

State Government

The 2003 General Assembly passed the most significant changes to the North Carolina Administrative Procedure Act since the major reworking of that legislation in 1995. The main thrust of the changes was to alter the process for temporary rule making, by distinguishing temporary rules from emergency rules, by giving the Rules Review Commission (RRC) a gatekeeper role for temporary rules, and by shortening the amount of time required for noncontroversial permanent rules to become effective.

Administrative Procedure Act

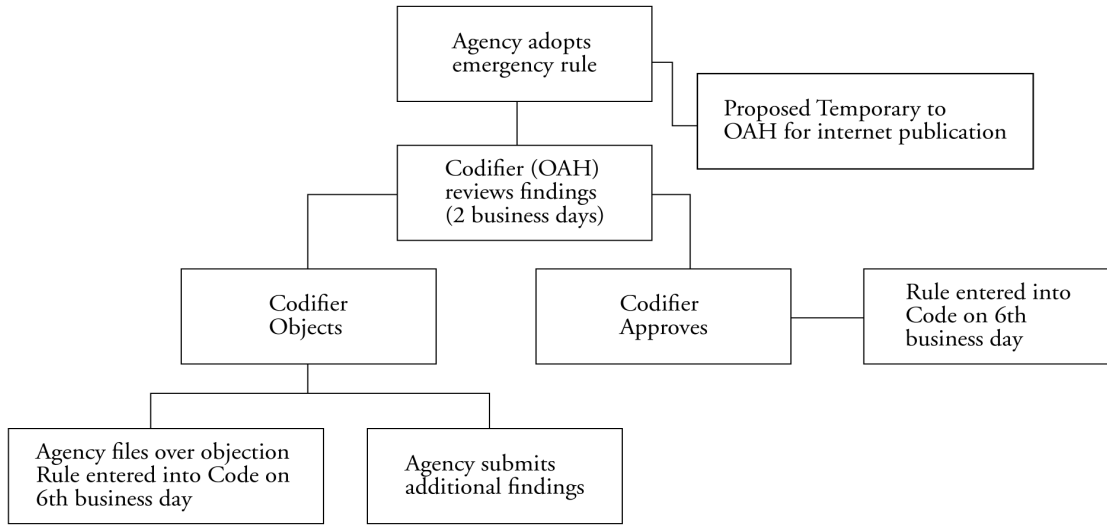
Rule Making

In Chapter 507, Section 27.8, of the 1995 N.C. Session Laws, the legislature substantially changed the process for permanent rule making. The main legislative goals at that time were to slow down the process and give more legislative control over the agencies, particularly regulatory agencies (notably the Department of Environment and Natural Resources) whose work had widespread impact on businesses in North Carolina. The 1995 amendments succeeded in these goals, but at the cost of three important, undesirable consequences. First, the agencies began to push more rules through the temporary rule-making process, which was much less burdensome procedurally, but which offered little or no public input or analysis of regulatory impacts. Second, the entire permanent rule-making process across state government bogged down, to the extent that it became much easier to change state policy through legislative changes than through administrative processes, even when the policy changes were not controversial. Third, the pressure built for agencies to get exemptions, in whole or in part, from the Administrative Procedure Act, and these piecemeal exemptions began seriously to erode the ideal of a consistent rule-making process—a hallmark goal for the Administrative Procedure Act.

In the 2003 regular session, the legislature passed S.L. 2003-229 (H 1151) in an attempt to fix these problems. The new legislation separates rules currently allowed as temporary rules into two categories, temporary and emergency. Only the newly defined emergency rules will be permitted the minimal oversight and process now given to all temporary rules. The emergency rule-making process is limited to rules for which immediate adoption “is required by a serious and unforeseen

threat to the public health or safety.” There is also a special exception allowing the Department of Health and Human Services to adopt emergency rules in response to changes in state or federal law pertaining to medical benefits. Emergency rules can be put into place over the objection of the Codifier of Rules and without review by the Rules Review Commission. However, they are subject to challenge in court and expire after no more than sixty days. The Office of Administrative Hearings’ unofficial flow chart of the new emergency rule-making process is shown below in Figure 1.

Figure 1. New Emergency Rule-Making Process
Source: Office of Administrative Hearings

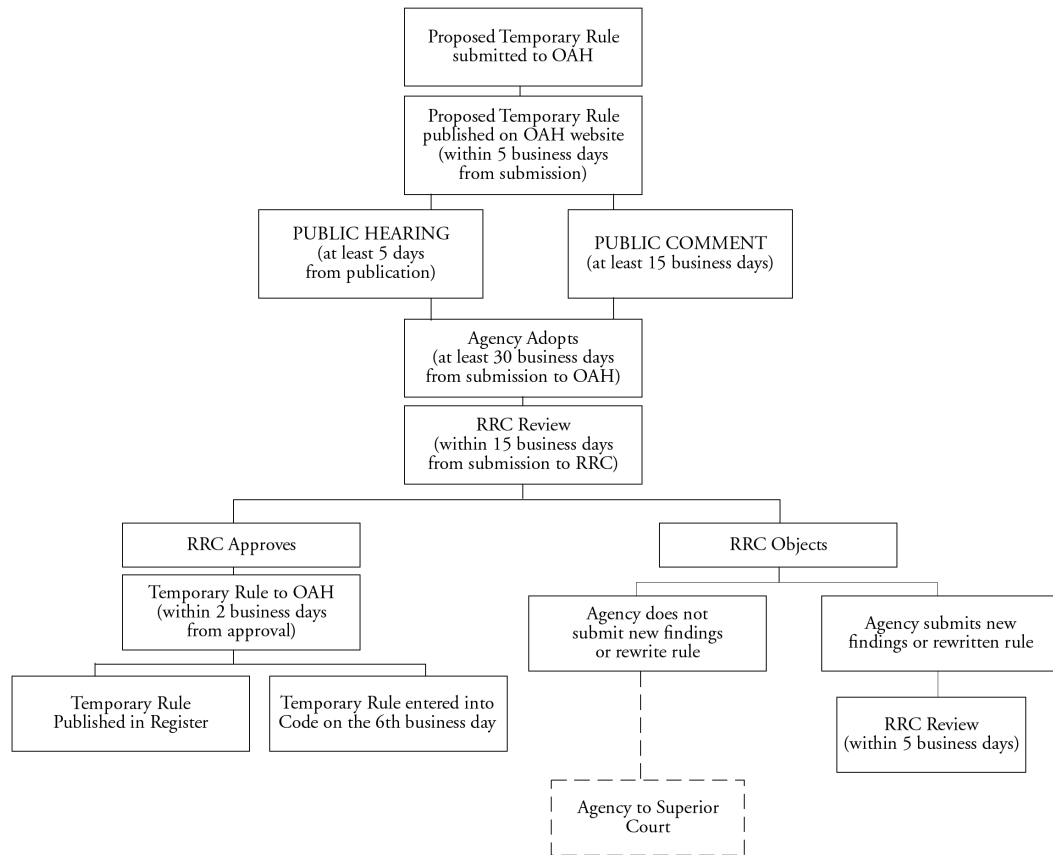


Emergency Rule expires on the earliest of the following dates:

1. The date specified in the rule.
2. The effective date of the permanent rule adopted to replace the temporary rule, if the Commission approved the permanent rule.
3. The date the Commission returns to an agency a permanent rule the agency adopted to replace the temporary rule.
4. The effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the temporary rule.
5. 270 days from the date the temporary rule was published in the North Carolina Register, unless the permanent rule adopted to replace the temporary rule has been submitted to the Commission.

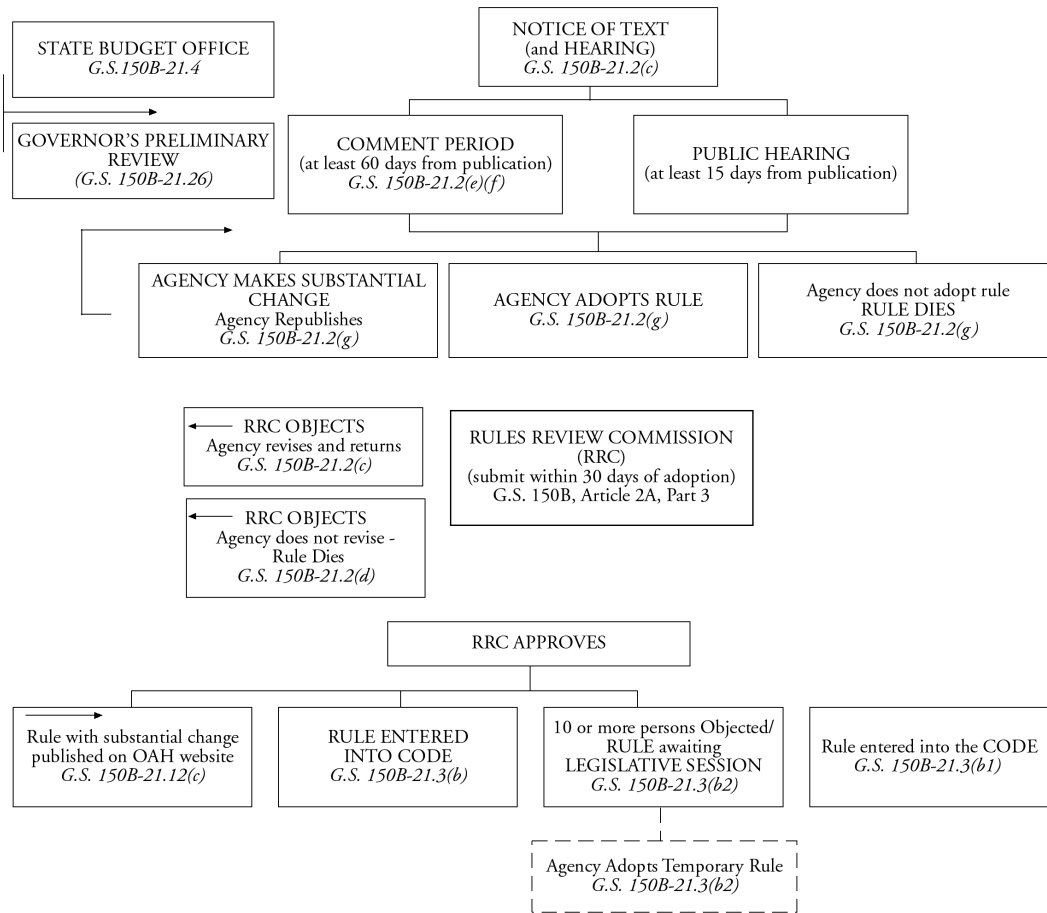
Temporary rules must now be submitted to the Rules Review Commission, which can veto them, and they must also receive at least thirty days’ public notice and a public hearing. Temporary rules are defined under the new provisions as they were under prior law, except that federal regulations and court orders that form the basis for temporary rule making must now be recent, and the statute now defines *recent* as, in essence, a change occurring or made effective within the last 210 days before a rule is submitted to the Rules Review Commission. The new law is highly prescriptive regarding the time period and method for review by the Rules Review Commission, in part because the decision need not be made by the full commission, but can instead be made by a panel of at least three of its members. The Office of Administrative Hearings’ unofficial flow chart of the new temporary rule-making process is shown below in Figure 2.

Figure 2. New Temporary Rule-Making Process
 Source: Office of Administrative Hearings



For permanent rules, the new law makes several changes designed to speed up the time it takes to make most rules effective. It eliminates the Notice of Rule-Making Proceedings, a requirement added in 1995 to give advance notice that an agency was about to revise or create rules so that interested parties could be involved in rule making prior to the time that a proposed rule was drafted. It allows permanent rules to go into effect on the first day of the month following the month in which they are approved by the Rules Review Commission, unless ten or more people file objections to the rules with the commission. In the event of such objections, the effective date would be delayed in the same manner in which it is presently delayed, until the next session of the General Assembly. The bill lowers the threshold for fiscal analyses caused by “substantial economic impact” from the current \$5,000,000 to \$3,000,000. It also expressly authorizes judicial review of decisions by the Rules Review Commission to reject rules. The Office of Administrative Hearings’ unofficial flow chart of the new permanent rule-making process is shown below in Figure 3.

Figure 3. New Permanent Rule-Making Process
 Source: Office of Administrative Hearings



Finally, S.L. 2003-229 makes several changes in the statutes governing the Rules Review Commission itself. In addition to giving that commission authority to veto temporary rules, it attempts to clarify the standard of “reasonable necessity” under which the commission reviews rules, and it expressly adds a standard requiring the commission to determine whether a rule was adopted in accordance with the rule-making process in the Administrative Procedures Act. Perhaps most importantly, it opens up permanent rules to future attack on process grounds by stating that Rules Review Commission approval creates only a rebuttable presumption, rather than a conclusive determination, that rules were adopted in accordance with the Administrative Procedure Act. It also attempts to clarify when agencies must reissue a notice and allow further comment on a rule after making changes in response to Rules Review Commission objections.

Sale of Blount Street Property

The Blount Street Historic District in Raleigh runs from the 1891 Executive Mansion north to Peace College, between the Historic Oakwood neighborhood to the east and the state government mall to the west. It developed in the decades following the Civil War as the home of many of Raleigh's industrial and civic leaders. Following a long period of decline in the mid-twentieth century, the district was slated for demolition in the 1960s to make way for an expressway and a new state government complex. Most of the properties were acquired by the state through purchase and condemnation. However, the historic preservation movement of the early 1970s

succeeded in designating the area as an historic district (1976). Today, many of the preserved historic homes are occupied by state agencies. S.L. 2002-186 called for a study of the state-occupied properties to assess their continued viability as office space and parking. S.L. 2003-404 (S 819) authorizes their sale (excluding the Executive Mansion and three other properties), with restrictions to ensure that future use is consistent with the historical and architectural character of the district.

Richard Whisnant