

Emergency and Temporary Rulemaking

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EMERGENCY RULEMAKING

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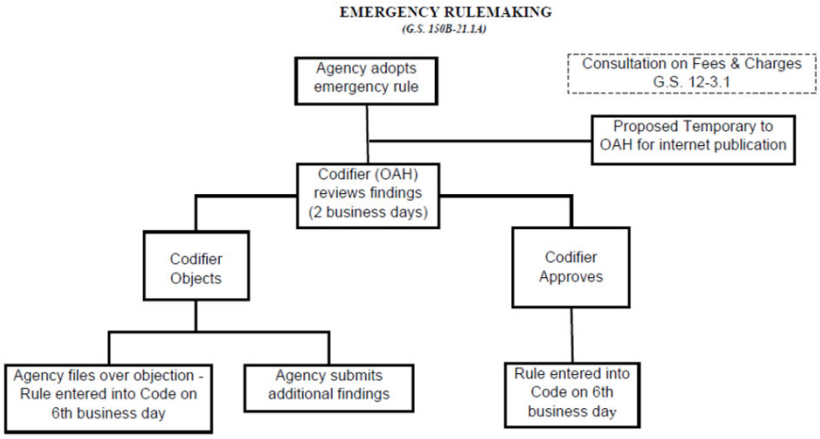

Emergency Rulemaking Flowchart

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When can an agency adopt emergency rules?



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Does the agency have authority to adopt an emergency rule?

§ 150B-21.1A. Adoption of an emergency rule.

An agency may adopt an emergency rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical if:



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.

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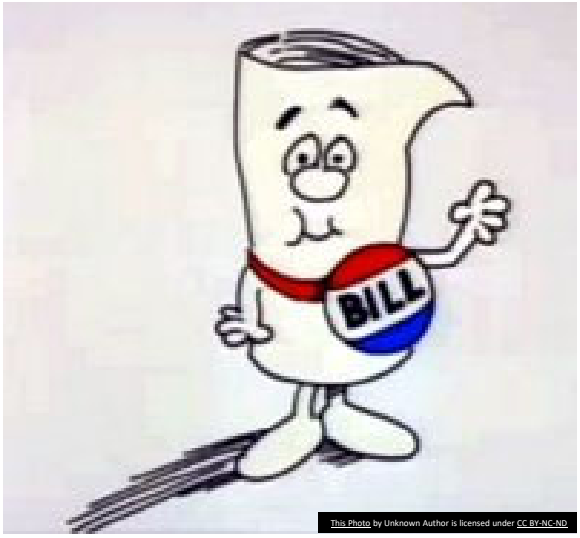

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Does the agency have authority to adopt an emergency rule?

The legislature can grant an agency specific authority to engage in emergency rulemaking.

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Codifier's Review of an Emergency Rule

The standards in G.S. 150B-21.9 do not apply to emergency rules.

An agency must prepare a written statement of its findings of need for an emergency rule. The statement must be signed by the head of the agency adopting the rule.

An agency must submit the rule and its written statement of its finding of need to the Codifier of Rules.

The Codifier of Rules reviews the agency's written statement of its findings of need for the rule within two business days to determine whether "immediate adoption of the rule is required by a **serious** and **unforeseen** threat to the public health or safety."

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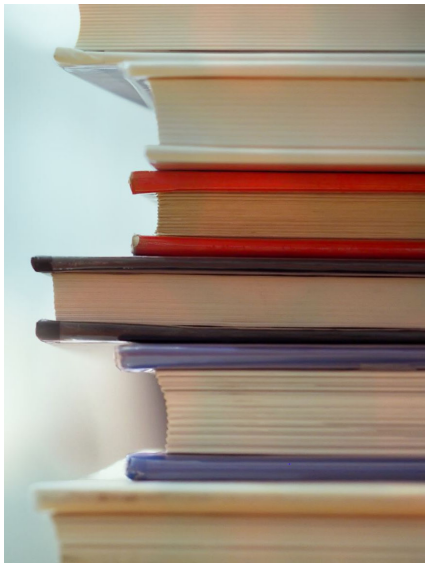

Reminder - The Codifier Reviews your Findings of Need Form for:

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.

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Codifier's Review of an Emergency Rule

- If the statement meets the statutory criteria, the Codifier of Rules notifies the head of the agency and enters the rule in the North Carolina Administrative Code on the sixth business day following approval by the Codifier of Rules.
- If the statement does not meet the statutory criteria, the Codifier of Rules notifies the head of the agency that it may provide additional findings or a new statement of need. The agency may either:
  - submit additional findings; or
  - notify the Codifier that does not intend on providing additional findings or a new Statement.

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What if the Codifier does not approve an emergency rule?

150B-21.1A(b) – "If an agency decides not to provide additional findings or submit a new statement the agency must notify the Codifier of its decision. The Codifier must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision."

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What is the expiration date of an emergency rule?

It is the earliest of the following dates:

- date specified in the rule;
- effective date of a temporary rule adopted to replace the emergency rule, if approved by the Commission;
- date the Commission returns a temporary rule to an agency that was adopted to replace the emergency rule; or
- 60 days from publication in the North Carolina Register, unless a temporary rule adopted to replace the emergency rule has been submitted to the Commission.

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Does the rule increase a fee?

- An emergency rule that establishes a new fee or increases an existing fee does not become effective until the agency has complied with the requirements of G.S. 12-3.1.



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What else is there to know about emergency rulemaking?

The agency **must simultaneously** begin the process for adopting a temporary rule by submitting the rule to the Codifier for publication in accordance with G.S. 150B-21.1(a3).

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TEMPORARY RULES

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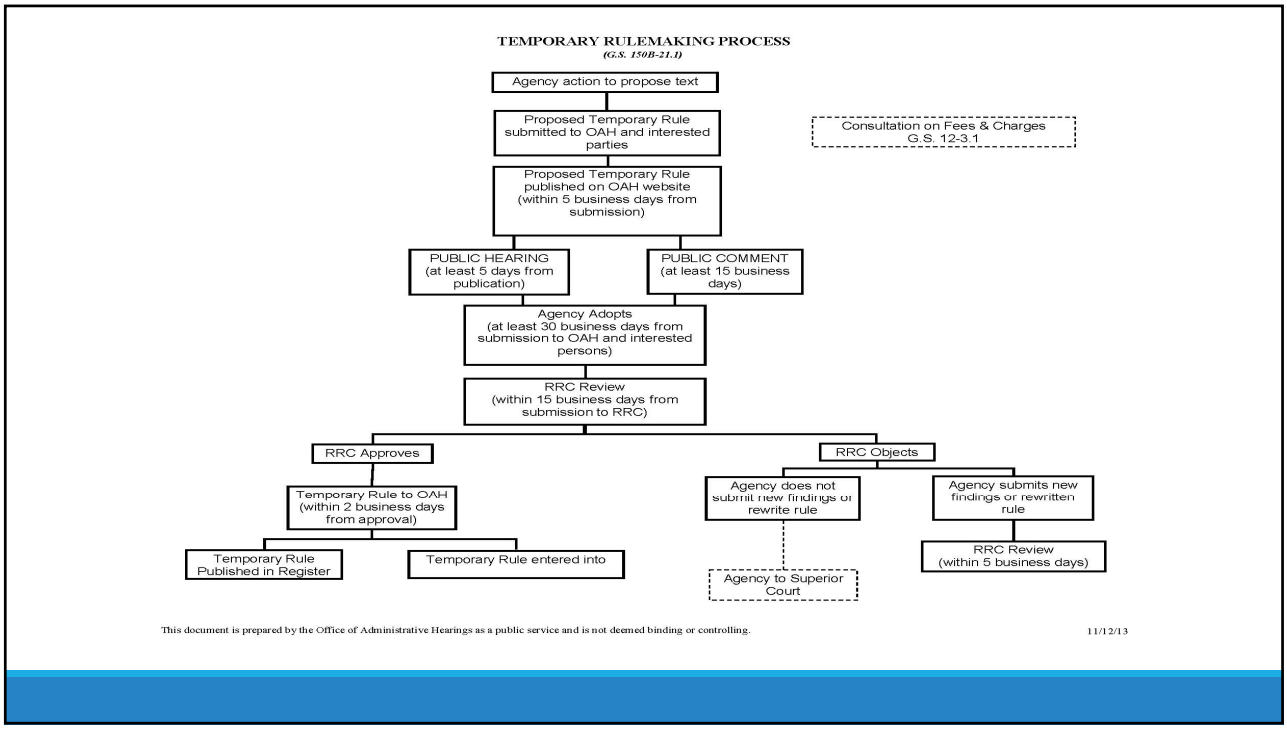

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Agency Steps to Begin Temporary Rule Making

Step 1:	A- An agency decides to make a temporary rule and writes the rule OR B- An agency must simultaneously commence temporary rule making by submitting the rule for publication when it adopts an emergency rule	➢ A-No time limit* ➢ B-Simultaneous with adoption of emergency rule
Step 2:	The rule is submitted to the Codifier of Rules, along with a notice of public hearing, for publication on the Internet.	➢ At least 30 business days prior to adoption.
Step 3:	The agency notifies persons on the mailing list required by G.S. 150B-21.2(d) and any other interested parties.	➢ At least 30 business days prior to adoption
Step 4:	The agency accepts public comments on the rule.	➢ At least 15 business days prior to adoption.
Step 5:	The agency holds at least one public hearing on the rule.	➢ No fewer than five days after publication on internet.
Step 6:	The agency adopts the temporary rule and prepares a submission for review by the Rules Review Commission.	➢ No time limit*

If authority comes from a "recent" change, 150B-21.1(a2) requires submission to RRC within 210 days of the change

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How does the RRC Review a temporary rule?

- An agency must prepare a written statement of its findings of need for a temporary rule. The statement must be signed by the head of the agency adopting the rule.
- An agency must submit the rule and its written statement of its finding of need to the Rules Review Commission.
- The Rules Review Commission must review the temporary rule and the agency's written statement of its findings of need for the rule within 15 business days.



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What is the standard of review for a temporary rule?

Step one:

- Did the agency have authority to adopt ***temporary*** rules?

Step two:

- Did the rulemaking effort comply with G.S. 150B-21.9:
  - ❖Is there authority for the rule content;
  - ❖Is the content clear;
  - ❖Is the content necessary; and
  - ❖Was the adoption in compliance with the G.S. 150B?

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Step 1:
Does the agency have statutory authority to adopt a temporary rule?

§ 150B-21.1. Adoption of a temporary rule.

An agency may adopt a temporary rule when it finds that

Prong 1: adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest

AND

Prong 2: the immediate adoption of the rule is required by one or more of the following reasons:

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What are the reasons to make a temporary rule?

***Prong 2*: If "the immediate 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 the United States Congress.
- A ***recent*** change in federal or State budgetary policy.
- A ***recent*** federal regulation.
- A ***recent*** court order.

**Remaining reasons set forth in G.S. 150B-21.1(a) are specific to certain agencies.

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What does "recent" mean?

150B-21.1(a2) defines "recent" as occurring or made effective no more than 210 days prior to the submission of the temporary rule to the **Rules Review Commission.**



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What if we can't meet the 210-day requirement?

- Under G.S. 150B-21.1(a2), upon written request of the agency, the Commission may waive the 210-day requirement upon consideration of:
  - the degree of public benefit
  - whether the agency had control over the circumstances that required the requested waiver,
  - notice to and opposition by the public
  - the need for the waiver
  - previous requests for waivers submitted by the agency.

-OR-

- Engage in permanent rulemaking.

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Step 2: Did the rulemaking comply with G.S. 150B-21.9

The Rule must still comply with section (a)

- Is there authority for the rule content;
- Is the content clear;
- Is the content necessary; and
- Was the adoption in compliance with Part 2 of Article 2A of G.S. 150B?

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What action may be taken by RRC for a temporary rule?



Approve the rule



Determine:

(A) the agency does not have authority under G.S. 150B-21.1(a) to adopt a temporary rule

-or-

(B) the temporary rulemaking action did not comply with G.S. 150B-21.9.

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RRC approved your temporary rule…

First…

The Rules Review Commission provides the approved rule to the Codifier of Rules within two business days.

Then…

The Codifier of Rules enters the rule in the North Carolina Administrative Code on the sixth business day following receipt from the Rules Review Commission.

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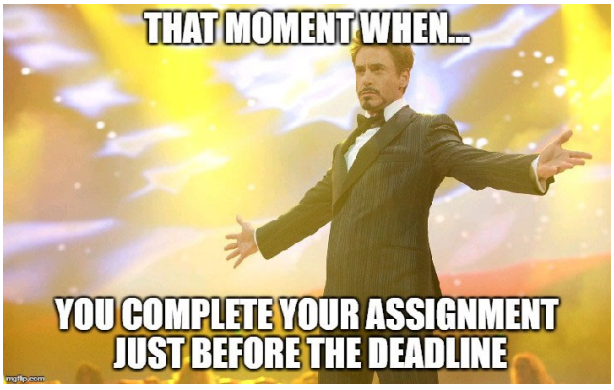
Important Note on Legislatively Directed Deadlines



If the legislature directs an agency to adopt temporary rules by a specific deadline, the RRC has historically objected to temporary rules unless the agency met its deadline.

Then the agency would have to go through permanent rulemaking.

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RRC did not approve your temporary rule…

- The Rules Review Commission provides immediate notice to the head of the agency.
- The agency may supplement the written statement of its findings of need or create a new statement within 30 days.
- If the agency decides not to supplement the written statement of its findings of need or fails to do so within 30 days, the Rules Review Commission will return the rule to the agency.

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An Agency's supplements and revisions will be reviewed within 5 days of receipt.

If the RRC finds that the supplements or revisions do not satisfy the objection, the rule will be returned without further notice.

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When does a temporary rule expire?

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

- date specified in the rule;
- effective date of a permanent rule adopted to replace the temporary rule, if approved by the Commission;
- date the Commission returns a permanent rule to an agency that was adopted by the agency to replace the temporary rule;
- effective date of an act of the General Assembly to disapprove a permanent rule adopted to replace the temporary rule; or
- 270 days from publication in the North Carolina Register, unless a permanent rule adopted to replace the temporary rule has been submitted to the Commission.

However, since the 2023 budget, regardless of whether a permanent rule has been adopted to replace it, a temporary rule expires 12 months after its effective date.

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Does the rule increase a fee?



A temporary rule that establishes a new fee or increases an existing fee does not become effective until the agency has complied with the requirements of G.S. 12-3.1 including consultation with the Joint Legislative Commission on Governmental Operations.

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Additional Tips for Temporary Rulemaking

- Days for the rulemaking process are *generally* not calendar days, but **business** days.
  - Weekends and days that the office is not open **are not** counted for business days.
  - However, the time for a **public hearing** is just "five days", which is inclusive of weekends and other days the office is closed.
- RRC has to review a temporary rule within 15 business days of submission. 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.
- Remember, when RRC reviews a temporary rule, it reviews **the entire rule**.

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Any questions?

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