June 24, 20XX – July 7, 20XX

A Rulemaking Roadmap
Perspectives from Both Sides of the Road

Brian Liebman and Anna Baird Choi
What is Rulemaking?

• The Administrative Procedure Act (G.S. 150B) provides for a uniform procedure for the adoption of rules and authorizes OAH to publish the North Carolina Register and the North Carolina Administrative Code.

• Except for minor exemptions found in G.S. 150B-1(d) and other agency specific statutes, State agencies and occupational licensing boards/commissions are required to follow this uniform procedure in providing notice to the public and interested persons of proposed rules, and for the filing of adopted rules for review and codification into the Code.
PERMANENT RULEMAKING FLOW CHART

Agency submits to State Budget
Agency approves fiscal note

Publication in NC Register
G.S. 1508-21.2(g)

Comment Period
(at least 60 days from publication)
G.S. 1508-21.2(e)(f)

Publication on Agency Website
G.S. 1508-19.2(d)

Public Hearing
(at least 35 days from publication)
G.S. 1508-21.2(f)

Agency reviews fiscal note & public comments
G.S. 1508-21.2(f) & (g)

Agency makes substantial change
Agency requests
G.S. 1508-21.2(g)

Agency adopts rule
G.S. 1508-21.2(g)

Agency does not adopt rule
Rule Dies
G.S. 1508-21.2(g)

RRC Objects
Agency reserves and returns
G.S. 1508-21.12(c)

RRC Objects
Agency does not reserve - Rule Dies
G.S. 1508-21.13(d)

Rules Review Commission (RRC)
(submit within 30 days of adoption)
G.S. 1508, Article 2A, Part 3

RRC Approves

RRC Approves with substantial change
G.S. 1508-21.12(c)
Republish
G.S. 1508-21.1(f) & (b)

Rule entered into Code
G.S. 1508-21.3(b)

10 or more persons Objected / Rule awaiting legislative session
G.S. 1508-21.3(b)

Rule entered into the Code
G.S. 1508-21.3(b)

Required under certain conditions
What to do **BEFORE PUBLICATION**

Dana McGhee
dana.mcghee@oah.nc.gov
984-236-1937

Julie Brincefield
julie.brincefield@oah.nc.gov
984-236-1935

---

**Pre-Review**
Depending on time and workload, staff will review draft language before publication.

**Fees**
G.S. 12-3.1
Susie Camilleri
919-733-4910
susie.camilleri@ncleg.net

**Fiscal Note**
G.S. 150B-19.1(e)
Carrie Hollis
984-236-0689
carrie.hollis@osbm.nc.gov

**Interested?**
- G.S. 150B-21.2
- ✅ Mailing list
- ✅ Listserv
- ✅ Fee to cover costs
An agency must submit a notice of text to OAH for publication in the N.C. Register. No later than the date of publication in the Register, the agency must publish the rule text, an explanation and reason for the rule, instructions on submitting comments, and any fiscal note on its website.

Whether or not it holds a hearing, the agency must accept public comment on the rule and any fiscal note for at least 60 days or until the date of the public hearing, whichever is later. An agency must consider all written and oral comments received.

An agency must hold a public hearing if it receives a written request within 15 days of publication of the notice of text. An agency may otherwise decide to hold a public hearing. Hearings must be recorded or transcribed.

The publication process

Publication

Public Hearing

Comments
## 2022 Publication Schedule

### North Carolina Register
Publication Schedule for January 2022 – December 2022

<table>
<thead>
<tr>
<th>Volume &amp; Issue</th>
<th>Issue Date</th>
<th>Last Day for Filing</th>
<th>Earliest Date for Public Hearing</th>
<th>End of Required Comment Period</th>
<th>Deadline to Submit to RRC for Review at Next Meeting</th>
<th>RRC Meeting Date</th>
<th>Earliest Effective Date of Permanent Rule</th>
<th>270th Day from Publication in the Register</th>
</tr>
</thead>
<tbody>
<tr>
<td>36:13</td>
<td>01/03/22</td>
<td>12/06/22</td>
<td>01/18/22</td>
<td>05/04/22</td>
<td>03/21/22</td>
<td>04/21/22</td>
<td>05/01/22</td>
<td>09/30/22</td>
</tr>
<tr>
<td>36:14</td>
<td>01/08/22</td>
<td>12/22/22</td>
<td>02/02/22</td>
<td>05/21/22</td>
<td>04/20/22</td>
<td>05/19/22</td>
<td>06/30/22</td>
<td>10/15/22</td>
</tr>
<tr>
<td>36:15</td>
<td>02/01/22</td>
<td>01/10/22</td>
<td>02/16/22</td>
<td>04/04/22</td>
<td>04/20/22</td>
<td>05/19/22</td>
<td>06/30/22</td>
<td>10/29/22</td>
</tr>
<tr>
<td>36:16</td>
<td>02/15/22</td>
<td>01/25/22</td>
<td>03/02/22</td>
<td>04/10/22</td>
<td>04/20/22</td>
<td>05/19/22</td>
<td>06/30/22</td>
<td>11/12/22</td>
</tr>
<tr>
<td>36:17</td>
<td>03/01/22</td>
<td>02/08/22</td>
<td>03/16/22</td>
<td>05/02/22</td>
<td>05/26/22</td>
<td>06/16/22</td>
<td>07/01/22</td>
<td>11/26/22</td>
</tr>
<tr>
<td>36:18</td>
<td>03/15/22</td>
<td>03/22/22</td>
<td>03/30/22</td>
<td>05/16/22</td>
<td>05/26/22</td>
<td>06/16/22</td>
<td>07/01/22</td>
<td>12/10/22</td>
</tr>
<tr>
<td>36:19</td>
<td>04/01/22</td>
<td>03/11/22</td>
<td>04/16/22</td>
<td>05/31/22</td>
<td>06/26/22</td>
<td>07/21/22</td>
<td>08/01/22</td>
<td>12/27/22</td>
</tr>
<tr>
<td>36:20</td>
<td>04/18/22</td>
<td>03/25/22</td>
<td>05/03/22</td>
<td>06/17/22</td>
<td>06/26/22</td>
<td>07/21/22</td>
<td>08/01/22</td>
<td>01/13/23</td>
</tr>
<tr>
<td>36:21</td>
<td>05/02/22</td>
<td>04/08/22</td>
<td>05/17/22</td>
<td>07/01/22</td>
<td>07/26/22</td>
<td>08/18/22</td>
<td>09/01/22</td>
<td>01/27/23</td>
</tr>
<tr>
<td>36:22</td>
<td>05/16/22</td>
<td>04/25/22</td>
<td>05/31/22</td>
<td>07/15/22</td>
<td>07/26/22</td>
<td>08/18/22</td>
<td>09/01/22</td>
<td>02/10/23</td>
</tr>
<tr>
<td>36:23</td>
<td>06/01/22</td>
<td>05/10/22</td>
<td>06/16/22</td>
<td>08/01/22</td>
<td>08/22/22</td>
<td>09/15/22</td>
<td>10/01/22</td>
<td>02/26/23</td>
</tr>
<tr>
<td>36:24</td>
<td>06/15/22</td>
<td>05/24/22</td>
<td>06/30/22</td>
<td>08/15/22</td>
<td>08/22/22</td>
<td>09/15/22</td>
<td>10/01/22</td>
<td>03/12/23</td>
</tr>
<tr>
<td>37:01</td>
<td>07/01/22</td>
<td>06/10/22</td>
<td>07/16/22</td>
<td>08/30/22</td>
<td>09/26/22</td>
<td>10/20/22</td>
<td>11/01/22</td>
<td>03/28/23</td>
</tr>
<tr>
<td>37:02</td>
<td>07/15/22</td>
<td>06/23/22</td>
<td>07/30/22</td>
<td>09/13/22</td>
<td>09/26/22</td>
<td>10/20/22</td>
<td>11/01/22</td>
<td>04/11/23</td>
</tr>
<tr>
<td>37:03</td>
<td>08/01/22</td>
<td>07/11/22</td>
<td>08/16/22</td>
<td>09/30/22</td>
<td>10/26/22</td>
<td>11/17/22</td>
<td>12/01/22</td>
<td>04/28/23</td>
</tr>
<tr>
<td>37:04</td>
<td>08/15/22</td>
<td>07/25/22</td>
<td>08/30/22</td>
<td>10/14/22</td>
<td>10/26/22</td>
<td>11/17/22</td>
<td>12/01/22</td>
<td>05/12/23</td>
</tr>
<tr>
<td>37:05</td>
<td>09/01/22</td>
<td>08/11/22</td>
<td>09/16/22</td>
<td>10/31/22</td>
<td>11/21/22</td>
<td>12/15/22</td>
<td>01/01/23</td>
<td>05/29/23</td>
</tr>
<tr>
<td>37:06</td>
<td>09/15/22</td>
<td>08/24/22</td>
<td>09/30/22</td>
<td>11/14/22</td>
<td>11/21/22</td>
<td>12/15/22</td>
<td>01/01/23</td>
<td>06/12/23</td>
</tr>
<tr>
<td>37:07</td>
<td>10/03/22</td>
<td>09/12/22</td>
<td>10/18/22</td>
<td>12/02/22</td>
<td>12/20/22</td>
<td>01/19/23</td>
<td>02/01/23</td>
<td>06/30/23</td>
</tr>
<tr>
<td>37:08</td>
<td>10/17/22</td>
<td>10/26/22</td>
<td>11/01/22</td>
<td>12/16/22</td>
<td>12/26/22</td>
<td>01/19/23</td>
<td>02/01/23</td>
<td>07/14/23</td>
</tr>
<tr>
<td>37:09</td>
<td>11/01/22</td>
<td>11/11/22</td>
<td>11/16/22</td>
<td>01/03/23</td>
<td>04/26/23</td>
<td>02/16/23</td>
<td>03/01/23</td>
<td>07/29/23</td>
</tr>
<tr>
<td>37:10</td>
<td>11/15/22</td>
<td>11/24/22</td>
<td>11/30/22</td>
<td>01/17/23</td>
<td>04/26/23</td>
<td>02/16/23</td>
<td>03/01/23</td>
<td>08/12/23</td>
</tr>
<tr>
<td>37:11</td>
<td>12/01/22</td>
<td>11/07/22</td>
<td>12/16/22</td>
<td>01/30/23</td>
<td>02/26/23</td>
<td>03/16/23</td>
<td>04/01/23</td>
<td>08/28/23</td>
</tr>
<tr>
<td>37:12</td>
<td>12/15/22</td>
<td>11/22/22</td>
<td>12/30/22</td>
<td>02/13/23</td>
<td>02/26/23</td>
<td>03/16/23</td>
<td>04/01/23</td>
<td>09/11/23</td>
</tr>
</tbody>
</table>

This document is prepared by the Office of Administrative Hearings as a public service and is not to be deemed binding or controlling.
Substantial Change:
Where the changed rule:
1) affects the interests of persons who could not reasonably have determined the rule would have affected their interests from the published text
2) addresses a subject matter or an issue not addressed in the published text
3) produces an effect that could not reasonably have been expected from the published text

G.S. 150B-21.2(g)

Once the agency has received comments and held a public hearing (if required or if they so choose), the agency may formally adopt the proposed rule or amendment UNLESS:

1. The time for commenting has not elapsed
2. More than 12 months have passed from the end of the comment period
3. The agency has made **substantial changes** from the proposed text published in the Register.

**Substantial Change? Republish!**
So I’ve done a little digging...and I think I figured out what’s wrong with your Rule
Requests for Changes

"Technical Changes" mean the changes made by an agency to reply to a request from the Commission or its staff.

Technical changes shall not result in a substantive change in the meaning, interpretation, or application of a rule.

Responses are due the earlier of 10 business days following receipt of staff’s email OR 5:00 p.m. on the Friday preceding the meeting.

Staff Opinions

Staff Opinions set forth the reviewing attorney’s specific grounds and rationale for recommending objection or approval of a rule.

They do NOT reflect on the agency’s policy goals, and are NOT necessarily the definitive statement of the Commission’s action.

• Prior to consideration by the Commission at its monthly meeting, counsel reviews proposed rules and may issue two documents:
  1) Request for Technical Changes
  2) Staff Opinion
• These documents will be sent to the Commission as well as the agency, and will be posted on the RRC’s monthly online agenda.

https://www.oah.nc.gov/rules-division/rules-review-commission
**Standard of Review**

Pursuant to G.S. 150B-21.9, RRC's review is limited to whether a rule:

1. Is within the agency's delegated statutory authority;
2. Is clear and unambiguous;
3. Is reasonably necessary; and
4. Was adopted in accordance with Part 2, Art. 2A of the APA.

**Commission Actions**

Per G.S. 150B-21.10 the Commission must:

1. Approve the rule,
2. Object to the rule, or
3. Extend the period of review.

**Objection**

If the Commission objects to a rule, it is not dead. The agency must:

1. Change the rule to satisfy the objection and re-submit the revised rule; or
2. Inform RRC in writing that the agency will not change the rule.

**Approval**

If the Commission approves a rule, it generally becomes effective on the 1st day of the next month. Exceptions include a later requested effective date by the agency or where legislative review is invoked.

**Objection Timeline**

An agency has 30 days to act following receipt of the formal letter. A board or commission has the later of 30 days or 10 days after its next regular meeting.

**Post Objection**

If the agency changes the Rule, RRC must approve the Rule if their objection has been satisfied AND the change is not substantial. Otherwise, a rule remains under review with RRC until the agency decides not to satisfy the objection and makes a written request for the rule to be returned.

**Extensions**

When RRC grants an extension, the Commission must either approve or object within 70 days. This means two meetings.

**RRC Meetings**

RRC meets the 3rd Thursday of every month, at 9:00 A.M. These are public meetings, not hearings. Interested persons may submit written comments and/or requests to speak.

**Approval**

If the Commission approves a rule, it generally becomes effective on the 1st day of the next month.

**Extensions**

When RRC grants an extension, the Commission must either approve or object within 70 days. This means two meetings.

**Objection Timeline**

An agency has 30 days to act following receipt of the formal letter. A board or commission has the later of 30 days or 10 days after its next regular meeting.
temporary
RULEMAKING
TEMPORARY RULEMAKING FLOW CHART

TEMPORARY RULEMAKING PROCESS
(GS 150B-21.8)

Agency action to propose text

Consultation on Fees & Charges

Proposed Temporary Rule submitted to OAH and interested parties

Proposed Temporary Rule published on OAH website (within 5 business days from submission)

PUBLIC HEARING (at least 5 days from publication)

PUBLIC COMMENT (at least 15 business days)

Agency Adopts (at least 30 business days from submission to OAH and interested persons)

RRC Review (within 15 business days from submission to RRC)

RRC Approves

Temporary Rule to OAH (within 2 business days from approval)

Temporary Rule Published in Register

RRC Objects

Agency does not submit new findings or rewritten rule

Agency submits new findings or rewritten rule

Temporary Rule entered into Agency to Superior Court

RRC Review (within 5 business days)
What is unique about temporary rulemaking?

An agency may adopt a temporary rule when it finds that:

**Prong 1:** adherence to permanent rulemaking’s notice and hearing requirements *would be contrary to the public interest*; AND

**Prong 2:** the immediate adoption of the rule is required by:

1. A **serious** and **unforeseen** threat to the public health, safety, or welfare
2. The effective date of a recent act of the G.A. or Congress
3. A recent change in federal or state budgetary policy
4. A recent federal regulation
5. A recent court order

Recent = occurring or effective no more than 210 days prior to submission of a temporary rule to RRC
RRC reviews temporary rules not only for the standards in G.S. 150B-21.9, but also whether the agency has shown the need for temporary rulemaking pursuant to G.S. 150B-21.1.

The agency must prepare a written statement of its findings of need for a temporary rule.

The statement must be signed by the agency head.

RRC must review a temporary rule and the written statement of findings of need within 15 business days of filing.

If feasible, an agency should coordinate the submission of the temporary rule with the RRC’s meeting schedule. A poorly-timed submission may result in a special set meeting that is not necessary for the agency’s desired effective date of the rule.

A temporary rule expires on the earliest of the following dates:
1. The date specified in the rule
2. The effective date of a permanent rule approved by RRC to replace the temporary rule
3. The date the permanent rule is returned unapproved
4. The effective date of an act of the GA to disapprove the permanent rule
5. 270 days from publication in the Register, unless a permanent rule has been submitted to RRC.
Emergency

RULEMAKING
EMERGENCY RULEMAKING
FLOW CHART
What is unique about emergency rulemaking?

The Codifier, not RRC, reviews emergency rules.

Prong 1: adherence to the notice and hearing requirements would be contrary to the public interest
AND
Prong 2: the immediate adoption of the rule is required by a serious and unforeseen threat to the public health or safety.

If the Codifier does not approve the Rule, the agency may either submit additional findings, OR notify the codifier that it will not submit new findings, at which the codifier must enter the rule into the Code on the 6th business day after receiving such notice.

If the Codifier approves the Rule, it is entered into the code on the 6th business day thereafter.

N.C.G.S. § 150B-21.1A

SURE IT'S AN
“EMERGENCY”
When submitting an emergency rule, an agency must simultaneously begin the temporary rules process by submitting a rule to the codifier in accordance with G.S. 150B-21.1(a3).

If an emergency rule establishes or increases a fee, the rule does NOT become effective until the agency consults with the GA as required by G.S. 12-3.1

An emergency rule expires on the **earliest** of the following dates:
1. The date specified in the rule
2. The effective date of a temporary rule approved by RRC to replace the emergency rule
3. The date the temporary rule is returned unapproved
4. 60 days from publication in the Register, unless a temporary rule has been submitted to RRC
TIPS FOR A SUCCESSFUL FILING

Navigating the process from the perspective of a current RRC counsel
Statutory Issues

• Statutory Authority
  • One of the bases for RRC review is whether an agency has statutory authority to adopt a given rule.
  • When amending or readopting, ALWAYS check your statutory authority.
  • It is the agency’s burden to show that they have statutory authority. If the cited statutes do not provide that authority, you’re courting an objection.

• Definitions rules
  • In many cases, the GA will define some, but not all terms in a statute.
  • In your definitions rules, it is best practice to acknowledge and incorporate statutory definitions by reference.
Active and Passive Tense

• Many times rules are written in the passive tense. This sentence is a good example.

• Because the subject is not performing the action, it is unclear who is being bound by the rule.

• For instance:
  • “Applications shall be submitted no later than 30 days following notice…”

• Instead:
  • “A corporate officer or his or her designee shall submit an application to the Board no later than 30 days following notice…”

• There are occasions when passive tense is acceptable, generally when the subject of the sentence is truly unknown.
Oxford Commas

• The Oxford comma is placed immediately after the penultimate terms in a series of three or more terms.

• In rulemaking, where lack of precision can lead to an improper reading of your rule, the Oxford comma is essential.

• In 2017, the 1st Circuit decided a case entirely on the basis of the absence of an Oxford comma.

  • O’Connor v. Oakhurst Dairy, 851 F.3d 69 (1st Cir. 2017).
While sometimes absolutely necessary, parentheticals are generally frowned upon. Please attempt to incorporate parenthetical material into the body of your rule.

- Which vs. that
- Jargon
- Unnecessary words
- “Including”
  - This word connotes inclusiveness but not exclusiveness
  - Very often, “including” is used to introduce a list of requirements. I will almost always ask if there are other requirements that aren’t listed.
- Verbosity
Responding to Requests for Changes

• Explanations and Clarifications
  • When staff asks for clarification, or says “I don’t understand” a particular portion of the Rule, we appreciate any explanation you can give to help us understand.
  • HOWEVER, in 99% of cases, we’re asking because we believe the existing language is unclear. Please make efforts to revise language for which staff has indicated confusion or lack of understanding.

• Respond to all Requests
  • Occasionally, staff will ask a question or ask for clarification, and the agency simply will not respond.
  • We will follow up, and this will only extend the time necessary to conclude our review of your rules.
Responding to Requests for Changes

• Formatting the Text
  • After revising rules in response to a request for changes, please highlight all changes.
  • If you are deleting text that was added in the original amendment, please not only highlight and strike through, but place brackets around the text.

• Formatting your Responses
  • The best way to format your responses is to simply add answers underneath the relevant questions on the Request for Changes document.
  • This allows staff and the Commission to easily see what changes were made, or to see an answer to a question posed by staff.
Communications

• Please feel free to reach out to staff with your questions and concerns. We are always willing to help to the extent we can.

• For questions related to rules currently pending on RRC’s agenda, staff prefers to keep communication in writing (i.e. via email) which will then be posted on the website in the interests of transparency.

• However, we are still willing to speak with you by phone:
  • where you have questions that are not related to the substance of the rule, or
  • where talking out the problem is more expedient
    • Please bear in mind that where such conversations result in a change to the rule, they will be memorialized via email and posted online.
Don’t forget to read the style guide!

The style guide contains great information which may answer any questions you may have, or let you avoid receiving a request for changes from staff.

https://www.oah.nc.gov/media/11404/download

Publications staff are a great resource!

Julie and Dana have years of experience with filings, and can almost always answer questions about the publication process, required forms, or formatting.

Pre-reviews are your friend.

Staff continues to conduct pre-reviews as time permits. Don’t forget to send us the entire rule, rather than just the amended language. Also, please make all efforts to polish your rules before submitting to staff.
OAH Websites

N.C. Register
https://www.oah.nc.gov/documents/nc-register

N.C. Administrative Code
http://reports.oah.state.nc.us/ncac.asp

Rules Division
https://www.oah.nc.gov/rules-division

Rules Review Commission
https://www.oah.nc.gov/rules-division/rules-review-commission

Information for Rulemaking Coordinators
https://www.oah.nc.gov/rules-division/information-rulemaking-coordinators
Tips for Success

Navigating the rulemaking process as a rulemaking coordinator
BE PROFESSIONAL

LET'S KEEP THIS PROFESSIONAL
• Pre- Review Process

• Technical Changes

WHEN YOU HAVE UNLIMITED PATIENCE

BE PATIENT
• Issue-spot with your client

• Formatting

• Drafting

BE PREPARED

RULEMAKING IS COMING
Agency Attorney

Rulemaking Coordinator

Attorney for Interested Persons

TRAINING
RRC MEETING DAY

• Stay in touch with your RRC counsel

• Know your audience
Questions?