated without it. Justification for these latter

rules may include: Section 15.06 in respect to state departments, implied rule-making authority in respect to agencies having discretionary authority, and the constitutional duty to fairly enforce the laws. Whether these or any other grounds are adequate rule-making authority is a justiciable issue in a court challenge to a rule under Section 15.0417.

II. Rule Promulgation Schedule

The schedule for the promulgation of a rule is derived from four sources: Minnesota Statutes, Sections 15.0412, 15.0413, 15.051 and 15.052; Rules of the Chief Hearing Examiner, HE 102 to 108;[18] Rules of the Commissioner of Administration relating to the State Register, RGSTR 65 and 96 to 99;[19] and Rules of the Attorney General, AttyGen 302 to 306.[20] The following schedule attempts to consolidate the requirements of these sources into one usable format. The schedule will work backward from the final effective date of a rule. Except where noted in an accompanying footnote, the time interval specified in the schedule is a minimum period.

A. Basic Schedule.

1. 200 days before the effective date. The rule-making agency shall have drafted the proposed rule, completed all of its internal review procedures,[21] and submitted to the Chief Hearing Examiner copies of the following documents: the proposed rule, a proposed Order for and Notice of Hearing, the agency's estimated number of persons attending the hearing, and the agency's estimate of the length of the hearing.[22]

2. 183 days. The Chief Hearing Examiner shall have reviewed and approved, or ordered modifications in, the submitted documents;

and he shall have designated a hearing examiner, date and location for the hearing.[23]

3. 181 days. Copies of the proposed rule and Notice of Hearing, as approved by the Chief Hearing Examiner, shall have been delivered to the Office of State Register.[24] If the proposed rule is to contain illustrations, tabular materials or forms, copies of these items must have been submitted to the Office of State Register prior to this date.[25]

4. 174 days. The agency shall have requested from the Secretary of State the list of persons interested in rule-making in the relevant subject area.[26]

5. 167 days. The agency shall have mailed a copy of the Notice of Hearing to all persons on the Secretary of State's list and to any other persons who requested the agency to inform them of rule-making. The Notice of Hearing and the proposed rule shall have been published in the State Register.[27]

6. 162 days. The agency shall have filed with the Chief Hearing Examiner copies of the following documents: Order for and Notice of Hearing, affidavits of receipt of the Secretary of State's list and of mailing to persons on that list, Statements of Need for the rule and Evidence to be presented at the hearing, the names of agency personnel who will represent the agency at the hearing or testify for it at the hearing, rule petitions submitted to the agency pursuant to Section 15.0415, and materials received by the agency pursuant to a request by the agency for information and opinions as permitted by Section 15.0412, Subdivision 6.[28]

7. 130 days. The hearing examiner and the agency shall have completed the hearing on the proposed rule. Additional written materials may be submitted for 20 days following the close of the hearing.[29]

8. 110 days. The hearing record shall have been closed by the hearing examiner, a transcript of the hearing shall be prepared, and the examiner shall commence to write his report. The report shall state the examiner's findings of fact and his conclusions and recommendations, and shall take notice of the degree to which the agency has documented its statutory authority to promulgate the rule, fulfilled substantive and procedural requirements, and demonstrated the need for and reasonableness of the rule.[30]

9. 80 days. The hearing examiner shall have completed his report and delivered it to the agency for agency review. Interested persons will have ten days from the agency's receipt of the report to file additional written comments or materials with the agency.[31]

10. 70 days. The agency shall have adopted the rule as proposed, adopted an amended rule which does not differ substantially from the proposed rule,[32] or failed to adopt a rule. If the rule was adopted as proposed or as amended, the full record of the hearing, including the agency's findings of facts, shall have been submitted to the Chief Hearing Examiner for review as to whether the rule adopted was substantially different from the rule as proposed and whether the requirements of HE 102 to 108 were followed. In determining whether the adopted rule is substantially different, the Chief Hearing Examiner shall consider the interests of affected parties and whether the adopted rule

"goes to a new subject matter" or is "fundamentally different" than the proposed rule.

11. 58 days. The Chief Hearing Examiner shall have submitted his report to the agency. If he determined that the adopted rule was substantially different, or if the Hearing Examiner's rules were not followed, the Chief Hearing Examiner shall have instructed the agency to reconvene the rule hearing after proper notice or to withdraw the rule.[34] If the report from the Chief Hearing Examiner was favorable, the agency shall have filed with the Attorney General copies of the following documents: the rule as adopted and proposed, the Order for and Notice of Hearing, the Secretary of State's list and the affidavit of mailing, the Statement of Need, the Hearing Examiner's Report, the agency's Findings of Fact, the Order Adopting Rules, any petitions submitted pursuant to Section 15.0415, and the transcript of the hearing.[35] The Attorney General shall within 20 days approve the rule as to form and legality.[36] As to legality, the Attorney General shall review the rule in respect to rule-making authority, statutorily prescribed adoption procedures, statutory purposes, consistency with other pertinent law or judicial decision, and constitutionality and general reasonableness.[37]

12. 36 days. The Attorney General shall have reported to the agency his approval or disapproval.[38] If he approved, the Attorney General shall have filed the rule with the Secretary of State, and the agency shall have submitted it to the Office of State Register for publication.[39]

13. 20 days. The rule as adopted shall have been published in the State Register.[40]

14. 0 days. The rule is effective and shall have the force and effect

B. Variations from the Schedule.

At several points, the above schedule allows extra days for the completion of functions which may in fact be completed in less time. For example, review by the Attorney General may take less than the statutory maximum of twenty days; hearing examiners' reports on simple, uncontested proposed rules may be prepared in less than 30 days. On the other hand, particularly complex or controverted rule-making proceedings may add considerable time to those intervals for which there is no statutory maximum time period. It should be generally assumed that the schedule is a minimum schedule; delays will be inevitable, and perhaps desirable, in a complex promulgation scheme which anticipates participation by a number of interested parties and agencies.

Another time factor which may delay the promulgation of a rule is the pre-drafting comment procedure provided for in Section 15.0412, Subdivision 6. This subdivision was added by the 1975 amendments to encourage agencies to seek outside advice and comment from all possible sources prior to the initial drafting of proposed rules.[42] A common complaint of persons affected by agency rule-making is that it is very difficult to influence the content of a proposed rule once the agency has decided on a first draft. Although agencies often contacted major affected interests during the drafting process, other interests were invariably excluded, albeit unintentionally.

To remedy this deficiency, the new subdivision says that if an agency elects to seek outside information or opinions, it shall publish notice of this election in the State Register and shall

"afford all interested persons an opportunity to submit data or views on the subject of concern in writing or orally." Neither the statute nor relevant rules specify how long the agency must wait to receive these materials.[43] Any written materials received by the agency pursuant to the State Register notice will become part of the hearing record on the proposed rule.

C. Effect of the 1975 Amendments.

The 1975 amendments to the APA, and rules promulgated pursuant to the 1975 amendments, have doubled the minimum amount of time required to promulgate a rule. While the new procedures require 200 days, former practice required an average of 100 days to promulgate a set of non-complex rules requiring no more than one day's hearing.[44]

Only part of the lengthened promulgation period is directly attributable to statutory requirements. Rules of the Chief Hearing Examiner and the Office of State Register promulgated since the 1975 APA amendments, and internal procedures in those agencies and the Office of Secretary of State, have added 80 days to the basic statutory schedule. Examples of additional time requirements which were engrafted upon the statutory schedule are the 27 days for review and correction of documents by the Chief Hearing Examiner (see steps 2 and 11 in the schedule), and 17 days for the mailing and processing of documents between agencies and interested persons (see steps 2, 3, 4, 11 and 12 in the schedule).

Regardless of the source of the time requirements, the doubling of the time required to promulgate a rule has placed a substantial burden on state agencies. An occasional result of this time burden is that an agency has found

itself in the untenable position of being required by statute to promulgate rules relating to a new program before a certain date. That date, however, may be an unduly optimistic limitation, especially if the program is complex or controversial.[45]

D. Emergency Rule-making.

One method of avoiding time constraints is emergency rule-making. Section 15.0412, Subdivision 5, recognizes that some agencies may be compelled by court order or by federal law to promulgate rules in a manner not consistent with the APA time schedule. In addition, the Legislature will occasionally grant emergency rule-making authority when it wishes a new program to be implemented quickly or when it has recognized that frequent amendments to an existing rule will be necessary.[46]

Emergency rules need not be promulgated pursuant to the APA, but they must be published in the State Register "as soon as practicable." The rules shall not be effective for longer than 75 days and may be reissued or continued in effect for a period not to exceed an additional 75 days.[30]

III. Post-Promulgation Remedies

After a rule becomes effective several methods are provided in the APA for an interested person to seek amendment of the rule or to challenge its validity.

A. Petition the agency.

Under prior law, any interested person was permitted to petition the agency requesting "the adoption, suspension, amendment or repeal of any rule."[48] The 1975 amendments retained this privilege while tightening the process from both sides: a petition must now meet certain minimum standards, and the agency is

obligated to respond formally to the petitioner. More particularly, a petition must "be specific as to what action is requested and the need for the action,"[49] and it must be submitted in a form and manner as prescribed by the Attorney General.[50]

The agency is required by the 1975 amendments to respond in writing to the petition within 60 days after its receipt. The response must be "a specific and detailed reply in writing as to [the agency's] planned disposition of the request."[51] The statute is careful not to order the agency to conduct a rule-making proceeding in respect to any petition it may receive. However, the Legislature's tightening of the petition procedure in 1975 leaves the clear implication that an agency should give careful attention to all petitions it receives under this section.[52]

B. Legislative Commission to Review Administrative Rules.

Legislatures throughout the country have in recent years sought means to insure effective oversight over rule-making by executive branch agencies. Techniques to accomplish this include use of a "legislative veto" whereby the Legislature reserves to itself or to one of its committees the privilege of approving agency rules before they become effective. A second technique, and one adopted by the Minnesota Legislature in 1974, is the creation of a legislative review body empowered to suspend existing rules pending later review by the entire legislature.[53]

Minnesota's Legislative Commission to Review Administrative Rules is composed of five state senators and five representatives. The Commission acts on complaints submitted to it and may, by vote of at least six members, suspend a rule. If a rule is suspended, the Commission must "as soon as possible" introduce a bill to in effect "repeal" the rule. If the bill passes the rule is void

and the agency may not again promulgate it without specific legislative authority. If the bill fails, the rule becomes immediately effective, and the Commission may not again suspend it. The law also provides for the Commission to receive advice from the relevant standing committee of the Legislature before a suspension takes effect.[54]

Since its creation in 1974 the Commission has yet to vote to suspend a rule. If the Commission ever does attempt to suspend, however, its action may be constitutionally invalid for one of several reasons. First, the Legislature may not delegate legislative powers to one of its committees; legislative actions require the vote of at least a majority of each House.[55] Second, the Constitution specifically prohibits legislators from holding any other state office of a policy-making nature unless their decisions are subject to the supervisory approval of another public official.[56] Therefore, if the suspension of a rule is viewed as a "legislative" action, the first objection may come into play; if it is viewed as an "administrative" action, the second objection may be controlling In either case, the "separation of powers" and "delegation of powers" concepts may be interpreted to prohibit the Legislature from delegating quasi-legislative (rule-making) powers to an executive branch agency while reserving veto or suspension powers to itself.[57]

C. Judicial relief.

The APA provides for a declaratory judgment action to determine the validity of a rule.[58] The petition for declaratory judgment must be filed in the district court where the principal office of the agency is located, and the agency must be made a party. The court shall declare the rule invalid if it finds that the rule "violates constitutional provisions or exceeds the statutory

authority of the agency or was adopted without compliance with statutory rule-making procedures."[59]

A crucial factor in the usability of this declaratory judgment remedy is the standing of a petitioner. Section 15.0416 says simply that a petition may be filed "when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner." In 1974 the Minnesota Supreme Court faced this issue and determined that the test for standing of an intervenor (and presumably for a petitioner in the first instance) was whether he was injured in fact "absent a discernible legislative intent to the contrary in a given case."[60] In its decision the court permitted intervention in a declaratory judgment action by two "public interest" groups which were able to establish that their members were injured by the agency's rules prohibiting price advertising of prescription drugs.

A second issue relating to the availability of judicial relief is the doctrine of exhaustion of administrative remedies. The only APA reference to this doctrine is the ambiguous statement in Section 15.0416 that declaratory judgment relief is available "whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question." Presumably this means that a petitioner need not have requested the agency, by means of a petition under Section 15.0415 or otherwise, to reverse its determination that its rule is valid. Nor would it appear likely that a petitioner must pursue a complaint with the Legislative Commission to Review Administrative Rules before his judicial remedies would become available. However, the applicability of the doctrine to rule-making is uncertain and the

Supreme Court has yet to focus on the issue. Perhaps the most that can be said is that judicial review will not be available until the rule promulgation process is completed.[61]

The availability of injunctive relief is not mentioned in the APA. Therefore, it is conceivable that declaratory judgment actions were intended to be the sole judicial remedy available. On the other hand, assuming the exhaustion of administrative remedies hurdle is overcome, and assuming the other standards for the granting of injunctive relief are met,[62] it would appear that temporary injunctive relief would be appropriate pending a decision in a declaratory judgment action.[63]

Footnotes

* Counsel to the Minnesota State Senate with primary responsibility to the Senate Governmental Operations Committee; B.A., Grinnell College, 1969; J.D., Duke University School of Law, 1972. The views expressed in this chapter do not necessarily represent the views of the Legislature or any member thereof.

1. Minn. Stat. §§15.0411 to 15.052 (1975 Supp.). Future section references in the text are to Minnesota Statutes, 1975 Supplement, unless otherwise noted.

2. Throughout this chapter, reference is made to the singular "rule" or "proposed rule." This reference should be construed to include not only a new rule or newly proposed rule, but also to include several rules promulgated in one proceeding and the amendment, suspension or repeal of an existing rule or rules.

3. A more thorough discussion of the legislative history and rationale behind Laws 1975, Chapter 380, may be found in Thomas J. Triplett and James Nobles, "Rule-making under Minnesota's Administrative Procedure Act: 1975 Amendments," 43 Hennepin Lawyer No. 6., 14-17 (July-August, 1975).

4. The Corrections Department exclusion was added to the APA by Laws 1976, Chapter 68. Exceptions from APA requirements may occasionally be found in enabling legislation for various agencies. An example is undergraduate curriculum requirements prescribed by the State Board for Community Colleges. Minn. Stat. § 136.63, Subd. 1a. The Board of Regents of the

University is probably excluded from APA requirements by virtue of Article XIII, Section 3 of the Minnesota Constitution.

5. The ability to classify agencies by reference to their name style is a result of a common nomenclature act which changed the names of 40 agencies. Laws 1975, Chapter 271. Agencies whose names were changed have until January, 1978, to begin using their new names. For various reasons, six agencies having rule-making powers were permitted to keep names inconsistent with the nomenclature. These agencies are named in the styles "Agency," "Authority," and "Society."

6. Minn. Stat. § 15.0412, Subd. 5. See Section II(D) of this chapter, infra.

7. Minn. Stat. §§ 15.0411, Subd. 4; 15.0418 to 15.0422. Attempting to differentiate between a rule and a contested case is often very difficult. For example, is an agency decision designating a lake, which happens to be completely surrounded by one person's farmland, as public water for drainage or navigation purposes a contested case, or a rule, or some combination of the two?

8. Minn. Stat. § 15.0411, Subd. 3 (1974).

9. For examples of informal rule-making by state agencies prior to the 1975 amendments, see Triplett and Nobles, supra at 14.

10. Minn. Stat. § 15.0411, Subd. 3.

11. See note 7, supra.

12. Minn. Stat. § 15.0412, Subd. 3, requires each "agency" (again, referring only to those authorized by law to make rules) to "adopt rules setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties."

13. Minn. Stat. § 15.0411, Subd. 2.

14. Minn. Stat. § 15.052, Subd. 3.

15. The six departments which appear to have express general rule-making authority are Education (§ 121.07), Human Rights (§ 363.05, Subd. 1), Labor and Industry (§ 175.171), Personnel (§ 43.05, Subd. 2), Public Service (§ 216A.05, Subd. 1), and Vocational Rehabilitation (Laws 1976, Chapter 332, Section 3; to become effective July 1, 1977). Not included in this analysis are the Departments of Corrections, Employment Services and Military Affairs which are basically exempt from the APA in the first place.

16. Minn. Const. art. V, § 3.

17. K. C. Davis, Administrative Law Text, § 6.04 at 143 (3d. ed. 1972).

18. Statutory authority for the promulgation of rules by the Chief Hearing Examiner is Minn. Stat. § 15.052, Subd. 4.

19. Statutory authority for the promulgation of rules by the Commissioner of Administration is Minn. Stat. §§ 15.0412, Subd. 3, and 15.051, Subd. 1.

20. Statutory authority existing prior to July 1, 1975, for the promulgation of rules by the Attorney General was Minn. Stat. § 15.0412, Subd. 1 (1974).

The Attorney General is in the process of adopting amended rules in order to be consistent with the amended APA including the requirement of § 15.052, Subd. 4, that the rules of the Chief Hearing Examiner shall "supersede any other agency procedural rules with which they may be in conflict." Those portions of AttyGen 302 to 306 which are inconsistent with and are therefore superseded by the APA and HE 102 to 108, are not considered in this rule promulgation schedule. Authority for the promulgation of rules relating to petitions for the adoption of a rule is § 15.0415.

21. Internal review procedures need not themselves be the subject of rule. Minn. Stat. § 15.0412, Subd. 3. Optional pre-drafting procedures are specified in § 15.0412, Subd. 6, and will be further discussed in Section II(B), infra.

22. HE 102 and HE Advisory Forms A and B. If the agency estimates that the implementation of a rule will cost all political subdivisions in the state in excess of a total of $100,000 per year for either of the first two years after implementation, the agency must include with its Notice a statement of the estimated cost. Laws 1976, Chapter 138 (to be codified as § 15.0412, Subd. 7).

23. Id. The interval contained in this schedule includes seven extra days in which the Chief Hearing Examiner and the agency may negotiate necessary changes in the submitted documents.

24. Minn. Stat. §§ 15.0412, Subd. 4, and 15.051, Subds. 1 and 2. Submitted documents must conform with procedure and style requirements contained in RGSTR 51 to 65.

25. Copies of illustrations and a reduced, reproducible copy of each must be submitted 20 days prior to the submission of the text of the proposed rule. Copies of tabular materials and forms must be submitted ten days prior to submission of the text. RGSTR 65.

26. Minn. Stat. §§ 5.21 and 15.0412, Subd. 4.

27. Minn. Stat. § 15.0412, Subd. 4. This interval permits seven days for the receipt of the list from the Secretary of State and the mailing of the Notice. The agency must make one free copy of the proposed rule available to every requesting person.

28. HE 103 and HE Advisory Forms A, B, E, F, G, J and L. See also D. Harves, "Clarification of Rules of the Office of Hearing Examiners Relating to Statements of Need and Evidence." (Office of Hearing Examiners, April 5, 1976).

29. Minn. Stat. § 15.0412, Subd. 4. This interval allows seven days for the hearing; if additional time is anticipated, the remainder of this schedule should be adjusted accordingly. Rules for the conduct of the hearing are found in HE 104.

30. Minn. Stat. §§ 15.0412, Subd. 4, and 15.052, Subd. 3; HE 105. The Office of Hearing Examiners anticipates that a transcript of a day's hearing will be prepared within seven days.

31. Id. The Office of Hearing Examiners attempts to insure that a report is prepared within 30 days after the close of the hearing record.

32. Minn. Stat. § 15.052, Subd. 4; HE 108.

33. HE 107. As to the agency findings of fact requirement, see AttyGen 302.

34. HE 107, 108.

35. AttyGen 302, 303.

36. Minn. Stat. § 15.0412, Subd. 4; AttyGen 305. Before approving or disapproving the rule the Attorney General shall allow at least ten days after his receipt for the submission of objections to form and legality by interested persons. AttyGen 305.

37. AttyGen 305. Presumably AttyGen 305 will be amended to more closely follow the specific "legality" requirements contained in §§ 15.0412 and 15.052.

38. If the Attorney General objects to the adopted rule, he shall re-submit the rule to the agency for correction. This correction process, if employed, will add additional time to the promulgation schedule.

39. Minn. Stat. § 15.0412, Subd. 4.

40. Id.

41. Minn. Stat. §§ 15.0412, Subd. 4, and 15.0413, Subds. 1 and 2. The rule may have a later effective date if required by statute or if specified in the text of the rule itself.

42. Laws 1975, Chap. 380, § 2, Subd. 6.

43. Assuming 20 days to be a reasonable time to wait for the receipt of outside materials, an agency electing to use Subdivision 6 must add an additional 34 days to its promulgation schedule (including the 14 day pre-publication requirement of the State Register).

44. See generally Minn. Stat. §§ 15.0412 and 15.0413 (1974); AttyGen 302 to 305; Triplett and Nobles, supra.

45. In First National Bank of Shakopee v. Minnesota Department of Commerce, No. 119 (Mn., filed August 20, 1976), the Minnesota Supreme Court held that statutory time limits "which are obviously designed merely to secure order, uniformity, system and dispatch in public business, are generally deemed directory." The court held that the failure of a district judge to file a decision within the allotted statutory time was not fatal. See also Wenger v. Wenger, 200 Mn. 436, 274 N.W. 517 (1937). Although these cases did not involve rule-making proceedings, the rationale behind the holdings should in most cases validate a rule which is not promulgated prior to a statutory deadline.

46. An example of this granting of emergency rule-making authority is Laws 1976, Chapter 254, Section 9, wherein the Housing Finance Agency was given emergency rule authority in order to speed implementation of a housing program for Indian residents of the state.

47. Minn. Stat. § 15.0412, Subd. 5.

48. Minn. Stat. § 15.0415 (1974).

49. Minn. Stat. § 15.0415 (Laws 1975, Chapter 380, Section 6).

50. Id. As of this writing, the Attorney General has not promulgated rules in this area. His draft rules and draft petition form, however, require the petition to state "in as much detail and as completely as possible" the reasons for the requested adoption, amendment, suspension or repeal." 1 State Register 16 (July 13, 1976).

51. Id.

52. See also HE 103 and AttyGen 302 which require all materials received and distributed by an agency pursuant to § 15.0415 to be included as part of the hearing record.

53. Minn. Stat. § 3.965 (1974). By mid-1976, 24 states had created similar review bodies. Neal R. Peirce, "Overriding the Rule-Makers," 2 State Legislatures, No. 5. pp 19-20 (October/November 1976).

54. Id. Since no bill is "dead" until the Legislature adjourns sine die, it may be some time after a negative vote on a bill before the rule again becomes effective.

55. Minn. Const. art. IV, §§ 13 and 22.

56. Minn. Const. arts. III, § 1 and IV, § 5; McCutcheon v. City of St. Paul, 298 Minn. 443, 216 N.W. 2d 137, (1974).

57. Minn. Const. art. III, § 1.

58. Minn. Stat. § 15.0416 (1974).

59. Minn. Stat. § 15.0417 (1974).

60. Snyder's Drug Stores, Inc. v. Minnesota State Board of Pharmacy, 301 Minn. 28 at 32, 221 N.W. 2d 162 (1974).

61. For a commentary on the "confused and uncertain" status of the doctrine, see K. C. Davis, supra at Chapter 20.

62. Minn. Dist. Ct. R. Civ. Pro. 65.01 to 65.03.

63. See, J. Michael Miles and J. Patrick Wilcox, "Rule-Making Pursuant to the Administrative Procedure Act," Administrative Agencies; Minnesota Law and Practice, 2-1, 2-20 to 2-21 (Minnesota Continuing Legal Education, 1974).