



**Brian Liebman
and
Anna Baird Choi**

**Perspectives from Both Sides of
the Road**

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.

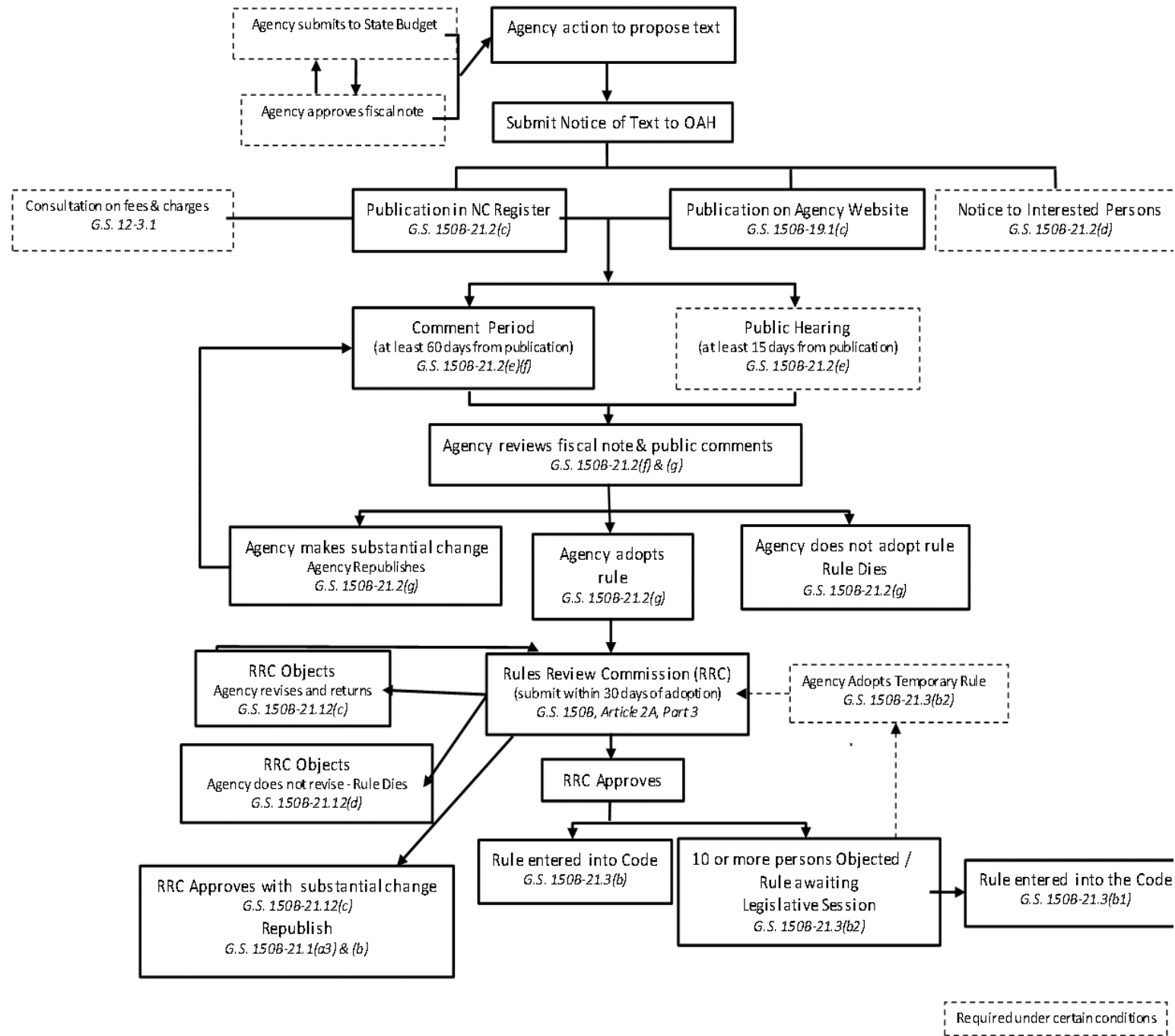


A photograph of a dense forest with large, gnarled trees covered in moss. A path leads into the distance, creating a sense of depth. The lighting is soft and dappled, filtering through the canopy. The overall mood is serene and ancient.

Permanent

RULEMAKING

PERMANENT RULEMAKING FLOW CHART



What to do **BEFORE PUBLICATION**

Dana McGhee

dana.mcgee@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



Publication



Public Hearing



Comments



The publication process



2022 Publication Schedule

**[HTTPS://WWW.OAH.NC.GOV/
RULES-DIVISION/
INFORMATION-RULEMAKING-
COORDINATORS](https://www.oah.nc.gov/rules-division/information-rulemaking-coordinators)**

NORTH CAROLINA REGISTER Publication Schedule for January 2022 – December 2022

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment Period	Deadline to submit to RRC for review at next meeting	RRC Meeting Date	Earliest Eff. Date of Permanent Rule	270 th day from publication in the Register
36:13	01/03/22	12/08/21	01/18/22	03/04/22	03/21/22	04/21/2022	05/01/22	09/30/22
36:14	01/18/22	12/22/21	02/02/22	03/21/22	04/20/22	05/19/2022	06/01/22	10/15/22
36:15	02/01/22	01/10/22	02/16/22	04/04/22	04/20/22	05/19/2022	06/01/22	10/29/22
36:16	02/15/22	01/25/22	03/02/22	04/18/22	04/20/22	05/19/2022	06/01/22	11/12/22
36:17	03/01/22	02/08/22	03/16/22	05/02/22	05/20/22	06/16/2022	07/01/22	11/26/22
36:18	03/15/22	02/22/22	03/30/22	05/16/22	05/20/22	06/16/2022	07/01/22	12/10/22
36:19	04/01/22	03/11/22	04/16/22	05/31/22	06/20/22	07/21/2022	08/01/22	12/27/22
36:20	04/18/22	03/25/22	05/03/22	06/17/22	06/20/22	07/21/2022	08/01/22	01/13/23
36:21	05/02/22	04/08/22	05/17/22	07/01/22	07/20/22	08/18/2022	09/01/22	01/27/23
36:22	05/16/22	04/25/22	05/31/22	07/15/22	07/20/22	08/18/2022	09/01/22	02/10/23
36:23	06/01/22	05/10/22	06/16/22	08/01/22	08/22/22	09/15/2022	10/01/22	02/26/23
36:24	06/15/22	05/24/22	06/30/22	08/15/22	08/22/22	09/15/2022	10/01/22	03/12/23
37:01	07/01/22	06/10/22	07/16/22	08/30/22	09/20/22	10/20/2022	11/01/22	03/28/23
37:02	07/15/22	06/23/22	07/30/22	09/13/22	09/20/22	10/20/2022	11/01/22	04/11/23
37:03	08/01/22	07/11/22	08/16/22	09/30/22	10/20/22	11/17/2022	12/01/22	04/28/23
37:04	08/15/22	07/25/22	08/30/22	10/14/22	10/20/22	11/17/2022	12/01/22	05/12/23
37:05	09/01/22	08/11/22	09/16/22	10/31/22	11/21/22	12/15/2022	01/01/23	05/29/23
37:06	09/15/22	08/24/22	09/30/22	11/14/22	11/21/22	12/15/2022	01/01/23	06/12/23
37:07	10/03/22	09/12/22	10/18/22	12/02/22	12/20/22	01/19/2023	02/01/23	06/30/23
37:08	10/17/22	09/26/22	11/01/22	12/16/22	12/20/22	01/19/2023	02/01/23	07/14/23
37:09	11/01/22	10/11/22	11/16/22	01/03/23	01/20/23	02/16/2023	03/01/23	07/29/23
37:10	11/15/22	10/24/22	11/30/22	01/17/23	01/20/23	02/16/2023	03/01/23	08/12/23
37:11	12/01/22	11/07/22	12/16/22	01/30/23	02/20/23	03/16/2023	04/01/23	08/28/23
37:12	12/15/22	11/22/22	12/30/22	02/13/23	02/20/23	03/16/2023	04/01/23	09/11/23

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)

Before Filing with RRC



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

Lawrence Duke

Bill Peaslee

Brian Liebman

Review by Commission Counsel



- 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>

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.

RRC **REVIEW**

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

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.

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

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

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.

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.

RRC Meetings

RRC meets the 3rd Thursday of every month, at 9:00 A.M.

These are public meetings, not hearings.

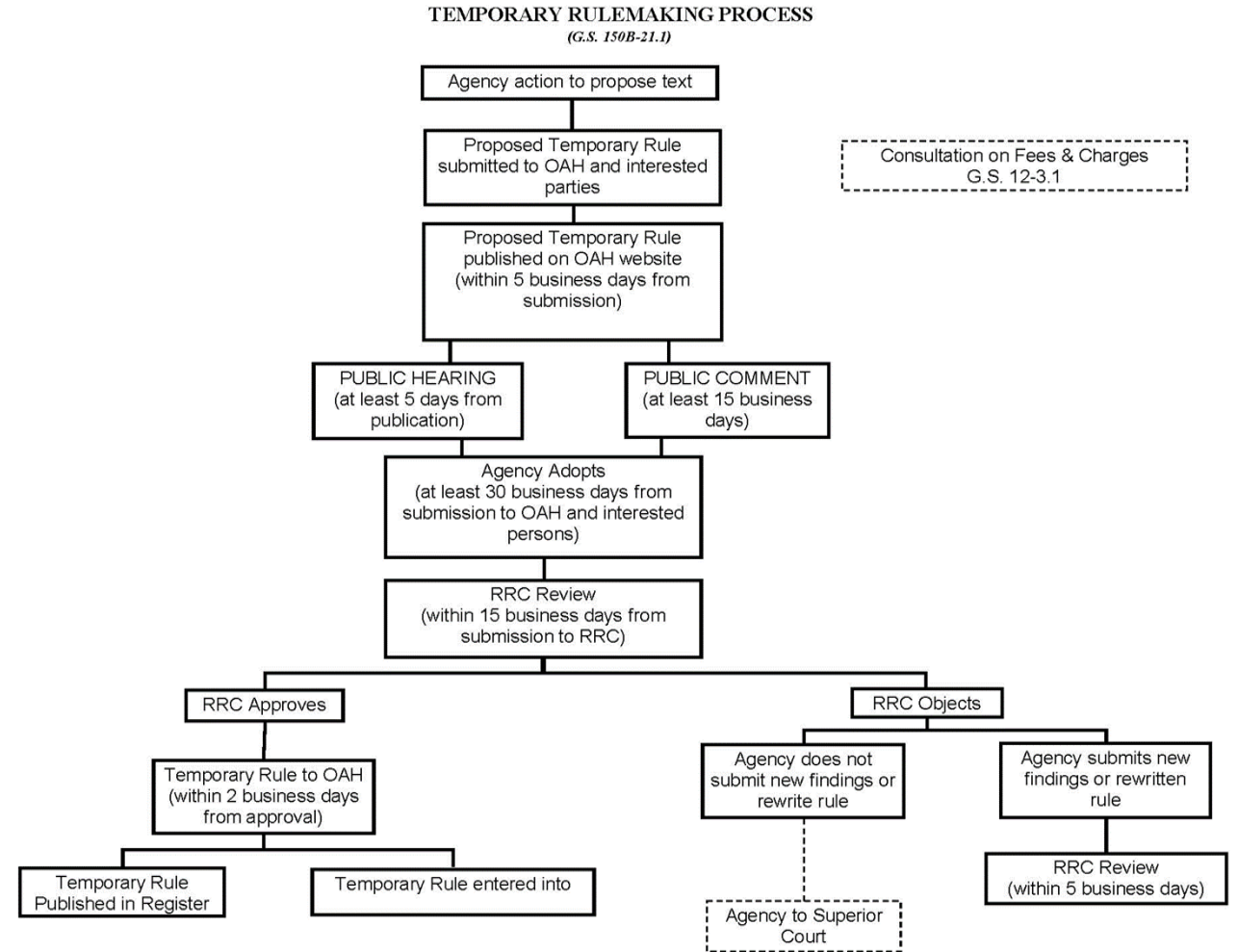
Interested persons may submit written comments and/or requests to speak.



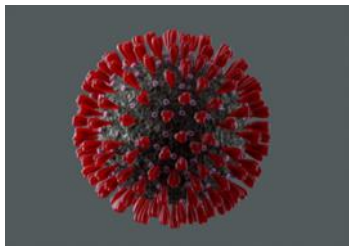
temporary

RULEMAKING

TEMPORARY RULEMAKING FLOW CHART



What is unique about temporary rulemaking?



COVID?

Statutory Threshold G.S. 150B-21.1

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:

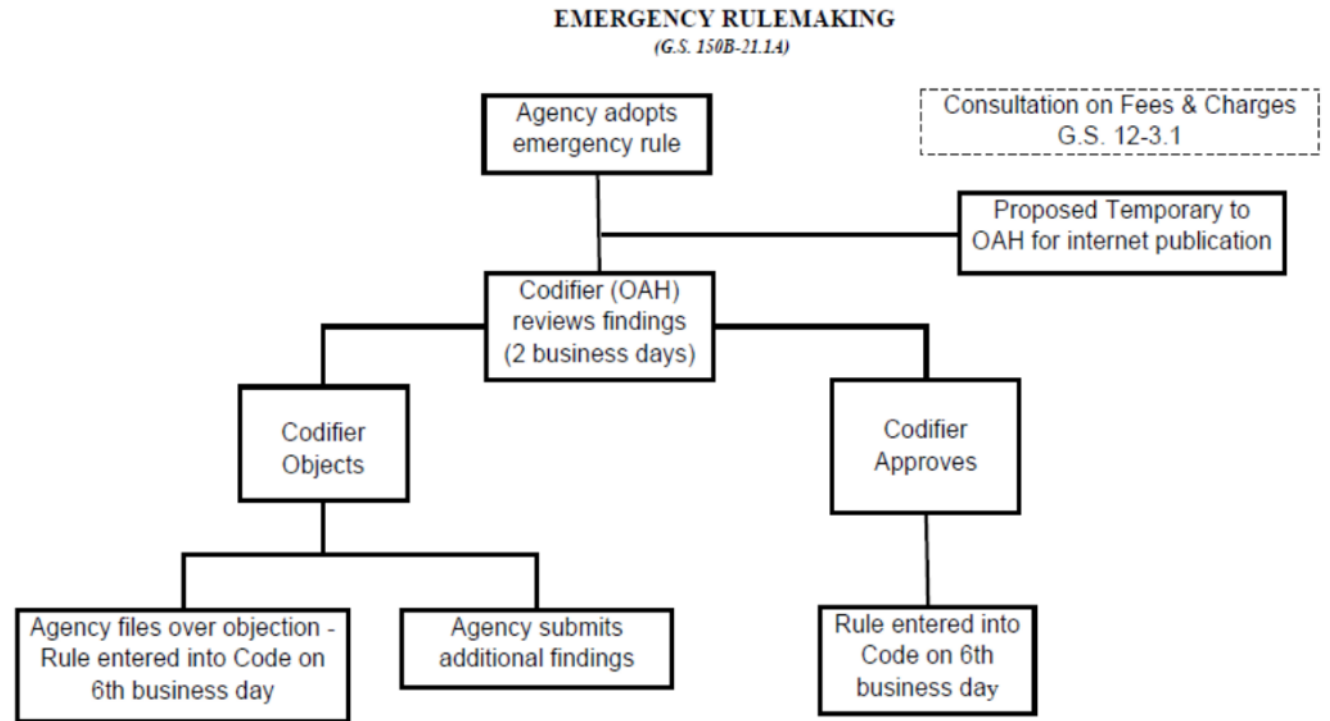
1. The date specified in the rule
2. The effective date of a permanent rule approved by RRC to replace the temporary rule
3. The date the permanent rule is returned unapproved
4. The effective date of an act of the GA to disapprove the permanent rule
5. 270 days from publication in the Register, unless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

Notes on Temporary Rulemaking

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

N.C.G.S. § 150B-21.1A

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.



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

Notes on Emergency Rulemaking



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.

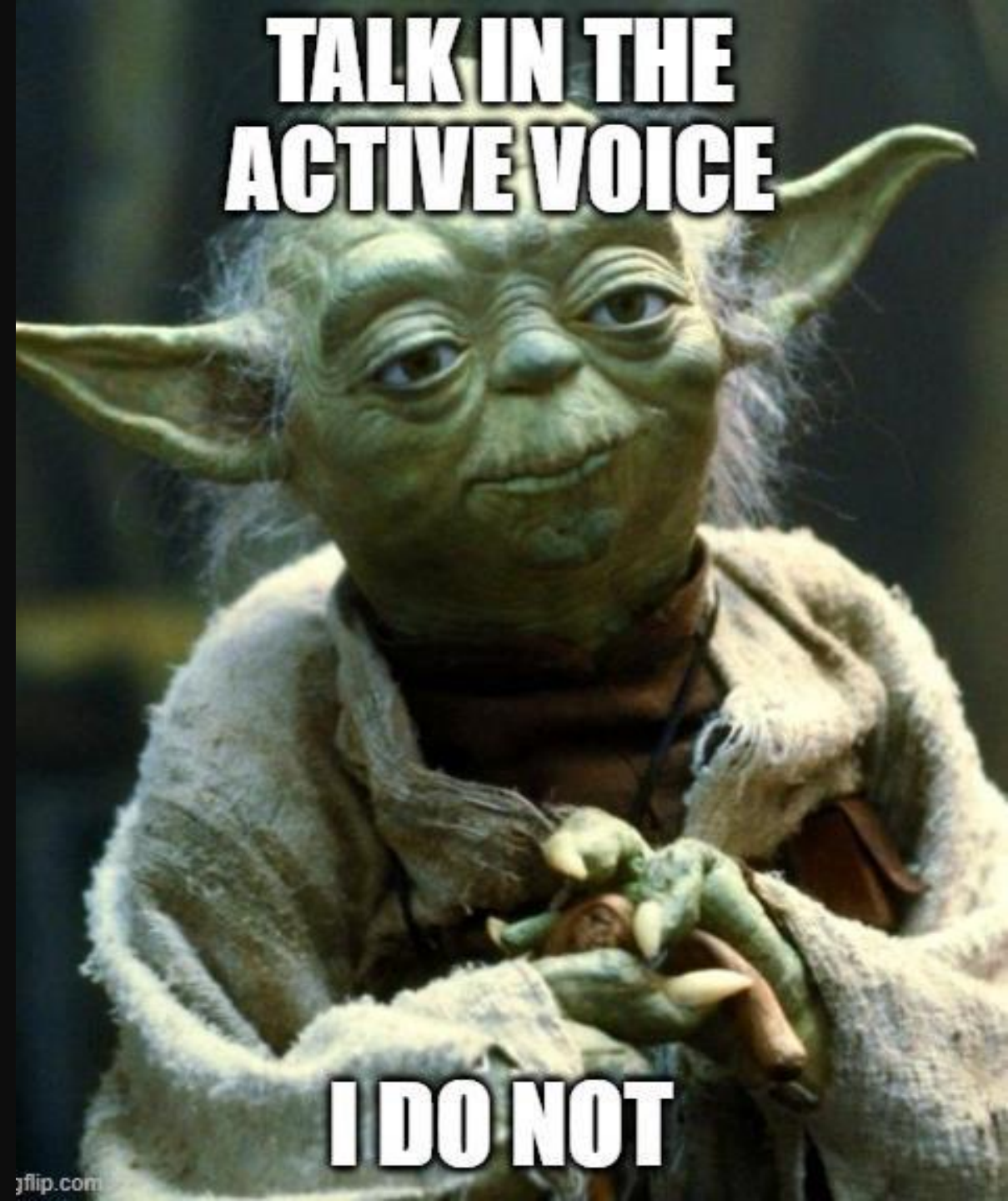
- **Definitions rules**

- 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.
-





**YOU DON'T UNDERSTAND THE IMPORTANCE OF
THE "OXFORD COMMA"**



NO ONE CARES.



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).
 - See also *Winkler v. N.C. State Bd. of Plumbing, Heating & Fire Sprinkler Contractors*, 261 N.C.App. 106 (2018).

Grammar and Usage

Let's eat, Timmy.

↳ Correct at the
dinner table

Let's eat Timmy.

↳ Correct on a raft
in the ocean

- 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.



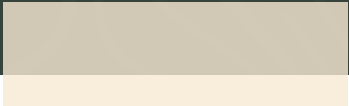
Responding to Requests for Changes

- 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.



Final Tips



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

**LET'S KEEP THIS
PROFESSIONAL**

**BE
PROFESSIONAL**




WHEN YOU HAVE UNLIMITED PATIENCE

- Pre- Review
Process
- Technical
Changes

**BE
PATIENT**

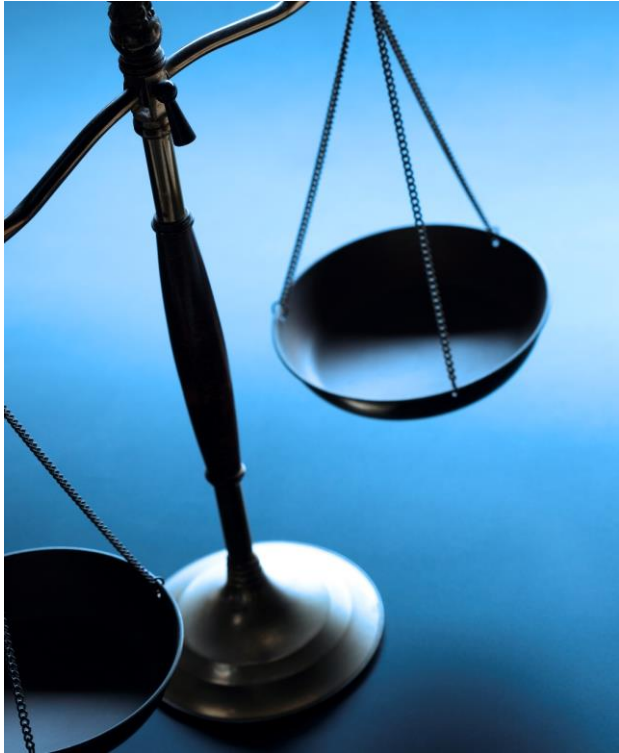


- 
- Issue-spot with your client
 - Formatting
 - Drafting
-

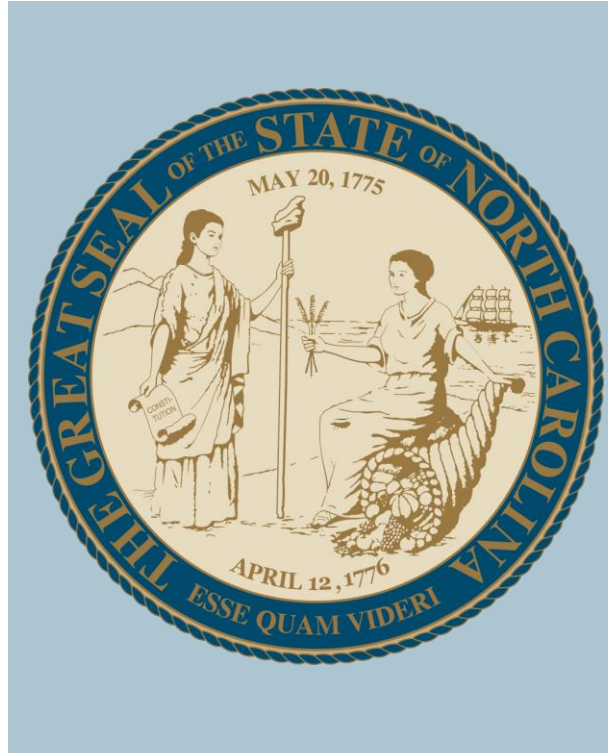
**BE
PREPARED**

RULEMAKING IS COMING





Agency Attorney



Rulemaking Coordinator



Attorney for Interested Persons



TRAINING



I LIKE MEETINGS

**MEETINGS ARE
MY FAVORITE**

RRC MEETING DAY

- Stay in touch with your RRC counsel
- Know your audience



Questions?