

# **Expedited, exempt, and obsolete rulemaking – There's More than One Way to Get There**

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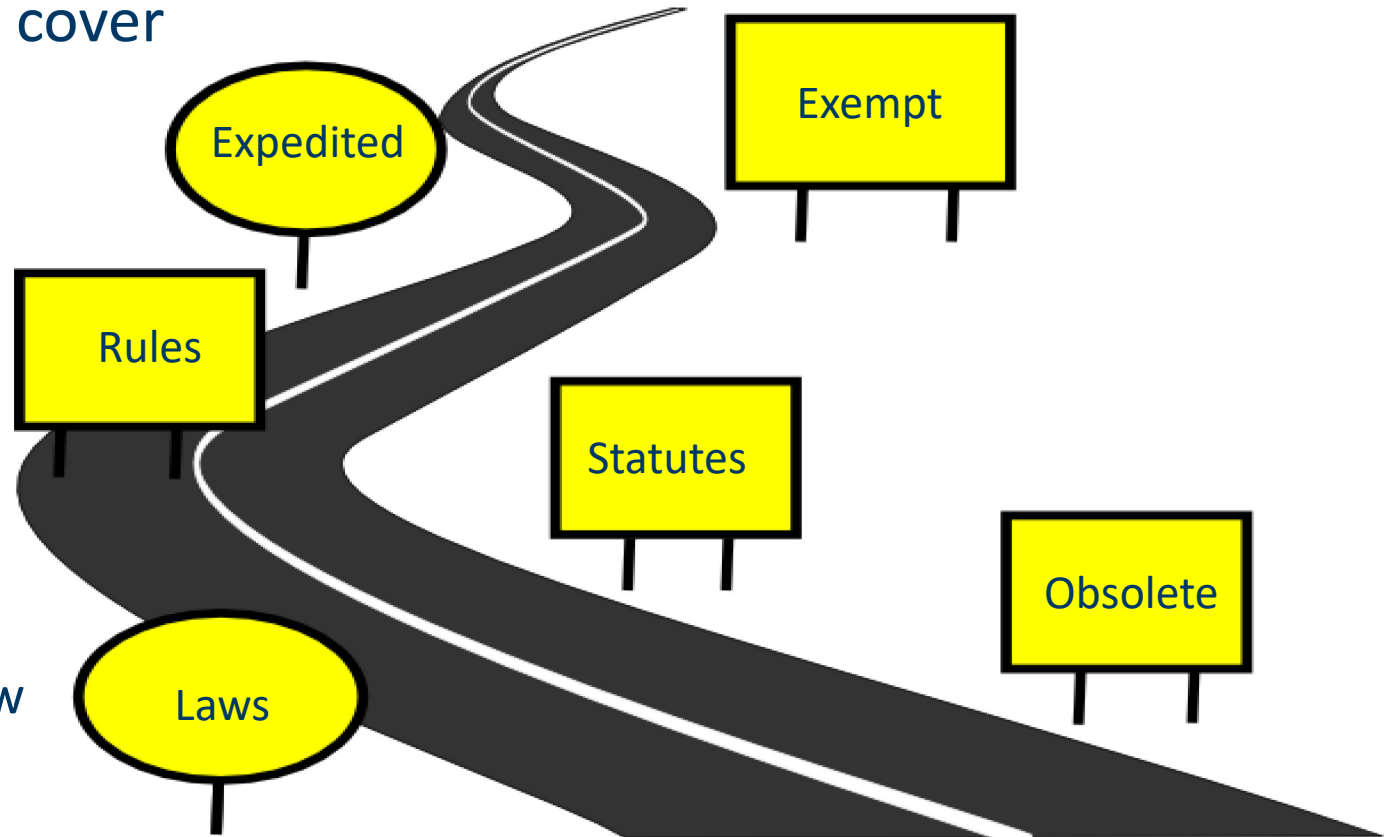
Jason Kuenle | Senior Assistant Revisor

- Types of rulemaking we will cover

- Exempt
- Expedited
- Obsolete

- Authorizations

- General statutory
- Specific statutory/Session law



# Definition of a Rule

“Rule means every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.”

-14.02, subd. 4

# Four Stages of Rulemaking

- Rule development
- Approval as to form
- Approval as to legality
- Filing and publication



# Rulemaking Processes Comparison Chart

RULE PROCESS TYPE	MAX DURATION (unless otherwise specified in law)	FORMAL PUBLIC HEARING	PUBLIC COMMENT PERIOD	ALJ APPROVAL AS TO LEGALITY	SUBJECT TO VETO
<b>Exempt Permanent Rules</b> <a href="#">Minn. Stat. § 14.386</a>	2 years	no	no	yes	yes
<b>Good Cause Exempt Permanent Rules</b> <a href="#">Minn. Stat. § 14.388</a> (1) address a serious and immediate threat to the public health, safety, or welfare (2) comply with a court order or a requirement in federal law... (3) incorporate specific changes set forth in applicable statutes when no interpretation of law is required (4) make changes that do not alter the sense, meaning, or effect of a rule	2 years if adopted under clauses (1) or (2); otherwise until revised or repealed	no	yes	yes	no
<b>Expedited Permanent Rules</b> <a href="#">Minn. Stat. § 14.389</a> Possibility of hearing depends on whether the statutory authority to use this procedure references subd. 5 in § 14.389.	until revised or repealed	possible (conditional on authority)	yes	yes	yes
<b>Permanent Rules</b> <a href="#">Minn. Stat. §§ 14.05 to 14.28</a>	until revised or repealed	possible	yes	yes	yes
<b>Repeal of Permanent Rules</b> <a href="#">Minn. Stat. § 14.3895</a>	n.a.	possible	yes	yes	yes

# Different Processes

- Why? Related to the purposes of the APA
  - Balance between efficient government administration and accountability
  - Interpretation (or lack thereof)
  - Timing
- How?
  - Granting authorizations – legislative decision
  - Which available authorization to use – agency decision



# A perspective on good cause exempt rulemaking

Elizabeth P Carlson | DNR Rules Coordinator

# GCE procedure features

- Exemption from many familiar rulemaking procedural requirements “for good cause” is because those steps are unnecessary, impracticable, or contrary to the public interest in those four particular circumstances
- Designed for speed – taking advantage of electronic notice because interested parties have five (5) days to submit comments to the ALJ, starting the day the agency e-files the case with the OAH for review as to legality
- NOT subject to governor’s veto



# GCE and four stages of rulemaking

## Despite speed, still covers all four stages of rulemaking:

### 1. Rule development

- By agency, although content is likely framed or constrained by requirements, boundaries, limitations; less public input

### 2. Approval as to form

- By Office of Revisor of Statutes (no proposed rule, just “adopted” version)

### 3. Approval as to legality

- By administrative law judge

### 4. Filing and publication

- Filed via the OAH; published by the agency

# Best practices for GCE rulemaking – BE PREPARED FOR NOTIFICATION

## ■ Plan for notifications

- Need to do any advance communication to affected parties?
- Prepare informational webpage to go live on submission date
- Use similar text in email/GovDelivery notifications, with a link to webpage
- Do you need to send any notifications by regular mail? Mail a day or two before the submission (include copies of rule and Notice of Submission)

## ■ Prepare certifications of notice as usual in case the ALJ requests copies

# Best practices for GCE rulemaking – BE ORGANIZED FOR SUBMISSION

- Draft the rule language and Preliminary Proposal Form, and get internal approvals
- Prepare rulemaking documents – transmittal letter, proposed order adopting rules, exempt notice of submission
- Choose a submission date for the webpage to go live, eFile the case to the OAH, and all notifications are sent
  - Remember to open OAH docket and arrange for eFiling
  - Notify OAH staff that an eComments page is needed because comments must go directly to the ALJ

### **1. BOUNDARIES**

a) Think through requirements in the GCE authority and your other rulemaking requirements. Read your draft rule language with a critical eye and ask others to read it as well to check on whether it is drifting outside the boundaries. And confer with your revisor.

*COMMENT: if you do get a disapproval on using the GCE procedure, then you know for sure in a short time frame that you will have to go another route. Take it in as a learning experience, figure out your next option, and move on.*

### **1. BOUNDARIES**

b) If using clause 3, is your rule language is actually interpreting the law – explaining how it is going to work? Then the GCE process does not provide enough fair notice.

*COMMENT: if you do get a disapproval on using the GCE procedure, then you know for sure in a short time frame that you will have to go another route. Take it in as a learning experience, figure out your next option, and move on.*

## 2. AFFECTED INTERESTS

Prepare to meet your audiences' information needs.

- What is the effect of the rule change? Will it surprise affected interests?
- Would an advance communication help with understanding what the Notice of Submission is about when it arrives?
- Can you design an informational webpage to help answer basic questions?

*COMMENT: It is vital to notify potentially affected interests and avoid surprising people. The communications and relationship work that occur before a rulemaking begins can affect the success or failure of the rulemaking effort in profound ways.*

### **3. OBJECTIVES**

Determine the objectives for the rulemaking before trying to identify the best procedure for it. Process follows function.

*COMMENT: Be willing to “go slow to go fast” when it is important for a successful rulemaking, not just looking for the shortest path to the end.*

**R-04038** was a GCE rulemaking to conform a rule with a session law requiring the DNR to allow the taking of fish by spearing on Cass Lake. The rule to meet this requirement was a one-line repealer.

ALJ Lipman received 54 comments. This was so unusual that the ALJ added a memo to his decision and remarked:

Executive branch officials – whether they serve in the Department of Natural Resources or as judges in the Office of Administrative Hearings – are not permitted to rewrite duly enacted state laws. To the contrary, Executive Branch officials are bound to “take care” that the laws that have been enacted are “faithfully executed.”

*See, Minn. Const., Art. V, Sections 1 and 3.*



**R-03821** had a classic **GCE defect of interpretation**

On 10/14/2008, the ALJ disapproved one part (how it was written had some interpretation of the session law). The DNR removed that text → remainder of rule finished and effective on 1/05/2009

*BUT* that was not the end of the story...

**R-03846 ExpP** Deer, Bear, and Prairie Chicken

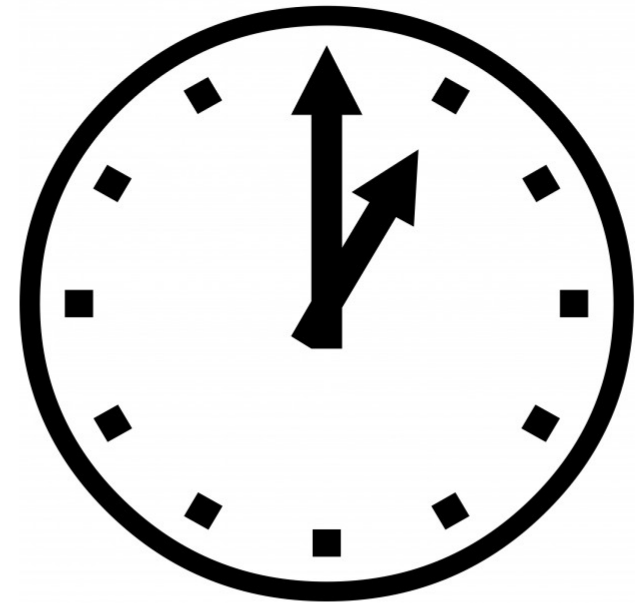
Had opportunity and authority to put part 6232.2900 Bear Permit Procedures into an expedited (no hearing) permanent package → finished/effective on 6/01/2009.

# Good Cause Exempt Authority

- 1) address a serious and immediate threat to the public health, safety, or welfare;
- 2) comply with a court order or a requirement in federal law in a manner that does not allow for compliance with sections 14.14 to 14.28;
- 3) incorporate specific changes set forth in applicable statutes when no interpretation of law is required; or
- 4) make changes that do not alter the sense, meaning, or effect of a rule...

-14.388, subdivision 1

- Clauses (1) and (2) limited to a two years of effect
  - Temporary exempt rules
  - Deal with emergency situations
  - May require fuller follow-up rulemaking process
- Clauses (3) and (4) are permanent



# Invoking Temporary Exempt Rulemaking

“Removing rules from the normal process precludes notice to the public and any opportunity for the affected members of the public to comment on the potential impacts of the proposed rule. This is a significant intrusion into the rights of the public and increases the risk of unanticipated adverse consequences arising from application of the rule.”

- *Jewish Community Action v. Commissioner of Public Safety*, 657 N.W.2d 604 quoting a Chief ALJ opinion

# GCE Standing and Session Authority

- Requirements for GCE in 14.388
- Session law rule authorizations often cite to 14.388

“Sec. 2. RULE CHANGE.

The Peace Officer Standards and Training Board shall amend Minnesota Rules, parts 6700.0600, subpart 2; 6700.1000, subparts 1, 2, 7, and 9; and 6700.1101, subpart 2, so that new part-time peace officer licenses are not issued and that existing licenses are canceled when a part-time license holder either leaves the officer's agency of employment or is not employed by a law enforcement agency on or after June 30, 2014. The board may invoke the good cause exemption to the rulemaking procedures in Minnesota Statutes, chapter 14, as provided for in Minnesota Statutes, section 14.388, subdivision 1, clause (3), to implement the conforming amendments listed in this section.”

- Laws 2014, chapter 244, section 2

# Approval of 6700.1101, Subpart 3

- 6700.1101, subpart 3, not in session law authorization
- “The additions the Board proposes to subpart 3 of this rule were not specifically authorized by the Legislature in 2014 Minn. Laws, ch. 244. However, the addition of the underlined language to this subpart as shown above, meets the requirement of a different good cause exemption, the exemption provided by Minn. Stat. § 14.388, subd. 1(4). Subdivision 1(4) permits an exemption for rule changes that “do not alter the sense, meaning, or effect of a rule.”

# Disapproval of 6700.1000, subpart 1

- 6700.1000, subpart 1, is specifically listed in the session law

“The second amendment to subpart 1, the elimination of alphabetically staggered license renewal periods, was not authorized by the Legislature. The Legislature did not address the timing of license renewal requirements in Laws of Minnesota 2014, ch. 244. The license renewal requirements apply to all peace officers, not just part-time ones. The Administrative Law Judge cannot approve the second proposed amendment to this subpart as it does not meet the good cause exemption of Clause (3).”

# Other Session Law GCE Authorizations (1)

## Sec. 115. STAMP DESIGN; RULE AMENDMENT.

(a) The commissioner of natural resources shall amend Minnesota Rules, part 6290.0400, subpart 3, to:

(1) allow a contest entry to be created using nonphotographic digital media; and

(2) require a person submitting a contest entry to list all media used in the creation of the entry.

(b) The commissioner may use the good cause exemption under Minnesota Statutes, section 14.388, subdivision 1, clause (3), to adopt rules under this section, and Minnesota Statutes, section 14.386, does not apply except as provided under Minnesota Statutes, section 14.388.

- Laws 2019, First Special Session chapter 4, article 3, section 115



# Other Session Law GCE Authorizations (2)

## Sec. 3. OBSOLETE RULES REGARDING PRIOR AUTHORIZATIONS FOR MEDICAL SUPPLIES AND EQUIPMENT.

(a) The commissioner of human services shall amend Minnesota Rules, part 9505.0310, subpart 3, to remove the following medical supplies and equipment from the list for which prior authorization is required as a condition of medical assistance payment: a nondurable medical supply that costs more than the performance agreement limit; and durable medical equipment, prostheses, and orthoses if the cost of their purchase, projected cumulative rental for the period of the recipient's expected use, or repairs exceeds the performance agreement limit.

(b) The commissioner of human services shall amend Minnesota Rules, part 9505.0365, subpart 3, to remove the requirement that prior authorization for an ambulatory aid is required for an aid that costs in excess of the limits specified in the provider's performance agreement.

(c) The commissioner may use the good cause exemption in Minnesota Statutes, section 14.388, subdivision 1, clause (3), to adopt rules under this section. Minnesota Statutes, section 14.386, does not apply except as provided in Minnesota Statutes, section 14.388.

- Laws 2015, chapter 78, article 5, section 3

# Dangerous Authorization

“Sec. 129. RULE CHANGE ON SCHOOL BUS OPERATION.

The commissioner of public safety must amend Minnesota Rules, part 7470.1000, subpart 2, so that it is consistent with Minnesota Statutes, section 169.443, subdivision 2, using the good cause procedure under Minnesota Statutes, section 14.388.”

- Laws 2017, First Special Session chapter 3, article 3, section 129

## Bounds of Clause (3)

“By its terms, the good cause exception for legislatively directed rule changes presumes and mandates that no interpretation of law by the agency be needed.... [T]he legislation specifies no language changes to the formula paragraph of the rule, the part now in controversy. Yet in order to effectuate the identified intent of the legislation, the Board would have had to alter the formula paragraph or strike it entirely. To do either would go beyond the requirement of subdivision 1(3) of the good cause exemption, which allows the agency only to “incorporate specific changes set forth in the applicable statute when no interpretation of law is required.” The Board could not simply implement the legislation by striking and adding language as set forth in the legislation. Therefore, the proposed rules do not fit within the good cause exception from the rulemaking provisions of chapter 14 because the Board is not simply incorporating “specific changes set forth in applicable statutes when no interpretation is required.””

# Expedited Authority

- Section 14.389 is not its own authority, it is a process only
- In most instances, expedited authority is not an open authority
  - One-off in statute
  - Session law authorizations
- When statutory changes are made but interpretation is still necessary, ask for expedited authority

# Section 14.389 Language

Subdivision 1. **Application.** This section applies when a law requiring or authorizing rules to be adopted states that this section must or may be used to adopt the rules. When a law refers to this section, the process in this section is the only process an agency must follow for its rules to have the force and effect of law. Sections [14.19](#) and [14.366](#) apply to rules adopted under this section.

Subd. 5. **Option.** A law authorizing or requiring rules to be adopted under this section may refer specifically to this subdivision. If the law contains a specific reference to this subdivision, as opposed to a general reference to this section:

- (1) the notice required in subdivision 2 must include a statement that a public hearing will be held if 100 or more people request a hearing. The request must be in the manner specified in section [14.25](#); and
- (2) if 100 or more people submit a written request for a public hearing, the agency may adopt the rule only after complying with all of the requirements of chapter 14 for rules adopted after a public hearing.

## Sec. 4. RULEMAKING.

The Office of Administrative Hearings is directed to use the expedited rulemaking provisions of Minnesota Statutes, section 14.389, to amend Minnesota Rules, part 1420.1850, to conform to the amendments of Minnesota Statutes, section 176.361, subdivision 3.

- Laws 2017, chapter 94, article 5, section 4

## Sec. 68. RULEMAKING.

The Board of Barber Examiners may use expedited rulemaking procedures under Minnesota Statutes, section 14.389, to amend Minnesota Rules, chapter 2100, to conform with sections 29 to 52 and sections 69 and 70.

- Laws 2016, chapter 189, article 13, section 68

# Statutory Example (3.7371)

Subd. 7. **Rules.** The commissioner shall adopt rules and may amend rules to carry out this section. The commissioner may use the expedited rulemaking process in section 14.389 to adopt and amend rules authorized in this section. The rules must include:

- (1) methods of valuation of crops damaged or destroyed;
- (2) criteria for determination of the cause of the crop damage or destruction;
- (3) notice requirements by the owner of the damaged or destroyed crop;
- (4) compensation rates for fence damage or destruction that must not exceed \$1,800 per claimant per fiscal year; and
- (5) any other matters determined necessary by the commissioner to carry out this section.



# Bounds of Expedited Rulemaking

- Unlike Good Cause Exempt, there are no additional substantive requirements
- Similar legal review to full rulemaking process
  - Constitutionality review
  - Delegation review
  - Excessive authority review
  - Conflict with statute review
- Use of expedited versus full is more driven by political considerations



# Expedited permanent rulemaking by the MnDNR

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# General features of DNR's expedited permanent rulemaking

## Expedited permanent under § 14.389

- Rule development stage has no formal Request for Comments but that doesn't alter DNR's approach to working with stakeholders
- Used for non-controversial rules, so no SONAR saves a lot of time and effort
  - Webpage can link to more information when helpful
- DNR does additional public notice the same as with a full rulemaking
  - Do notify potentially affected interests. Avoid surprising people. Communications and relationship work before and during a rulemaking affect the success or failure
- Exhibits submitted to the OAH are similar to a full rulemaking

# Expedited permanent and four stages of rulemaking

## All four stages of rulemaking are more apparent:

### 1. Rule development

- Probably similar to full rulemaking

### 2. Approval as to form

- By Office of Revisor of Statutes

### 3. Approval as to legality

- By administrative law judge

### 4. Filing and publication

- Filed via the OAH; agency publishes a notice of adoption

# DNR's ExpP authority *WITHOUT* a hearing - 84.027, subd. 13a (a)

## **2007: DNR granted authority to use § 14.389 procedure (no hearing option) for these specific purposes:**

- Describe zone or permit area boundaries
- Designate fish spawning beds or fish preserves
- Select hunters or anglers for areas and provide for registration of game or fish
- Prevent or control wildlife disease
- Correct errors or omissions in rules that do not have a substantive effect on the intent or application of the original rule
- Designate prohibited invasive species, regulated invasive species, and unregulated nonnative species

# DNR's ExpP authority *WITH* a hearing option - 84.027, subd. 13a (b)

**2015: DNR was granted authority to use § 14.389 procedure *with the subd. 5 hearing option* to adopt other rules authorized under game and fish laws in chapter 97A, 97B, and 97C**

- No more than a handful of hearing requests so far, as expected
- DNR sought this “general” authority because:
  - Time-sensitive nature of hunting and angling regulation
  - Ongoing consultations with the regulated parties
  - Full longer process still available for controversial proposed rules

# Where no one has gone before... what about a hearing?

The statute gives this direction:

## **Sec. 14.389, subd. 5**

(2) if 100 or more people submit a written request for a public hearing, the agency may adopt the rule **ONLY AFTER COMPLYING WITH ALL OF THE REQUIREMENTS OF CHAPTER 14 FOR RULES ADOPTED AFTER A PUBLIC HEARING.** [*emphasis added*]

So, if it goes to a hearing, “expedited” is over. Agency must back up, prepare a Statement of Need and Reasonableness (SONAR), publish a Notice of Hearing, and finish out the rulemaking using the ordinary rulemaking procedures.

# Closing thoughts from DNR's perspective

- Expedited permanent rulemaking is just one more tool in the toolbox, only to be used when appropriate
- When we only had the regular permanent rulemaking process:
  - Used to save bits of game and fish rulemaking until we had enough to make an ordinary rulemaking seem worthwhile
  - Couldn't finish non-controversial rules quickly after working with stakeholders on language
- Another benefit of an expedited method: we can break up the large packages into smaller, manageable cases *and* finish non-controversial rulemaking faster





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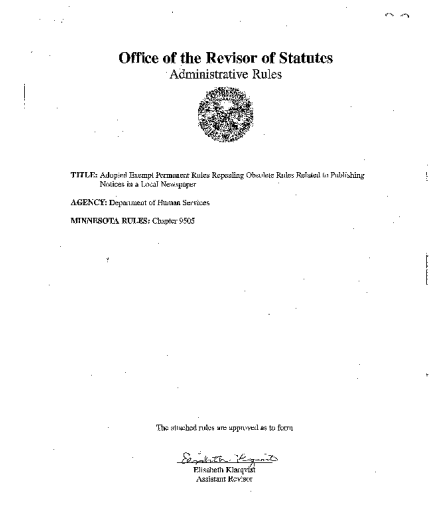
# Obsolete Rules Repeal Process

## Minn. Stat. § 14.3895

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# Obsolete rules repeal process: consider options for repeal

- Rules can be repealed using the obsolete rulemaking option found in Minn. Stat. § 14.3895. Includes repealing specific language (not just whole parts or subparts)
- Rules can be repealed legislatively (but only whole parts or subparts)
- Rules can be repealed as part of another rulemaking process



# Obsolete rules repeal process: four stages of rulemaking

## **1. Rules development**

- Includes determining best route for accomplishing repeal

## **2. Approval as to form- by Revisor's Office**

- Publish rules in State Register with Notice of Request for Comments

## **3. Approval as to legality- by Administrative Law Judge**

## **4. Filing and publication**

# Obsolete rules repeal process: Case Study

- Rule: publishing notice of actions in newspapers
- Reason: Centers for Medicare & Medicaid Services program integrity review found noncompliance; rule repeal part of corrective action plan
- ALJ suggested (but did not require) Additional Notice Plan to include the Minnesota Newspaper Association (MNA)
- No comments or requests for hearing, but did receive data request from MNA

# Obsolete rules repeal process: SONAR and hearing

- SONAR and hearing required only if 25 or more people request it
- What happens if you get 25 or more requests?
  - For SONAR: prepare SONAR and provide dual notice
  - For hearing: prepare SONAR and provide notice of hearing

# Obsolete rules repeal process: Obsolete Rules Report

- Must be identified in obsolete rules report
- Obsolete rules report- Minn. Stat. § 14.05, subd. 5
  - Due December 1 each year (may be amended)
  - Must include:
    - Why the rule or portion of rule is obsolete
    - Status of rules identified in prior year's report
  - Must submit even if agency has no obsolete rules

