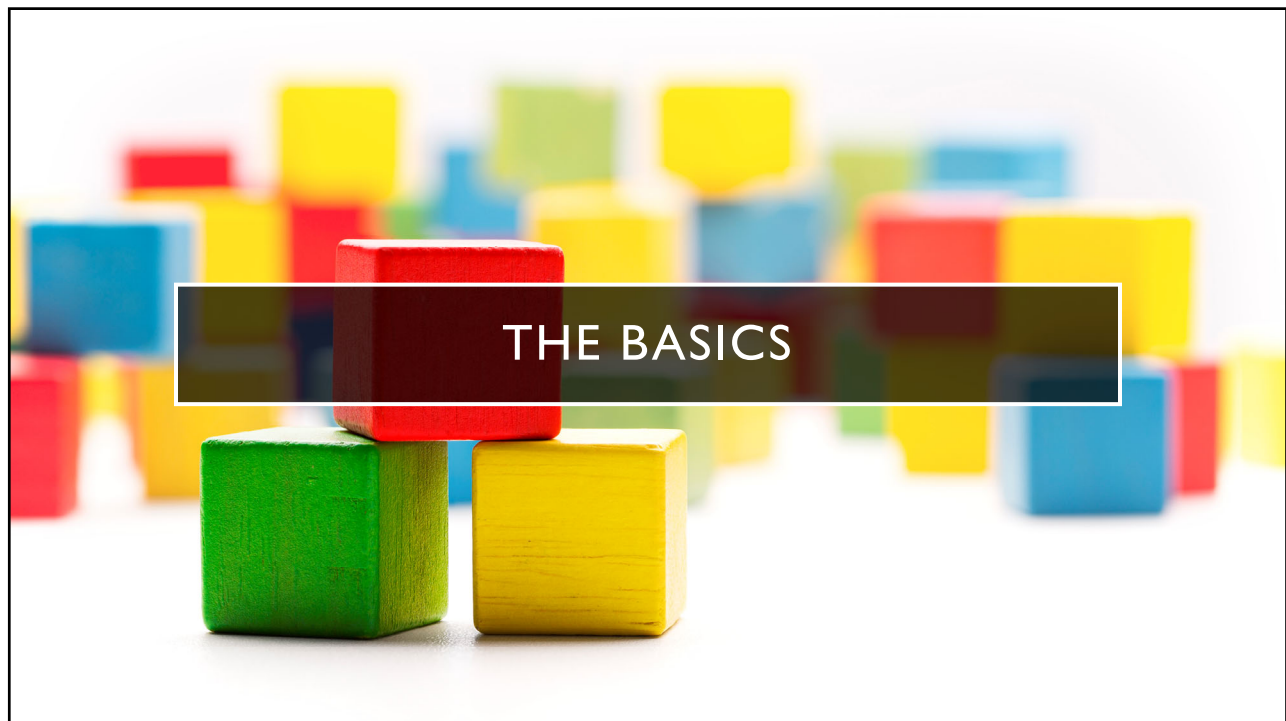




## THE RULES REVIEW COMMISSION AND THE PERMANENT RULEMAKING PROCESS

Brian Liebman, Commission Counsel

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## THE BASICS

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## 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.

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- Each agency must designate one or more rulemaking coordinators to oversee the agency's rulemaking functions.
  - See also 26 NCAC 02C .0107, which requires the agency to notify OAH in writing of the name and address of the rulemaking coordinator
- The coordinator shall serve as the liaison between the agency, other agencies, units of local government, and the public in the rule-making process.
  - Prepare notices of public hearings
  - Coordinate access to the agency's rules
  - Screen proposed rules before publication in the Register for accurate fiscal notes

## WHO ARE RULEMAKING COORDINATORS?

<https://www.oah.nc.gov/documents/rulemaking-coordinator-list>

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## Rulemaking Record G.S. 150B-21.2(i)

- An agency must keep a record of a rulemaking proceeding, which must include:
  - all written comments received,
  - a transcript or recording of any public hearing held on the rule, and
  - any written explanation made by the agency for adopting the rule.



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## Useful Websites

Rules Division

<https://www.oah.nc.gov/rules-division>

N.C. Register

<https://www.oah.nc.gov/documents/nc-register>

N.C. Administrative Code

<http://reports.oah.state.nc.us/ncac.asp>

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>

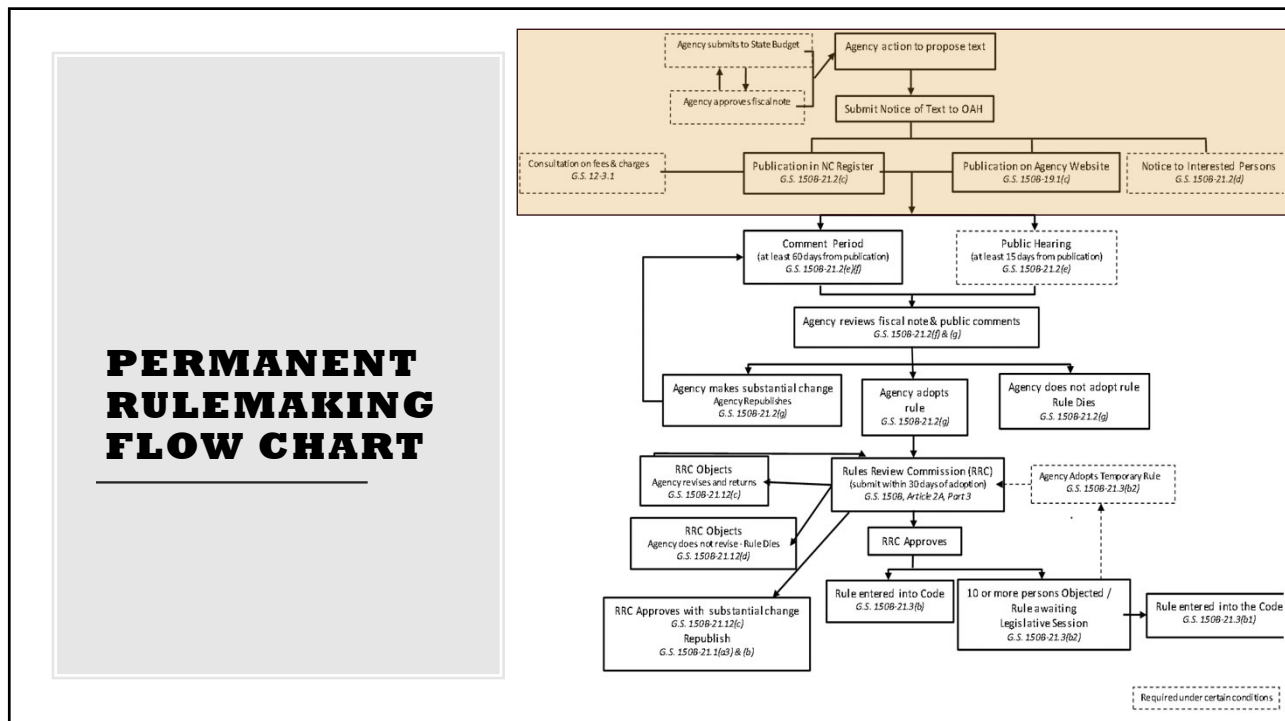


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# Fiscal Notes and Fees

## Fiscal Notes G.S. 150B-21.4

- The agency is responsible for determining the fiscal impact of any proposed rule.
  - G.S. 150B-19.1(e)
- An agency must prepare a fiscal note and submit it to OSBM prior to publishing in the Register any new rule or amendment that “would require the expenditure or distribution of funds” under the State Budget Act.

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## Fees and Charges G.S. 12-3.1

Any rule that establishes a fee or charge, or increases an existing fee or charge triggers a requirement to comply with G.S. 12-3.1.

G.S. 12-3.1 requires the agency to make a written request for a consultation with the Joint Legislative Commission on Government Operations:

- The amount of the current fee/charge
- The amount of the proposed new fee/charge or the amount of increase
- The statutory authority for the fee/charge
- A detailed explanation of the need for the establishment or increase of the fee/charge

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## Public Notice

- The public is notified of agency rulemaking through:
  - a notice published in the North Carolina Register (G.S. 150B-21.2) and
  - posting of required information on the agency’s website [G.S. 150B-19.1(c)].
- This notice provides a means for interested parties to participate and debate the merits of a proposed rule before adoption by the agency.

## NORTH CAROLINA REGISTER

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February 1, 2024

<b>I. EXECUTIVE ORDERS</b> Executive Order No. 295 – 299	955 – 966
<b>II. IN ADDITION</b> NC License and Theft Bureau – Public Notice of License Application Submission NC Rate Bureau – Public Notice	967 968
<b>III. PROPOSED RULES</b> Public Safety, Department of Paralegals, Department of Occupational Licensing Boards and Commissions Optometry, Board of Examiners in Pharmacy, Board of	969 – 970 970 – 971 971 – 973
<b>IV. EMERGENCY RULES</b> Environmental Quality, Department of Coastal Resources Commission	974 – 984
<b>VI. APPROVED RULES</b> Health and Human Services, Department of Child Care Commission Health Service Regulation, Division of Mental Health, Division of Labor, Department of Department of Public Safety, Department of Paralegals, Department of Environmental Quality, Department of Coastal Resources Commission Wildlife Resources Commission Revenue, Department of Department of Secretary of State, Department of Department of Occupational Licensing Boards and Commissions Chiropractic Examiners, Board of Cosmetic Art Examiners, Board of Optometry, Board of Examiners in	985 – 1035

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## What must be published? When and Where?

### On the Agency Website

G.S. 150B-19.1(c), requires an agency to publish the following on its website no later than the date the notice of text is published in the NC Register

1. The text of a proposed rule.
2. An explanation of the proposed rule and the reason for the proposed rule.
3. Any federal certification required by G.S. 150B-19.1(g).
4. Instructions on how and where to submit oral or written comments on the proposed rule, *including a description of the procedure by which a person can object to a proposed rule and subject the proposed rule to legislative review.*
5. Any fiscal note that has been prepared for the proposed rule.

### In the NC Register

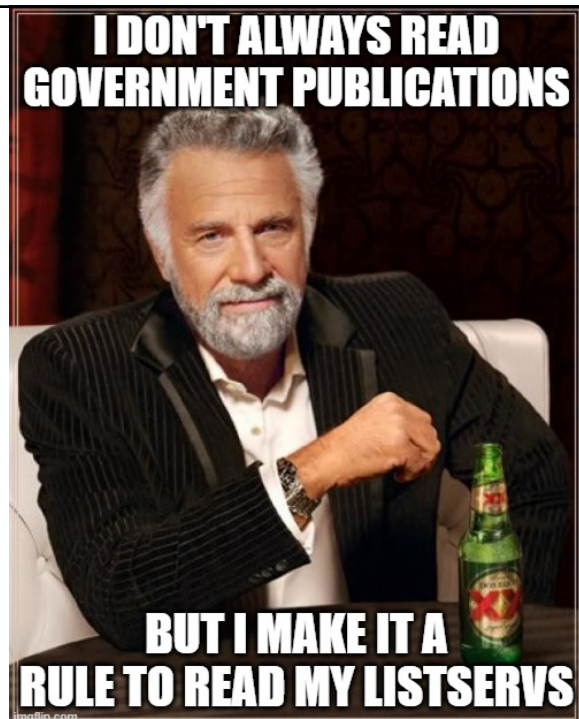
G.S. 150B-21.2(c) defines what **MUST** be included in the notice of text:

1. The text of the proposed rule.
2. A short explanation.
3. A link to the agency's website containing further info (see G.S. 150B-19.1(c)).
4. A citation to legal authority for adoption
5. The proposed effective date.
6. Date, time, and place of any public hearing scheduled.
7. Instructions to demand a public hearing
8. Comment period.
9. If prepared, a statement that a copy of the fiscal note is available from the agency.

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## Notice to Interested Persons

- G.S. 150B-21.2(d) requires an agency to maintain a mailing list and send notice of text to each person who has requested notice of rulemaking.
- An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs
- Email listservs are acceptable

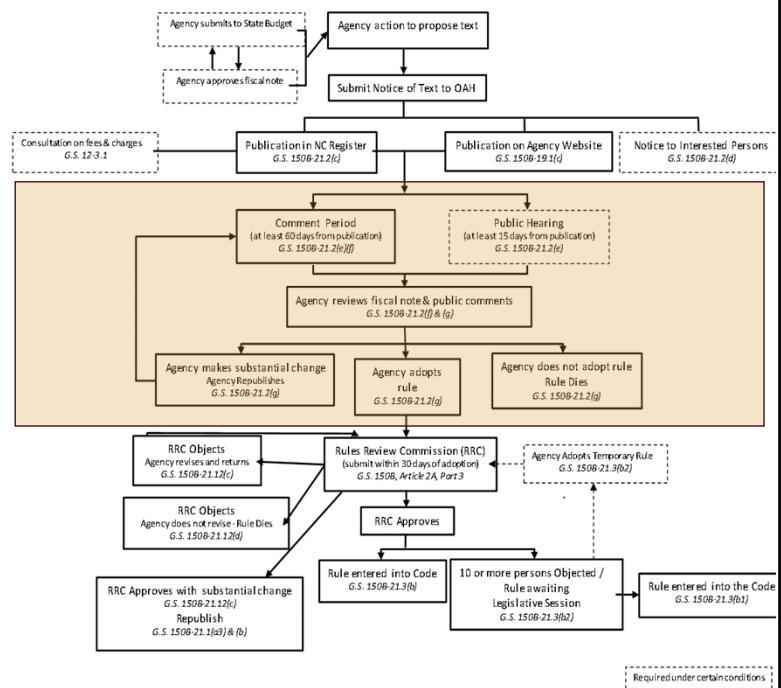


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## PERMANENT RULEMAKING FLOW CHART



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## PUBLIC HEARING G.S. 150B-21.2(e)

When *must* an agency hold a public hearing?

- If it receives a **written** request within 15 days of publication of the notice of text

An agency may otherwise *choose* to hold a public hearing. In either case, the procedure followed is the same:

- The hearing must be held at least 15 days **but not later than 60 days** from publication of notice
- The agency must accept comments on both the proposed rule and any accompanying fiscal note
- The hearing must be recorded or transcribed

If a noticed hearing must be rescheduled for any reason, the agency *shall* publish notice in the Register at least 15 days prior to the new hearing

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## COMMENTS G.S. 150B-21.2(f)

- The agency must accept public comment on the rule and fiscal note for at least 60 days, or until the date of any public hearing, whichever is longer.
- An agency must consider all written and oral comments received.
- Written comments must be included in the record.



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## ADOPTION

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

However, the agency MAY NOT adopt the 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.
- If the agency makes changes that cause the text to differ **substantially** from the proposed text published in the Register

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- An adopted rule differs substantially from a proposed rule if it does one or more of the following:
  - Affects the interests of **persons** who, based on the proposed text published in the *NC Register*, could not have reasonably determined that the rule would affect their interests.
  - Addresses a **subject matter** or an issue that is not addressed in the proposed text of the rule.
  - Produces an **effect** that could not reasonably have been expected based on the proposed text of the rule.

SUBSTANTIAL  
DIFFERENCE  
G.S. 150B-  
21.2(G)

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NOW WHAT?

If the agency reviews comments, and makes no changes, or non-substantial changes, it may adopt the Rule and submit it to the RRC for review.

A rule must be sent to RRC within 30 days of adoption.

If the agency makes substantial changes to the Rule, the agency should republish the new language in the Register.

Finally, if the agency chooses not to adopt the Rule, the Rule dies.

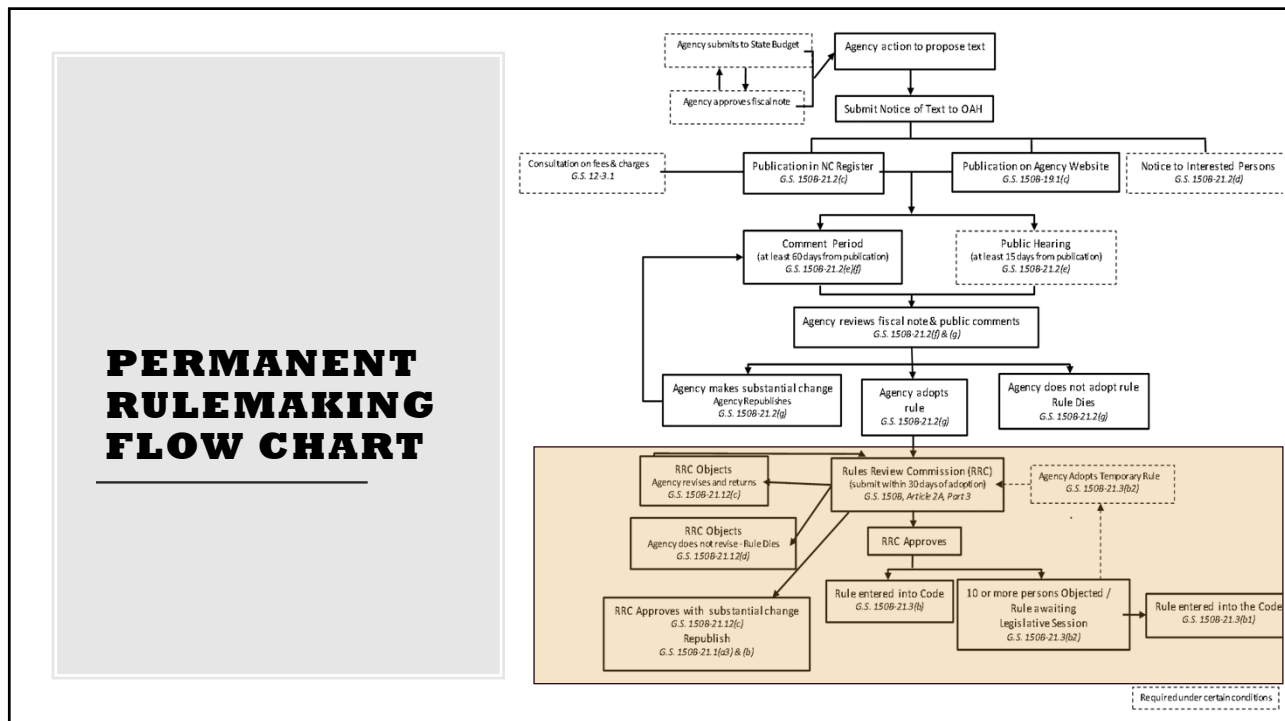
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## THE RULES REVIEW COMMISSION

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## Who is the RRC, and what do they do?

RRC consists of 10 members appointed by the two houses of the General Assembly.

The RRC reviews agency rules.

Generally, for inclusion in the North Carolina Administrative Code, a permanent rule must be approved by the Commission.

There are some exceptions, which will typically be found in Chapter 150B or in the agency's specific statutes.



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## Who is the RRC, and what don't they do?

RRC is NOT the Rules Police.

The Commission does not have wide-ranging authority to delve into the quality or efficacy of your rules. In fact, we are statutorily barred from raising such questions:



"The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to the standards set forth in this subsection."

-N.C. Gen. Stat. 150B-219(a)

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## Timeframe and Logistics

- The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month.
- Rules submitted after the twentieth of a month shall be reviewed by the last day of the second subsequent month.
- If the twentieth is not a business day, please ensure your rules have been filed before the twentieth.



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## Standards for Review

Under G.S. 150B-21.8, “when the Commission reviews an amendment to a temporary or permanent rule, it may review the entire rule that is being amended”

G.S. 150B-21.9 lays out the four factors the Commission may review:

1. It is within the authority delegated to the agency by the General Assembly
2. It is clear and unambiguous
3. It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
4. It was adopted in accordance with Part 2 of Article 2A of the Administrative Procedure Act.



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- 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.


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## RRC Meetings

- RRC meetings are public meetings, not public hearings – there is no right to speak. Requests to speak are governed by 26 NCAC 05 .0105 and .0106.
- An agency will always have the opportunity to defend its rules.
- The Commission is interested in hearing comments relevant to the standards for review set forth in G.S. 150B-21.9.

### Changes for 2024

- Meetings are usually—but **not always**—the last **Wednesday** of the month.
- Meetings begin at **10:00 AM.**
- Oral presentations to the Commission are limited to **5 minutes**, except in the discretion of the Chair.



Upcoming meetings:

February 22, 2024 (special meeting)


February 28, 2024 (regular meeting)

March 27, 2024

April 30, 2024

May 29, 2024

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## Commission Action

At the first meeting at which a permanent rule is before the Commission for review, the Commission must take one of the following actions:

<p>(1) <b>Approve</b> the rule, if the Commission determines that the rule meets the standards for review.</p>	<p>(2) <b>Object</b> to the rule, if the Commission determines that the rule does not meet the standards for review.</p>	<p>(3) <b>Extend the period of review</b> for the rule, if the Commission determines it needs additional information on the rule to be able to decide whether the rule meets the standards for review.</p>
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## Extension of the Period of Review

The Commission must notify the agency of the extension and the reason it was granted.


- Almost always, the extension occurs **at the agency's request**.

The Commission **must** either approve or object to the rule within 70 days.

- That means any extension will last no more than two meetings.

In 2023, RRC adopted 26 NCAC 05 .0115 governing extensions:

A rule subject to extension will be reviewed at the second meeting unless:  
the agency provides written notice of its intent to go to the first meeting AND  
submits all responses no later than 10 business days prior to the first meeting.



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## Objection!

The rule is not  
dead!

An objection does not end  
your rule.

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## Objection!

### First Steps - G.S. 150B-21.9(a)

RRC must send the agency that adopted the rule a written statement of the objection and the reason for the objection.

The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission; or
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.



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## **Objection!**

### **Agency Timelines – G.S. 150B-21.9(b)**

An agency that is not a board or commission must take one of the actions within 30 days after receiving the Commission's statement of objection.

A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

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## **Objection!**

### **Agency Responses– G.S. 150B-21.9(c)**

When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the objection.

If it does, the Commission **must approve** the rule.

The Commission must also determine if the **change is substantial**.

#### **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)

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## Objection!

### Return of Rules – G.S. 150B-21.9(d)

The General Assembly made major changes to the APA in late 2023, changing how rules under an objection are returned.

A rule to which RRC has objected stays under review until the agency:

- (1) satisfies the objection or
- (2) submits a written response indicating that the agency has decided not to change the rule.

#### Timelines:

An agency that is not a board or commission = 30 days from receipt of the objection letter

A board or commission = the **longer** of 30 days OR 10 days after the board or commission's next **regular** meeting

G.S. 150B-21.9(b)

However, under the new language, if the agency does not submit a “revised rule to satisfy the Commission’s objection” within the time limit in 150B-21.9(b) or tells RRC it is not changing the rule in writing, RRC “shall return the rule to the agency.”

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## Approval

If the Commission votes to approve a Rule, it is delivered to the Codifier and usually becomes effective on the first day of the next calendar month.

If the rule objected to is one of a group of related rules adopted by the agency at the same time, the agency that adopted the rule may cause any of the other rules in the group to have a delayed effective date by submitting a written statement to that effect to the Commission before the other rules become effective.



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## Legislative Review

- If the Commission receives **written objections to the rule from 10 or more persons**, no later than 5:00 P.M. of the day following the day the Commission approves the rule, clearly requesting review by the legislature, the rule becomes effective on:
  - the earlier of the thirty-first legislative day or
  - the day of adjournment of the next regular session of the General Assembly that begins at least 25 days after the date the Commission approved the rule.
- The Commission does not include any letters received before the agency officially adopts the rule in this count.

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## Legislative Review

If a bill that specifically disapproves the rule is introduced in either house of the General Assembly before the **thirty-first legislative day of that session**, the rule becomes effective on the **earlier** of either:

1. The day an **unfavorable** final action is taken on the bill; or
2. The day that the session of the General Assembly **adjourns without ratifying** a bill that specifically disapproves the rule.

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## Legislative Review

A permanent rule that is specifically disapproved by a bill enacted into law before the rule becomes effective does not become effective.



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