

RULE-MAKING UNDER THE APA

*A Primer for Members of the
Joint Regulatory Reform Committee*

November 18, 2011

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PURPOSE OF THE ADMINISTRATIVE PROCEDURE ACT

G.S. 150B-1

The purpose of the Administrative Procedure Act is to establish a uniform system of administrative rule-making and adjudicatory procedures for State agencies. These procedures ensure that the functions of rule-making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.

THE APA INCLUDES

ARTICLE 1

GENERAL PROVISIONS

- Policy & Scope (including exemptions)
- Definitions
- Special Provisions on Licensing
- Declaratory Rulings

ARTICLE 2A

RULE-MAKING

- Restrictions on What Can Be Adopted As a Rule
- Requirements for Agencies in the Rule-making Process
- Review of Existing Rules
- Limitation on Certain Environmental Rules
- Petitioning an Agency to Adopt a Rule
- Adoption of Emergency, Temporary & Permanent Rules
- Effective Dates of Rules
- Fiscal Notes for Rules - State, Local, and Substantial Economic Impact
- Rules Review Commission Review of Rules
- Publication of the *North Carolina Register* and the *North Carolina Administrative Code*

ARTICLE 3

ADMINISTRATIVE HEARINGS

- Contested Case Procedures

ARTICLE 3A

OTHER ADMINISTRATIVE HEARINGS

ARTICLE 4

JUDICIAL REVIEW

WHICH AGENCIES ARE COVERED BY THE APA?

◆ The APA does *not* apply to

- Legislative Branch
- Judicial Branch
- Local Governments

◆ The APA applies to all state departments, agencies, and boards *except* those that are specifically exempted. Most exemptions are in the APA, however some are in other statutes.

• Full Exemptions (G.S. 150B-1(c))

- NC National Guard in exercising its court-martial jurisdiction.
- Department of Health and Human Services in exercising its authority over the Camp Butner reservation.
- The Utilities Commission.

- The State Board of Elections in administering the HAVA Administrative Complaint Procedure.
- The NC State Lottery.
- Any agency with regard to disputes under the American Recovery and Reinvestment Act of 2009 (*expires June 30, 2012*)

- **Exemptions from Rule-Making (Article 2A)** (G.S. *150B-1(d)*)

- The Rules Review Commission.
- The Department of Revenue, *with respect to the notice and hearing requirements.*
- The NC Global Transpark Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.
- The Division of Adult Correction of the Department of Public Safety with respect to matters related solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees.

- The State Health Plan in administering the provisions of Parts 2, 3, 4, & 5 of Article 3A of Chapter 135 of the General Statutes.
- The NC Federal Tax Reform Allocation Committee with respect to adoption of the annual qualified allocation plan.
- The Department of Health and Human Services in adopting new or amending existing medical coverage policies under the State Medicaid Program.
- The Economic Investment Committee in developing criteria for the Job Development Investment Grant Program.
- The NC Ports Authority with respect to the establishment of fees.
- The Department of Commerce and the Governor's Office in developing guidelines for the One North Carolina Fund.
- The Department of Commerce in developing guidelines for:
 1. The North Carolina Economic Development Reserve.
 2. NC Green Business Fund.
- The Department of Commerce and the Economic Investment Committee in developing criteria and administering:
 1. The Site Infrastructure Development Program.
 2. The Job Maintenance and Capital Development Fund.
- The State Ethics Commission.

- The Department of Health and Human Services in implementing the Medicaid Waiver programs.

- **Exemptions from Contested Case Provisions (Article 3)**

(G.S. 150B-1(e))

- The Department of Health and Human Services and the Department of Environment and Natural Resources in complying with the mandates of the Federal Education of the Handicapped Act Amendments of 1986.
- Hearings required by the Rehabilitation Act of 1973.
- The Division of Adult Correction of the Department of Public Safety.
- The Department of Transportation, except as provided in G.S. 136-29.
- The Occupational Safety and Health Review Board.
- The NC Global Transpark Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.
- Hearings that are provided by the Department of Health and Human Services regarding the eligibility and provision of services for eligible assaultive and violent children.

- The State Health Plan with respect to disputes involving the performance, terms, or conditions of a contract between the Plan and a entity under contract with the Plan.
- The State Health Plan with respect to determinations that an admission, availability of care, continued stay, or other health care service does not meet the Plan's requirement for medical necessity, appropriateness, and the requested service is therefore denied, reduced or terminated.
- The Department of Public Safety for hearings and appeals authorized under Chapter 20.
- The Wildlife Resources Commission for determinations of whether to authorize or terminate authority for a person to act as a license agent.
- The Department of Health and Human Services with respect to:
 - Health Choice Program determinations.
 - Adult care home appeals.
- The Department of Commerce for unemployment insurance appeals.
- The Industrial Commission.

◆ **Exemption for The University of North Carolina and the State Board of Community Colleges** (G.S. 150B-1(f)&(g))

- ◆ Except as provided for in G.S. 143-135.3, the University of North Carolina and The State Board of Community Colleges are exempt from the APA *except* for Article 4, Judicial Review.

KEY DEFINITIONS IN RULE-MAKING (G.S. 150B-2)

- ◆ **AGENCY** means an agency or an officer in the executive branch of government of NC and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A unit of local government is *not* an agency.
- ◆ **ADOPT** means to take final action to create, amend, or repeal a rule.
- ◆ **CODIFIER OF RULES** means the Chief Administrative Law Judge of the Office of Administrative Hearings or a designated representative of the Chief Administrative Law Judge.

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- ◆ **CONTESTED CASE** means an administrative proceeding to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. "Contested case" does *not* include rule-making, declaratory rulings, or the award or denial of a scholarship, grant, or loan.

 - ◆ **RULE** means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term *includes* the establishment of a fee and the amendment or repeal of a prior rule. The term "rule" does *not* include the following:
 - ◆ Statements concerning only the internal management of an agency or group of agencies within the same principal office or department, including policies and procedures manuals, *if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.*
 - ◆ Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, by an

occupational licensing board, or by the State Board of Elections.

- ◆ *Nonbinding* interpretive statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
- ◆ A form, the contents or substantive requirements of which are prescribed by rule or statute.
- ◆ Statements of agency policy made in the context of another proceeding, including:
 - ◆ Declaratory rulings under G.S. 150B-4
 - ◆ Orders establishing or fixing rates or tariffs
 - ◆ Requirements communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
- ◆ Statements that set forth criteria or guidelines to be used by the staff of an agency
 - in performing audits, investigations, or inspections;
 - in settling financial disputes or negotiating financial arrangements; or,

- in the defense, prosecution, or settlement of cases.
- ◆ Scientific, architectural, or engineering standards, forms, or procedures, including, design criteria and construction standards used to construct or maintain highways, bridges, or ferries.
- ◆ Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Personnel Commission.
- ◆ Establishment of the interest rate that applies to tax assessments under G.S. 105-241.1 and the variable component of the excise tax on motor fuel under G.S. 105-449.80.
- ◆ The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing, reviewed by the Rules Review Commission, and approved by the Governor.

Additional definitions can be found under G.S. 150B-2.



THE RULE-MAKING PROCESS: KEY PLAYERS

◆ AGENCIES

- ◆ Designate rule-making coordinator.
- ◆ Adopt, amend, and repeal rules.
- ◆ Prepare fiscal notes.
- ◆ Certify which rules are required by federal law.
- ◆ Accept public comment.
- ◆ Hold public hearings.
- ◆ Respond to petitions for rule-making submitted by the public.
- ◆ Maintain interested party mailing list.

◆ OFFICE OF ADMINISTRATIVE HEARINGS (OAH)

- ◆ Publishes the *North Carolina Register (NCR)* of proposed rules.
- ◆ Publishes the *North Carolina Administrative Code (NCAC)* of enacted rules.
- ◆ Reviews agencies' findings of need for emergency rules.
- ◆ Holds administrative hearings.

◆ OFFICE OF STATE BUDGET & MANAGEMENT (OSBM)

- ◆ Reviews fiscal notes and Substantial Economic Impact statements prepared by agencies and certifies State fund availability and compliance with regulatory principles.
- ◆ Prepares Substantial Economic Impact statements, if requested to do so by the agency.
- ◆ Compiles an annual summary of the projected fiscal impact of rules on local government that were adopted during the preceding fiscal year.
- ◆ Compiles a schedule of anticipated rule actions by State agencies for the upcoming fiscal year.
- ◆ Coordinates and oversees Rules Modification and Improvement Program

◆ RULES REVIEW COMMISSION (RRC)

- ◆ Reviews agency rules after the rules are adopted by the agency.
- ◆ Reviews agencies findings of need and proposed temporary rules.
- ◆ Accepts requests for legislative review of rules.

- ◆ Forwards approved rules to the Office of Administrative Hearings for entry into the *North Carolina Administrative Code*.


◆ PUBLIC

- ◆ May submit written and oral comments on agency proposed rules.
- ◆ May petition agencies to amend, adopt, or repeal rules.
- ◆ May request legislative review of rules approved by the Rules Review Commission.

◆ GENERAL ASSEMBLY

- ◆ In cases in which ten or more written requests for legislative review have been received by the RRC, any legislator may introduce a bill to disapprove a permanent rule approved by the RRC within the first 30 days of the next regular legislative session.
- ◆ Enacts policies and programs into State law and delegates rule-making authority to agencies.

◆ **GOVERNOR**

- ◆ Enacts rules, approved by the RRC, by Executive Order upon finding that it is necessary that the rules become effective in order to protect the public health, safety, or welfare, if the effective date is delayed for legislative review.
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THE RULE-MAKING PROCESS: STEPS IN ADOPTING A PERMANENT RULE

STEP 1: THE AGENCY DETERMINES A RULE IS NEEDED.

The rule-making process begins when the agency determines that a rule is required to implement or interpret a law. In developing and drafting a proposed rule, the agency must adhere to the following principles:

- ◆ An agency may only adopt rules that are clearly authorized by federal or State law and that are necessary to serve the public interest.
- ◆ An agency must seek to reduce the burden upon those who must comply with the rule.
- ◆ Rules must be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.
- ◆ An agency must consider the cumulative effect of rules and may not adopt a rule that is unnecessary or redundant.

- ◆ Rules should be based on sound scientific, technical, economic or other relevant information.
- ◆ Rules must be designed to achieve the regulatory objective in a cost-effective and timely manner.

Agencies must also do the following in connection with the adoption of a rule:

- Post information about a proposed rule on its website when it submits the rule for publication in the NC Register.
- Determine whether there is overlap in its policies and programs with another agency and coordinate their rule-making activity.
- Prepare a fiscal note and review details of fiscal note with the rule-making body.
- Consider at least 2 alternatives to the proposed rule if the rule has a substantial economic impact.
- Prepare federal certification if the rule is required by federal law and post the certification on the website. (*G.S. 150B-19.1*)

- STEP 2:** **FEDERAL CERTIFICATION.** Whenever an agency proposes a rule that is necessary to implement or comply with federal law, the agency must prepare a certificate to the proposed rule which:
- ◆ Identifies the federal law requiring the adoption of the proposed rule.
 - ◆ Contains a statement setting forth the reasons why the proposed rule is required by federal law.
 - ◆ Identify any part of the proposed rule which is *not* required by federal law or which exceeds the requirements of federal law.

The agency must post the certification on the agency website and provide a citation of the law to OSBM. (*G.S. 150B-19.1(g)*)

- STEP 3:** **PREPARATION OF FISCAL NOTE.** Before publishing the proposed text of a rule, the agency must determine whether or not the rule has State fiscal impact, local fiscal impact, or substantial economic impact.

State Fiscal Impact: If the proposed rule affects the expenditures or distribution of State funds subject to the State Budget Act, the

agency must submit the proposed rule, an analysis of the proposed rule, and a fiscal note to OSBM and obtain certification that the required funds are available and that the agency has adhered to the regulatory principles. *(G.S. 150B-21.4(a))*

DOT Analyses: If the proposed rule affects environmental permitting of a DOT project, the agency must conduct a cost analysis and submit it to the Board of Transportation. If the Board of Transportation submits an objection to the rule and the RRC approves the rule, the rule will be subject to legislative review before becoming effective. *(G.S. 150B-21.4(a1))*

Local Fiscal Impact: If the proposed rule affects the expenditures or revenues of local government, the agency must submit the proposed rule and fiscal note to the Governor, the Fiscal Research Division, OSBM, the NC Association of County Commissioners, and the NC League of Municipalities. *(G.S. 150B-21.4(b))*

Substantial Economic Impact: Before publishing the proposed text of a rule, either the agency or OSBM must determine whether or not the rule has a substantial economic impact. (*G.S. 150B-21.4(b1)*)

“Substantial economic impact” means an aggregate financial impact on all persons of at least \$500,000 in a 12-month period.

A substantial economic impact fiscal note must contain the following:

- ◆ A description of the persons who would be affected by the proposed rule change.
- ◆ A description of the types of expenditures that persons affected by the proposed rule change would have to make to comply with the rule and an estimate of these expenditures.
- ◆ A description of the purpose and benefits of the proposed rule change.
- ◆ An explanation of how the estimate of expenditures was computed.
- ◆ A description of at least two alternatives to the proposed rule that were considered by the agency

If the agency requests OSBM to prepare the substantial economic impact fiscal note, OSBM must prepare the note within 90 days. (G.S. 150B-21.4(b2))

STEP 4: **PUBLICATION OF THE NOTICE OF TEXT** At this point, the agency is ready to begin the formal rule-making process. The agency must first publish a *Notice of Text* in the *NC Register* which contains:

- ◆ The text of the proposed rule.
- ◆ An explanation of the reason for proposed action and a link to the agency website containing information about the proposed rule.
- ◆ Citation to the law giving the agency authority to adopt the rule.
- ◆ The proposed effective date.
- ◆ The date, time, and place of any public hearing that has been scheduled.
- ◆ Instructions on how to demand a public hearing if one is not scheduled.

- ◆ The period of time during which and the person to whom written comments may be submitted.
- ◆ Notice of where a fiscal note may be obtained if one has been prepared.
- ◆ The procedure by which a person can object to a proposed rule and the requirements for subjecting the rule to the legislative review process. (G.S. 150B-21.2(c))

STEP 5: **PUBLIC HEARING AND COMMENT PERIOD.** The agency must hold a public hearing on a proposed rule if one is requested within 15 days of the publication of the notice of text. Most agencies hold at least one public hearing whether requested or not. The agency must accept public comment on both the proposed rule and the fiscal note. The agency must accept public comment for at least **60 days.** (G.S. 150B-21.2(f))

STEP 6: **ADOPTION OF THE RULE** An agency may *not* adopt a rule:

- ◆ Until the time for commenting on the proposed text has elapsed.

- ◆ If more than 12 months have elapsed since the end of the comment period.
- ◆ That differs substantially from the proposed text published in the *NC Register*. (G.S. 150B-21.2(g))

STEP 7: REVIEW BY THE RULES REVIEW COMMISSION (RRC)

Permanent rules which have been adopted by agencies must be approved by the Rules Review Commission before the rule can go into effect. In reviewing permanent rules, the RRC must determine that:

- ◆ The rule is within the statutory authority delegated to the agency by the General Assembly.
- ◆ The rule is clear and unambiguous.
- ◆ The rule is reasonably necessary to implement or interpret an enactment of the General Assembly, or of the Congress, or a regulation of a federal agency. The RRC must consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.

- ◆ The rule was adopted in accordance with the APA.

The RRC may not consider questions relating to the quality or efficacy of the rule, but is restricted to the statutory standards noted above.

The Rules Review Commission reviews the *entire* rule, not just the portion being amended. (*G.S. 150B-21.8 - 21.9*)

RRC Objection to a Permanent Rule: If the RRC objects to a permanent rule, the agency must:

- ◆ Change the rule to satisfy the objection and re-submit the rule to the RRC, or
- ◆ Submit a written response to the RRC indicating that the agency has decided not to change the rule.

A rule to which the RRC has objected remains under review until the agency decides not to satisfy the objection at which time the rule is returned to the agency. (*G.S. 150B-21.12*)

STEP 8: RULES BECOME EFFECTIVE

Effective Dates of Rules *(G.S. 150B-21.3(b))*

- ◆ Permanent rules approved by RRC become effective on the first day of the month following the month the rule is approved by the RRC, unless the RRC receives written objections to the rule.
- ◆ If the RRC receives written objections from 10 or more people clearly requesting legislative review, then the rule cannot become effective before the 31st legislative day of the next regular session of the General Assembly. *(G.S. 150B-21.2(b1 & (b2))*.

Bills to Disapprove Permanent Rules to Which Objections Have Been Filed *(G.S. 150B-21.3(b2))*

- ◆ Prior to the 31st legislative day, any legislator may introduce a bill to disapprove a rule.
- ◆ If a bill is introduced to disapprove a rule, the rule cannot become effective until:

- ◆ An unfavorable action is taken on the bill or
- ◆ The General Assembly adjourns without ratifying the bill.

A permanent rule that is specifically disapproved by a bill ratified by the General Assembly *cannot* become effective.

Executive Order Exception (G.S. 150B-21.3(c))

The Governor may, by Executive Order, make effective a permanent rule that has been approved by RRC upon finding that it is necessary for the rule to become effective to protect the public health, safety, or welfare, if the effective date is delayed for legislative review.

A rule made effective by Executive Order is still subject to legislative review and disapproval.

Fees

- ◆ A rule that establishes a new fee or increases an existing fee cannot become effective until the agency has consulted with the Joint Legislative Commission on

Governmental Operations. If the Commission does not meet within 90 days of receiving a request for consultation from the agency, including a detailed explanation of the need for the fee, the consultation requirement is deemed satisfied. (*G.S. 12-3.1 and G.S. 150B-21.3(c1)*)

OTHER AGENCY DUTIES & LIMITATIONS

◆ Annual Review of Existing Rules.

Each year, agencies must conduct a review of existing rules and repeal any rules which it finds to be unnecessary, unduly burdensome, or inconsistent with the rule-making principles. In addition, the Office of State Budget and Management coordinates and oversees an annual review of existing rules and maintains a web portal dedicated to receiving public comments on rules and tracking agency progress on reforming rules. (*G.S. 150B-19.2*)

◆ Limitation on Certain Environmental Rules.

Certain agencies are prohibited from adopting rules for the protection of the environment or natural resources if the rules impose standards

and limitations that are more restrictive than those imposed by an analogous federal law or rule, unless the rule responds to an emergency, a specific law, a change in budgetary policy, or a court order. The agencies subject to this limitation include:

- ◆ The Department of Environment and Natural Resources
- ◆ The Environmental Management Commission
- ◆ The Coastal Resources Commission
- ◆ The Marine Fisheries Commission
- ◆ The Wildlife Resources Commission
- ◆ The Commission for Public Health
- ◆ The Sedimentation Control Commission
- ◆ The Mining Commission
- ◆ The Pesticide Board (*G.S. 150B-19.3*)

**CIRCUMSTANCES WHEN NOTICE OF TEXT,
FISCAL NOTES, &
PUBLIC HEARINGS ARE NOT REQUIRED**

Agencies are *not* required to publish a notice of text, prepare a fiscal note, or hold a public hearing in the following circumstances:

1. Amending rules to do one of the following:

- ◆ Re-letter or renumber the rule.
- ◆ Substitute one name for another when an organization or position is renamed.
- ◆ Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.
- ◆ Change information that is readily available to the public, such as an address or telephone number.

- ◆ Correct a typographical error in the *North Carolina Administrative Code*.
- ◆ Change a rule in response to a request or an objection by the Rules Review Commission, unless the Commission determines that the change is substantial. (G.S. 150B-21.5(a))

2. Repealing rules in the following circumstances:

- ◆ The law under which the rule was adopted is repealed.
- ◆ The rule itself is declared unconstitutional.
- ◆ The rule is declared in excess of the agency's statutory authority. (G.S. 150B-21.5(b))
 - ◆ These rules *are* subject to review and approval by the Rules Review Commission.

3. OSHA Standards

When the Occupational Safety and Health Division of the Department of Labor proposes to adopt a rule concerning an occupational safety and health standard that is identical to a federal regulation promulgated by the Secretary of the US Department of Labor, it is *not* required to:

- ◆ Publish a notice of text;

- ◆ Conduct a public hearing; or
- ◆ Submit the rule to the Rules Review Commission for review and approval. (*G.S. 150B-21.5(c)*)

Rules adopted pursuant to this section become effective on the date the Department delivers the rules to the Codifier of Rules (OAH) or at a later date specified by the Division. (*G.S. 150B-21.3(e)*)

4. State Building Code

The Building Code Council is not required to publish a notice of text in the NC Register when it proposes to adopt a rule that concerns the State Building Code, but the Council must publish a notice including the following:

- A statement of the subject matter of the proposed rule.
- A short explanation of the reason for the proposed action.
- A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule.
- The person to whom questions or written comments may be submitted. (*G.S. 150B-21.5(d)*)

THE RULE-MAKING PROCESS: STEPS IN ADOPTING A TEMPORARY RULE

STEP 1: **ADOPTION** An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements would be contrary to the public interest and when adoption of the rule is required by:

- ◆ A serious and unforeseen threat to the public health, safety, or welfare.
- ◆ The effective date of a recent act of the General Assembly or Congress.
- ◆ A recent change in federal or State budgetary policy.
- ◆ A recent federal regulation.
- ◆ A recent court order.

- ◆ The need for the rule to become effective the same date as the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan.
- ◆ The need for the Wildlife Resources Commission to adopt a temporary rule to establish any of the following:
 1. No wake zones
 2. Hunting or fishing seasons
 3. Hunting or fishing bag limits
 4. Management of public game lands.
- ◆ The need for the Secretary of State to adopt temporary rules to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes (Electronic Commerce in Government).
- ◆ The Commissioner of Insurance may adopt temporary rules to implement the provisions of G.S. 58-2-205 (CPA Audits of Financial Statements).
- ◆ The need for the Chief Information Officer to implement the information technology procurement provisions.

- ◆ The need for the State Board of Elections to adopt temporary rules after prior notice or hearing or upon any abbreviated notice or hearing in the following circumstances:
 - ◆ In accordance with G.S. 163-22.2 (This statute governs the Board's authority to adopt temporary rules if any portion of the State's election laws or an election is held unconstitutional or invalid.)
 - ◆ To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.
 - ◆ The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections or the elections process.

"Recent" is defined as an act, change, regulation, or order occurring no more than 210 days prior to the submission of the rule to RRC.

Process At least 30 days prior to adoption, the agency must:

- Submit the temporary rule and notice of public hearing for publication on OAH's website. (OAH must publish on website within 5 business days.)
- Notify interested parties.
- Accept written comments on the rule for at least 15 business days prior to adoption.
- Hold at least one public hearing. (G.S. 150B-21.1(a3))

STEP 2:

REVIEW When an agency adopts a temporary rule it must submit the rule and a statement of findings of need for the rule to the RRC. The full Commission or a panel of 3 members must review the rule within 15 business days. In reviewing the rule, the Commission uses the same statutory criteria applied to permanent rules (*See Step 7 in Adopting Permanent Rules*).

If the rule is approved, OAH must enter the rule into the Administrative Code within 2 business days. (G.S. 150B-21.1(b))

STEP 3: **EFFECTIVE DATE AND EXPIRATION OF TEMPORARY RULES**

A temporary rule becomes effective when it is entered into the Administrative Code.

A temporary rule expires on the *earliest* of the following dates:

- ◆ The date specified in the rule.
- ◆ The effective date of the permanent rule adopted to replace the temporary rule, if the RRC approves the permanent rule.
- ◆ The date RRC returns the permanent rule to the agency
- ◆ The effective date of an act of the General Assembly that specifically disapproves the permanent rule.
- ◆ 270 days from the date the rule was published in the *NCR*, *unless* the permanent rule has been submitted to RRC. (*G.S. 150B-21.1(d)*)

THE RULE-MAKING PROCESS: STEPS IN ADOPTING AN EMERGENCY RULE

STEP 1: **ADOPTION** An agency may adopt an emergency rule without prior notice or upon any abbreviated notice or hearing the agency finds practical when the agency finds that adherence to the notice and hearing requirements of permanent rule-making would be contrary to the public interest *and* the immediate adoption of the rule is required by *a serious and unforeseen threat to public health or safety*. The agency must simultaneously commence the process for adopting a temporary rule.

The Department of Health and Human Services may adopt emergency rules when a recent act of the General Assembly or the Congress or a recent change in federal regulations authorizes new or increased services or benefits for children and families and the rule is necessary to implement the change. (G. S. 150B-21.1A(a))

STEP 2: **REVIEW OF AGENCY FINDINGS BY THE CODIFIER OF RULES**
When an agency adopts an emergency rule, it must submit the rule

and statement indicating why the rule must become effective immediately to the Office of Administrative Hearings (Codifier of Rules) for review. The Codifier of Rules must review the rule within 2 business days.

Approval: If the Codifier approves the agency's need for the emergency rule, the rule will be entered in the *North Carolina Administrative Code (NCAC)*.

Objection: If the Codifier objects to the agency's need for the emergency rule, the agency may revise and resubmit its findings.

If the agency decides *not* to revise its findings, the agency may file the rule over the objection of the Codifier. The Codifier must then enter the emergency rule into the *NCAC*. (G.S. 150B-21.1A(b))

STEP 3: **RULE BECOMES EFFECTIVE**

- ◆ An emergency rule becomes effective when it is entered in the NC Administrative Code. The Codifier must enter the rule in the Code on the 6th business day after it has been

approved or the agency has decided to adopt the emergency rule over the objection of the Codifier.

(G.S. 150B-21.3(a) & G.S. 150B-21.1A(b))

STEP 4:

EXPIRATION OF EMERGENCY RULES

- ◆ An emergency rule expires on the earliest of the following dates:
- ◆ The date specified in the rule.
- ◆ The effective date of a temporary rule adopted to replace the emergency rule, if it is approved by the RRC.
- ◆ The date the RRC returns a temporary rule to the agency, which was adopted to replace the emergency rule.
- ◆ Sixty days from the date the emergency rule was published in the *NC Register*, unless the temporary rule has been submitted to the RRC.

PUBLIC PARTICIPATION IN THE RULE-MAKING PROCESS

◆ PETITIONING AN AGENCY TO ADOPT A RULE (G.S. 150B-20)

Public's Responsibilities: Any person may petition an agency to adopt a rule by:

- ◆ Submitting a petition to the agency requesting the rule change, along with any written comments, if desired.
- ◆ Including the proposed text of the requested rule change if the petition requests the creation of a new rule or the amendment of an existing rule.
- ◆ Including a statement of the effect of the requested rule change.

Agency's Responsibilities:

- ◆ Establish by rule the agency's procedures for considering a petition.
- ◆ Must grant or deny a rule-making petition within **30 days** after the petition is submitted, *unless* the agency is a board or commission. If the agency is a board or commission, it must grant or deny the petition within **120 days** after the petition is submitted.

- ◆ Failure to grant or deny a rule-making petition within the time limits above constitutes a denial of the petition.
- ◆ If the agency **denies** the rule-making petition, it must send the petitioner a written statement of the reasons for denying the petition.
- ◆ If the agency **grants** the rule-making petition, it must inform the petitioner and initiate rule-making proceedings.

Review of Denial of a Rule-making Petition: An agency's denial of a rule-making petition is considered a final agency decision and is subject to judicial review under Article 4 of Chapter 150B.

WHERE TO FIND AGENCY RULES:

- ◆ The *North Carolina Register* is published twice monthly and contains the following information regarding rule-making:
 - ◆ Temporary rules recently adopted by agencies and entered into the NCAC.
 - ◆ Dates, times, and places of public hearings on proposed permanent rules.

- ◆ Proposed text of permanent rules.
- ◆ Actions by the Rules Review Commission.
- ◆ Cumulative index of proposed rules.
 - ◆ The *North Carolina Administrative Code* contains the following:
 - ◆ Permanent rules.
 - ◆ Temporary rules which are in effect.
 - ◆ Emergency rules which are in effect.

The *NC Register* and *NC Administrative Code* can be found on the NC Office of Administrative Hearings website at:
<http://www.oah.state.nc.us/>