

ADMINISTRATIVE RULES COMMITTEE

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), Rick Becker, Josh Boschee, Kim Koppelman, Andrew Marschall, Brandy Pyle, Dan Ruby, Bernie Satrom, Vicky Steiner, Nathan Toman, and Robin Weisz and Senators Joan Heckaman, Jerry Klein, Randy D. Lemm, Nicole Poolman, and David S. Rust.

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 1,950 rules sections and 2,285 pages of rules changed from January 2019 through October 2020. Both the number of sections reviewed and the number of pages of rules were substantially lower than the comparable amount from the previous biennial period, primarily due to extensive rules adopted in the previous biennial period by the Department of Environmental Quality. 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
January 2017-October 2018	3,736
January 2019-October 2020	1,950

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

Time Period	Supplement Pages
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
January 2017-October 2018	4,047
January 2019-October 2020	2,285

Rule Review Schedule

Since September 2005, NDAC supplements have been published on a calendar quarter basis. The 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.

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

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 from the State Department of Health for the repeal of administrative rules in NDAC Title 33 regarding environmental quality. Because all environmental quality-related duties of the State Department of Health were transferred to the Department of Environmental Quality on April 29, 2019, the environmental quality rules in NDAC Title 33 became obsolete.

The committee approved a request from the North Dakota Board of Medicine for the repeal of NDAC Section 50-02-11-02, which limited the time allowed to complete examination requirements. Testimony in support of the repeal indicated the section was in conflict with the standards in the Interstate Medical Licensing Compact. North Dakota joined the compact in 2019 following the passage of Senate Bill No. 2173 (2019).

The committee approved a request from the Public Service Commission for the repeal of NDAC Article 69-07 and the amendment of NDAC Chapter 69-01-01 to remove references to grain elevators and warehouses from the commission's rule. Senate Bill No. 2009 (2019) transferred the regulation of grain warehousemen, grain buyers, and hay buyers from the Public Service Commission to the Agriculture Commissioner. As a result of this legislation, these portions of the NDAC were obsolete and no longer in compliance with state law.

Rules Carried Over or Amended by Committee Approval

The committee carried over consideration of rules of the Department of Environmental Quality to address concerns regarding NDAC Section 33-16-03.1-13(1) and whether the hearing process may be used for a permit that involves significant revisions to the facility's nutrient management plan. The committee and the Department of Environmental Quality, in consultation with the North Dakota Stockmen's Association and the North Dakota Livestock Alliance, agreed on amendments offered by the department to address the issue.

The committee carried over for consideration the rules of the Retirement Board to address concerns regarding the conditions under which a political subdivision may leave the Public Employees Retirement System plan. After receiving further information and clarification from the Retirement Board, the committee took no further action on the rules.

The committee carried over for consideration a rule of the North Dakota Board of Optometry relating to a requirement for an optometrist to assess a patient's drug monitoring program data every 12 months during the patient's treatment with a controlled substance. The North Dakota Board of Optometry testified because an optometrist's authority to prescribe drugs is limited to schedule III drugs, the language relating to accessing the data every 12 months was unnecessary and was removed from NDAC Section 56-02-07-01(1).

The committee carried over for consideration the rules of the State Electrical Board due to concerns regarding the board's regulation of the telecommunications industry and the adoption of certain national rules. The committee was informed the State Electrical Board and the telecommunications industry worked out their differences and no further action was necessary. The committee and the State Electrical Board agreed to amendments that delayed implementation of the 2020 National Electrical Code until January 1, 2021, amended the adoption of the 2020 National Electrical Code to exclude the requirement to install whole-house surge protection, clarified smoke detectors only are required in places currently required by the building codes, and withdrew changes to NDAC Section 24.1-06-01-40(3) dealing with additional carbon monoxide detectors.

The committee, as authorized by NDCC Section 28-32-18(3), approved requested amendments to the rules of the Department of Environmental Quality (NDAC Sections 33.1-15-14-06 and 33.1-15-15-01.2); Board of University and School Lands (NDAC Section 85-01-01-02); Industrial Commission (NDAC Sections 43-02-03-10, 43-02-13-13, and 43-02-03-51.1(1)(h)); Superintendent of Public Instruction (NDAC Section 67-11-22-02); Department of Human Services (NDAC Sections 75-03-14-03(8) and 75-03-41-09(3)); and Real Estate Appraiser Qualifications and Ethics Board (NDAC Sections 101-02-02-03(4), 101-02-02-05(3), and 101-02-02-05.1(3)).

Rules Voided by Committee

The committee considered a motion to void a rule of the State Department of Health for failure to comply with express legislative intent. The rule related to the sale of low-acid, home-canned food products by cottage food producers. The motion to void the rule failed.

TABLE A

**Statistical Summary of Rulemaking
January 2019 Through October 2020 - Supplements 371 Through 378**

Title	Supplement No.	Agency	Amend	Create	Supersede	Repeal	Special	Reserved	Total
3	375 - Jan 20	Accountancy, Board of	3	0	0	0	0	0	3
4	376 - Apr 20	Management and Budget, Office of	10	0	0	1	0	0	11
7	373 - Jul 19	Agriculture Commissioner	23	7	0	9	0	0	39
	377 - Jul 20		15	28	0	2	0	0	45
10	373 - Jul 19	Attorney General	20	0	0	0	0	0	20
	377 - Jul 20		1	0	0	0	0	0	1
	378 - Oct 20		3	0	0	0	0	0	3
13	371 - Jan 19	Department of Financial Institutions	18	10	0	9	0	0	37
14	377 - Jul 20	Barber Examiners, Board of	0	1	0	0	0	0	1
24.1	377 - Jul 20	State Electrical Board	14	6	0	0	0	24	44
30	378 - Oct 20	Game and Fish Department	20	0	0	3	0	0	23
33	374 - Oct 19	State Department of Health	20	2	0	0	0	0	22
	375 - Jan 20		0	5	0	0	0	0	5
	377 - Jul 20		3	0	0	0	0	0	3
33.1	371 - Jan 19	Department of Environmental Quality	3	0	0	0	0	0	3
	377 - Jul 20		126	183	0	14	0	0	323
38	373 - Jul 19	Highway Patrol	3	0	0	0	0	0	3
43	376 - Apr 20	Industrial Commission	38	0	0	0	0	0	38
	378 - Oct 20		24	72	0	0	0	0	96
45	374 - Oct 19	Insurance, Commissioner of	24	11	0	1	0	0	36
50	375 - Jan 20	North Dakota Board of Medicine	5	5	0	24	0	0	34
54	377 - Jul 20	Board of Nursing	16	1	0	1	0	0	18
56	375 - Jan 20	Optometry, Board of	8	4	0	0	0	0	12
	376 - Apr 20		1	0	0	0	0	0	1
59.5	376 - Apr 20	State Personnel Board	2	0	0	0	0	0	2
61	374 - Oct 19	State Board of Pharmacy	16	0	0	1	0	0	17
	376 - Apr 20		9	0	0	8	0	0	17
61.5	376 - Apr 20	North Dakota Board of Physical Therapy	18	0	0	0	0	0	18
62	376 - Apr 20	Plumbing, Board of	3	0	0	1	0	0	4
	378 - Oct 20	Podiatric Medicine, Board of	6	2	0	0	0	0	8
66	375 - Jan 20	Psychologist Examiners, Board of	16	1	0	1	0	0	18
67	373 - Jul 19	Public Instruction, Superintendent of	0	10	0	18	0	0	28
	375 - Jan 20		42	32	0	70	0	0	144
	376 - Apr 20		2	15	0	0	0	0	17
67.1	375 - Jan 20	Education Standards and Practices Board	1	0	0	0	0	0	1
	378 - Oct 20		38	3	0	1	0	0	42
69	373 - Jul 19	Public Service Commission	1	0	0	0	0	0	1
	377 - Jul 20		7	10	0	0	0	0	17
71	372 - Apr 19	Retirement Board	1	1	0	0	0	0	2
	376 - Apr 20		16	0	0	0	0	0	16
72	377 - Jul 20	Secretary of State	0	13	0	0	0	0	13
	378 - Oct 20		49	3	0	2	0	0	54
74	377 - Jul 20	Seed Commission	19	4	0	0	0	0	23
75	371 - Jan 19	Department of Human Services	39	2	0	3	0	0	44
	374 - Oct 19		13	80	0	85	0	0	178
	375 - Jan 20		29	52	0	21	0	0	102
	376 - Apr 20		31	16	0	2	0	0	49
	377 - Jul 20		93	9	0	4	0	0	106
	378 - Oct 20		2	4	0	0	0	0	6
85	371 - Jan 19	University and School Lands, Board of	0	32	0	0	0	0	32
	375 - Jan 20		2	82	0	0	0	0	84
92	376 - Apr 20	Workforce Safety and Insurance	36	4	0	0	0	0	40
96	376 - Apr 20	Board of Clinical Laboratory Practice	4	1	0	0	0	0	5
101	373 - Jul 19	Real Estate Appraiser Qualifications and Ethics Board	14	0	0	0	0	0	14
	378 - Oct 20		3	0	0	0	0	0	3
108	377 - Jul 20	Department of Commerce	16	0	0	4	0	0	20
114	376 - Apr 20	Medical Imaging and Radiation Therapy Board	3	1	0	0	0	0	4
Total			929	712	0	285	0	24	1950