

**JOINT LEGISLATIVE  
ADMINISTRATIVE PROCEDURE  
OVERSIGHT COMMITTEE**



*REPORT TO THE  
2004 REGULAR SESSION OF THE  
2003 GENERAL ASSEMBLY  
OF NORTH CAROLINA*

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May 19, 2004

TO THE MEMBERS OF THE 2003-2004 GENERAL ASSEMBLY

The Joint Legislative Administrative Procedure Oversight Committee herewith submits to you for your consideration its report pursuant to G.S. 120-70.101(8).

Respectfully submitted,

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Senator John H. Kerr, III

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Representative Harold J. Brubaker

---

Representative William Culpepper

Co-Chairs  
Joint Legislative Administrative Procedure Oversight Committee

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## MEMBERSHIP

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### JOINT LEGISLATIVE ADMINISTRATIVE PROCEDURE OVERSIGHT COMMITTEE 2003-2004

#### President Pro Tempore's Appointments

Senator John Hosea Kerr, Cochair  
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## STAFF

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### JOINT LEGISLATIVE ADMINISTRATIVE PROCEDURE OVERSIGHT COMMITTEE 2003-2004

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## AUTHORIZING LEGISLATION

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### ARTICLE 12K.

#### *Joint Legislative Administrative Procedure Oversight Committee*

#### **§ 120-70.100. Creation and membership of Joint Legislative Administrative Procedure Oversight Committee.**

(a) The Joint Legislative Administrative Procedure Oversight Committee is established. The Committee consists of 16 members as follows:

- (1) Eight members of the Senate appointed by the President Pro Tempore of the Senate, at least three of whom are members of the minority party.
- (2) Eight members of the House of Representatives appointed by the Speaker of the House of Representatives, at least three of whom are members of the minority party.

(b) Members of the Committee shall serve a term of two years beginning on January 15 of each odd-numbered year. Members may complete a term of service on the Committee even if they do not seek reelection or are not reelected to the General Assembly, but resignation or removal from service in the General Assembly constitutes resignation or removal from service on the Committee. A member continues to serve until the member's successor is appointed. A vacancy shall be filled within 30 days by the officer who made the original appointment.

#### **§ 120-70.101. Purpose and powers of Committee.**

The Joint Legislative Administrative Procedure Oversight Committee has the following powers and duties:

- (1) To review rules to which the Rules Review Commission has objected to determine if statutory changes are needed to enable the agency to fulfill the intent of the General Assembly.
- (2) To receive reports prepared by the Rules Review Commission containing the text and a summary of each rule approved by the Commission.
- (3) To prepare a notebook that contains the administrative rules that have been approved by the Rules Review Commission and reported to the Committee and to notify each member of the General Assembly of the availability of the notebook.
- (4) To review State regulatory programs to determine if the programs overlap, have conflicting goals, or could be simplified and still achieve the purpose of the regulation.
- (5) To review existing rules to determine if the rules are necessary or if the rules can be streamlined.
- (6) To review the rule-making process to determine if the procedures for adopting rules give the public adequate notice of and information about proposed rules.
- (7) To review any other concerns about administrative law to determine if statutory changes are needed.
- (8) To report to the General Assembly from time to time concerning the Committee's activities and any recommendations for statutory changes.

**§ 120-70.102. Organization of Committee.**

(a) The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall each designate a cochair of the Joint Legislative Administrative Procedure Oversight Committee. The Committee shall meet at least once a quarter and may meet at other times upon the joint call of the cochairs.

(b) A quorum of the Committee is nine members. No action may be taken except by a majority vote at a meeting at which a quorum is present. While in the discharge of its official duties, the Committee has the powers of a joint committee under G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4.

(c) Members of the Committee receive subsistence and travel expenses as provided in G.S. 120-3.1. The Committee may contract for consultants or hire employees in accordance with G.S. 120-32.02. The Committee may meet in the Legislative Building or the Legislative Office Building upon the approval of the Legislative Services Commission. The Legislative Services Commission, through the Legislative Services Officer, shall assign professional staff to assist the Committee in its work. Upon the direction of the Legislative Services Commission, the Supervisors of Clerks of the Senate and of the House of Representatives shall assign clerical staff to the Committee. The expenses for clerical employees shall be paid by the Committee.

**§ 120-70.103. Exercise of duty to maintain a notebook of approved rules.**

With the approval of the Legislative Services Commission, the Joint Legislative Administrative Procedure Oversight Committee may delegate to the Legislative Library the duty to maintain a notebook containing rules approved by the Rules Review Commission. Whether the notebook is maintained by the Committee or by the Legislative Library, rules shall be filed in the notebook in accordance with the numbering system used in the North Carolina Administrative Code.

## COMMITTEE PROCEEDINGS

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The Joint Legislative Administrative Procedure Oversight Committee met six times during the interim between the 2003 and 2004 Sessions of the General Assembly. After receiving an orientation on the Administrative Procedure Act and the statute authorizing the Committee, the members of the Committee heard reports on a number of issues, including:

- Report on North Carolina Locksmith Licensing Board Fees
- Report on Rulemaking by the North Carolina Industrial Commission
- Discussion of Fire Code Rules Regulating The Use of Locks on Exit Doors
- Report on the Estimated Costs and Feasibility of Developing or Acquiring an Automated system for Rulemaking
- Discussion of Rules Regulating the Collection of Data by Emergency Medical Service Workers
- Discussion of Rules Review Commission Action on Phase II Stormwater Management Rules
- Discussion of the Exemption from Rulemaking of Medical Coverage Policies for the State Medicaid Program by the Department of Health and Human Services
- Discussion of the Wildlife Resource Commission's Guidance Memorandum to Address and Mitigate Secondary and Cumulative Impacts to Aquatic and Terrestrial Wildlife Resources and Water Quality
- Discussion of the Authority of the North Carolina Board of Massage and Bodywork Therapy to Charge Certain Fees

At its final meeting before the 2004 Regular Session, the Committee voted to recommend seven legislative proposals. The remainder of this report contains summaries and drafts of each of the legislative proposals.



# LEGISLATIVE PROPOSAL # 1: Repeal Medical Coverage Policy APA Exemption.

## BILL ANALYSIS

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**Committee:** Joint Legislative Administrative  
Procedure Oversight Committee

**Introduced by:**

**Summary by:** Karen Cochrane Brown  
Committee Counsel

**Date:** May 6, 2004

**Version:** 2003-SBz-29 [v.4]

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**SUMMARY:** *This bill repeals the exemption from rule-making for medical coverage policies that was enacted for the Division of Medical Assistance in the 2001 Budget Bill. The bill will thereby subject all medical coverage policies that fit the definition of a rule to the requirement that they be adopted as rules under the APA.*

### CURRENT LAW:

In the 2001 Budget Bill, the General Assembly granted the Department of Health and Human Services, Division of Medical Assistance an exemption from rule-making under the APA in adopting new or amending existing medical coverage policies under the State Medicaid Program. The law does not contain a definition of the term "medical coverage policies". In 2003, DMA attempted to convert its existing rules, found in 10 NCAC 220, to medical coverage policies. DMA then requested that OAH remove the rules from the Administrative Code. The Codifier of Rules refused to remove the rules and informed DMA that the rules could only be repealed by rule-making. The NC Association for Home and Hospice Care opposes DMA's action and requests that either the exemption be deleted or that the term "medical coverage policies" be defined to restrict DMA from using the exemption to bypass rule-making.

### BILL ANALYSIS:

This bill repeals the exemption from rule-making that was granted in 2001, thereby subjecting any medical coverage policy that fits the definition of a rule to the public notice and hearing requirements contained in the APA.

This bill would become effective when it becomes law and would apply retroactively to July 1, 2001.

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**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003**

**H**

**D**

**HOUSE DRH70397-SBz-29A\* (4/22)**

Short Title: Repeal Medical Coverage Policy APA Exemption.

(Public)

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Sponsors:

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Referred to:

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A BILL TO BE ENTITLED

AN ACT TO REPEAL THE DEPARTMENT OF HEALTH AND HUMAN SERVICES' EXEMPTION FROM THE RULE-MAKING REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT WHEN ADOPTING NEW OR AMENDING EXISTING MEDICAL COVERAGE POLICIES UNDER THE STATE MEDICAID PROGRAM.

The General Assembly of North Carolina enacts:

**SECTION 1.** Section 21.20(a) of S.L. 2001-424 reads as rewritten:

**"SECTION 21.20.(a)** In order to promote consistency among providers and to ensure that medical coverage criteria are uniformly applied to Medicaid recipients throughout the State, the Department of Health and Human Services shall adopt medical coverage policies for the State Medicaid Program that are consistent with national standards or Department-defined standards. If the Department determines that application of a national standard would likely cause significant deterioration in the quality of or access to appropriate medical care, then the Department shall substitute for that national standard an evidence-based, best-practice standard that will not compromise quality of or access to appropriate medical care. ~~The adoption of new or amended medical coverage policies under the State Medicaid Program are exempt from the rule-making requirements of Chapter 150B of the General Statutes.~~"

**SECTION 2.** Section 21.20(b) and Section 21.20(c) of S.L. 2001-424 are repealed.

**SECTION 3.** Section 10.19(bb) of S.L. 2003-284 is repealed.

**SECTION 4.** This act is effective when it becomes law and applies retroactively to July 1, 2001.

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## LEGISLATIVE PROPOSAL # 2: Petition to Determine Need for Rule/APA.

### BILL ANALYSIS

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<b>Committee:</b>	Joint Legislative Administrative Procedure Oversight Committee	<b>Introduced by:</b>	
<b>Date:</b>	May 6, 2004	<b>Summary by:</b>	Karen Cochrane Brown Committee Counsel
<b>Version:</b>	2003-ROz-8 [v.7]		

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**SUMMARY:** *This bill authorizes any person to petition an agency to determine whether a policy statement, guidance document, interpretive memorandum, or other document created or relied upon by an agency meets the definition of a rule and should be adopted as a rule under the APA. The bill also authorizes a direct appeal to the court from a denial of the petition by the agency.*

### CURRENT LAW:

This issue of use of agency documents arose due to the alleged misuse of a NC Wildlife Resources Commission guidance document. Specifically, the NC Wildlife Resources Commission issued a "Guidance Memorandum to Address and Mitigate Secondary and Cumulative Impacts to Aquatic and Terrestrial Wildlife Resources and Water Quality". The Wildlife Resources Commission does not have the authority to either adopt the recommendations in the Guidance Memorandum as rules or to enforce them. However, it has been alleged that this document is being enforced against the public by other agencies such as the Division of Water Quality in connection with permit applications without having been adopted as a rule under the APA.

The APA defines a rule as "any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedures or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule." Therefore, if an agency is applying a standard generally to the public, that standard must be adopted as a rule.

### BILL ANALYSIS:

This bill adds a new provision to the APA, which authorizes any person to petition an agency to determine whether a document created or relied upon by an agency fits the definition of a rule, and should be adopted as a rule. Upon filing a petition, the petitioner may request that the court stay any implementation or reliance upon the document by the agency until a determination is made. If the agency denies the petition and concludes that the document does not fit the definition of a rule, the petitioner can immediately seek judicial review of the denial. The court is authorized to review the agency's decision and determine, as a matter of law, whether the document meets the legal definition of a rule. The court may then direct the agency to commence rule-making to adopt the document as a rule.

This bill would become effective October 1, 2004.

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GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003

H/S

D

BILL DRAFT 2003-ROz-8\* [v.10] (4/26)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)  
5/11/2004 4:03:28 PM

Short Title: Petition to Determine Need for Rule/APA.

(Public)

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Sponsors:

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Referred to:

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A BILL TO BE ENTITLED

AN ACT TO AMEND THE ADMINISTRATIVE PROCEDURE ACT TO AUTHORIZE A  
PERSON TO PETITION AN AGENCY TO DETERMINE THE NEED FOR A RULE.

The General Assembly of North Carolina enacts:

**SECTION 1.** G.S. 150B-20 reads as rewritten:

**"§ 150B-20. Petitioning an agency to adopt a rule.**

(a) Petition. – A person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption. A person may submit written comments with a rule-making petition. If a rule-making petition requests the agency to create or amend a rule, the person must submit the proposed text of the requested rule change and a statement of the effect of the requested rule change. Each agency must establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in considering a rule-making petition.

(a1) Petition to Determine Need for Rule. – A person may petition an agency to review any policy statement, guidance document, interpretive memorandum, or other document created or relied upon by the agency to determine whether the document as written or as applied falls within the definition of a rule under this Chapter and should have been adopted as a rule in accordance with this Article. The petition shall be in writing and shall include a copy of the document and a statement describing the agency's application of the document. If the agency determines that the document should be adopted as a rule, it shall grant the petition. If the agency determines that the document should not be adopted as a rule, it shall deny the petition. Each agency shall establish by rule the procedure for submitting a petition to determine the need for a rule and the procedure the agency follows in reviewing and deciding the petition.

1 (b) Time. – An agency must grant or deny a ~~rule-making~~ petition authorized by this section  
2 submitted to it within 30 days after the date the ~~rule-making~~ petition is submitted, unless the  
3 agency is a board or commission. If the agency is a board or commission, it must grant or deny a  
4 ~~rule-making~~ the petition within 120 days after the date the ~~rule-making~~ petition is submitted.  
5 Upon the filing of a petition under subsection (a1) of this section, the petitioner may apply to the  
6 court, pursuant to G.S. 150B-48, for a stay of the agency's implementatation of or reliance upon  
7 the document that is the subject of the petition. In its discretion, the court may grant the stay and  
8 any other injunctive relief available pursuant to G.S. 1A-1, Rule 65, provided however, the  
9 petitioner need only make a prima facie showing that the challenged document can in good faith  
10 be classified as a rule.

11 (c) Action. – If an agency denies a ~~rule-making~~ petition, petition authorized by this section,  
12 it must send the person who submitted the petition a written statement of the reasons for denying  
13 the petition. If an agency grants a ~~rule-making~~ petition, petition authorized by this section, it must  
14 inform the person who submitted the ~~rule-making~~ petition of its decision and must initiate  
15 rule-making proceedings. When an agency grants a ~~rule-making~~ petition, the notice of text it  
16 publishes in the North Carolina Register may state that the agency is initiating rule making as the  
17 result of a ~~rule-making~~ petition authorized by this section and state the name of the person who  
18 submitted the ~~rule-making~~ petition. If the ~~rule-making~~ petition requested the creation or  
19 amendment of a rule, the notice of text the agency publishes may set out the text of the requested  
20 rule change submitted with the ~~rule-making~~ petition and state whether the agency endorses the  
21 proposed text.

22 (d) Review. – Denial of a ~~rule-making~~ petition authorized by this section is a final agency  
23 decision and is subject to judicial review under Article 4 of this Chapter. Failure of an agency to  
24 grant or deny a ~~rule-making~~ petition within the time limits set in subsection (b) is a denial of the  
25 ~~rule-making~~ petition.

26 (e) Repealed by Session Laws 1996, Second Extra Session, c. 18, s. 7.10(b)."

27 **SECTION 2.** G.S. 150B-51 is amended by adding two new subsections to read:

28 "(e) In reviewing an appeal from a denial of a petition under G.S. 150B-20(a), the court  
29 shall review the record before the agency to determine whether the agency's decision may have  
30 prejudiced the rights of the petitioner in one or more of the ways set forth in subsection (b)(1),  
31 (2), (3), (4) or (6) of this section.

32 "(f) In reviewing an appeal from a denial of a petition under G.S. 150B-20(a1), the court  
33 shall determine whether the document that is the subject of the petition falls within the definition  
34 of a rule under this Chapter, either as written or applied, and whether the document should have  
35 been adopted as a rule in accordance with Article 2A of this Chapter. If the court determines that  
36 the document should have been adopted as a rule, it may issue a stay of the agency's  
37 implementation of or reliance on the document in accordance with G.S. 150B-48, or continue any  
38 stay previously issued. The court also may direct the agency to commence rule-making in  
39 accordance with Article 2A of this Chapter to adopt the document as a rule. If the court  
40 determines that the document need not have been adopted as a rule, it may lift any stay previously  
41 issued subject to such terms or conditions as the court deems appropriate."

42 **SECTION 3.** This act becomes effective October 1, 2004



BILL ANALYSIS

## LEGISLATIVE PROPOSAL # 3: Clarify Fee Authority of Massage Therapy Bd.

**Committee:** Joint Legislative Administrative  
Procedure Oversight Committee

**Date:** May 6, 2004

**Version:** 2003-SBfz-30 [v.4]

**Introduced by:**

**Summary by:** Karen Cochrane Brown  
Committee Counsel

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**SUMMARY:** *This bill repeals a provision of the Massage and Bodywork Therapy Practice Act, which authorized the Board to adopt 'reasonable fees' for services of the Board. The Act contains specific fees related to licensees but no specific fees related to approval of schools. The bill further states that the Board has no authority to establish, charge, or collect any fees related to approval of massage and bodywork therapy schools without specific statutory authority.*

### CURRENT LAW:

The Massage and Bodywork Therapy Practice Act was enacted in 1998. The Act created a Board, which was authorized to license and regulate practitioners. In addition, the Board was authorized to establish rules for the approval of massage and bodyworks schools. The Act authorized the Board to adopt 'reasonable fees' for services of the Board and set out specific fees related to licensees, but no specific fees related to approval of schools. In 2001, the Board adopted a temporary rule setting fees for school approvals. In 2000, the Board obtained an AG's opinion that said the general fee authority contained in the statute was sufficient to support the charging of fees for school approvals. The Board relied on this advise in adopting the temporary rule. However, in December 2001, the temporary rule expired when no permanent rule was adopted to replace it. Unaware that the temporary rule had lapsed, the Board has continued to charge fees for school approval, until this year.

Prior to 1998, massage and bodywork therapy schools were licensed by the Community College System, as are other proprietary schools. After the Practice Act was enacted, the Community College System and the Board obtained an opinion from the Attorney General that language in the Massage and Bodywork Practice Act divested the Community College System of all authority to license these schools and gave the Board authority to "approve" the schools. The statute does not contain much specific guidance as to the criteria for approval. In addition, the Community College System has also been required to obtain approval from the Board for their massage and bodywork programs, and to pay the fees required in connection with the approval process.

### BILL ANALYSIS:

This bill repeals the Board's 'reasonable fee' authority and states that the Board may not collect fees from schools without specific statutory authority..

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**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003**

**H/S**

**D**

**BILL DRAFT 2003-ROfz-10\* [v.4] (5/5)**

**(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)  
5/11/2004 4:56:05 PM**

Short Title: Clarify Fee Authority of Massage Therapy Bd. (Public)

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Sponsors:

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Referred to:

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A BILL TO BE ENTITLED

AN ACT TO CLARIFY THAT THE NORTH CAROLINA BOARD OF MASSAGE AND  
BODYWORK THERAPY DOES NOT HAVE THE AUTHORITY TO ESTABLISH FEES  
RELATED TO THE APPROVAL OF MASSAGE AND BODYWORK THERAPY  
SCHOOLS.

The General Assembly of North Carolina enacts:

**SECTION 1.** G.S.90-626(8)is repealed.

**SECTION 2.** The North Carolina Board of Massage and Bodywork Therapy shall not  
establish, charge, or collect any fee related to the approval of massage and bodywork therapy  
schools without specific statutory authority.

**SECTION 3.** This act becomes effective July 1, 2004.

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BILL ANALYSIS

## LEGISLATIVE PROPOSAL # 4: Locksmith Criminal History Record Check Fee.

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**Committee:** Joint Legislative Administrative  
Procedure Oversight Committee

**Date:** May 6, 2004

**Version:** 2003-SBfz-26 [v.3]

**Introduced by:**

**Summary by:** Karen Cochrane Brown  
Committee Counsel

---

**SUMMARY:** *This bill authorizes the State Bureau of Investigation (SBI) to charge each applicant for a locksmith license or an apprentice designation a fee for conducting a criminal history record check on the applicant.*

### **CURRENT LAW:**

G.S. 74F-18, enacted during the 2003 Regular Session, directs the Locksmith Licensing Board to ensure that the State and national criminal history of an applicant for licensure is checked. The Board relies on the State Bureau of Investigation (SBI) in the North Carolina Department of Justice to conduct the actual criminal history checks and the SBI charges a fee for this service. The Board is not statutorily authorized to charge an applicant a fee to offset the cost to the Board of the criminal history record check and the SBI is not statutorily authorized to charge a direct fee to the applicant.

### **BILL ANALYSIS:**

This bill adds a provision to the Locksmith Licensing Act authorizing the Department of Justice to charge each applicant a fee for conducting the criminal history record check required by the Board before it can grant licensure or apprentice designation. The Board should not need to increase its fees to offset the cost of the criminal record check.

The act would become effective when it becomes law.

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**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003**

**H/S**

**D**

**BILL DRAFT 2003-SBfz-26\* [v.4] (3/29)**

**(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)  
5/12/2004 10:56:29 AM**

Short Title: Locksmith Criminal History Record Check Fee. (Public)

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Sponsors:

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Referred to:

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A BILL TO BE ENTITLED

AN ACT TO AUTHORIZE THE NORTH CAROLINA DEPARTMENT OF JUSTICE TO  
CHARGE EACH APPLICANT FOR A LOCKSMITH LICENSE OR AN APPRENTICE  
DESIGNATION A CRIMINAL HISTORY RECORD CHECK FEE.

The General Assembly of North Carolina enacts:

**SECTION 1.** G.S. 74F-18(b) reads as rewritten:

"(b) All applicants for licensure or apprentice designation shall consent to a criminal history record check. Refusal to consent to a criminal history record check may constitute grounds for the Board to deny licensure or apprentice designation to an applicant. The Board shall ensure that the State and national criminal history of an applicant is checked. The Board shall be responsible for providing to the North Carolina Department of Justice the fingerprints of the applicant to be checked, a form signed by the applicant consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories of Criminal Histories, and any additional information required by the Department of Justice. The Board shall keep all information obtained pursuant to this section confidential. The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection."

**SECTION 2.** This act is effective when it becomes law.

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BILL ANALYSIS

## LEGISLATIVE PROPOSAL # 5: Standards for Review of Rules by RRC.

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<b>Committee:</b>	Joint Legislative Administrative Procedure Oversight Committee	<b>Introduced by:</b>	
<b>Date:</b>	May 6, 2004	<b>Summary by:</b>	Karen Cochrane Brown Committee Counsel
<b>Version:</b>	2003-ROz-11 [v.1]		

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**SUMMARY:** *This bill restructures the section of the APA that defines the standard by which the Rules Review Commission (RRC) is authorized to review administrative rules. The bill creates a distinction between the initial review relating to the proper adoption of a rule and the more substantive review of the contents of the rule.*

### CURRENT LAW:

Under current law, the RRC is charged with reviewing temporary and permanent rules and determining whether the rules meet four statutory criteria. The rules must:

1. Be within the authority delegated to the agency by the General Assembly.
2. Be clear and unambiguous.
3. Be reasonably necessary to implement or interpret a law, taking into account the cumulative impact of all rules related to the specific purpose of the rule.
4. Be adopted in accordance with the rule-making provisions of the APA.

If the rule fails to meet any one of the criteria, the RRC must object to the rule and notify the agency of the objection and the reason for it. The agency may then revise the rule to satisfy the objection and return it to the RRC. The RRC again reviews the rule, and if the agency has satisfied the objection, the RRC must approve the rule. If the agency fails to satisfy the objection, the RRC must again notify the agency and allow the agency to attempt to satisfy the objection. This process continues until either the rule is approved or the agency notifies the RRC that it does not intend to revise the rule further. At which point, the RRC returns the rule to the agency and the rule terminates without going into effect.

Prior to 2003, the standard that a rule be adopted in accordance with the APA was not a basis for objection, but, if requested, the RRC could make the determination, and if it found that the rule had not been properly adopted, it would return the rule to the agency and terminate the rule.

The RRC has been sued in connection with its review of the Environmental Management Commission's Phase II Stormwater Rules. In that case, the RRC returned a rule for not being properly adopted, after the agency had revised the rule in response to an RRC objection.

**BILL ANALYSIS:**

This bill attempts to clarify the role of the RRC in reviewing for proper adoption and for content. These are two separate reviews with separate consequences. The bill amends the APA to make a distinction between the initial review of a rule to determine whether it has been adopted in accordance with the APA and the subsequent more substantive review of the contents of the rule. If the rule was not properly adopted, the RRC must return the rule to the agency and the agency must redo rule-making. If the rule fails to meet the content standards, the RRC must object to the rule and notify the agency of its objection. The bill separates the fourth statutory criteria and makes it the basis for the initial review of a rule. When a rule has been adopted by an agency and sent to the RRC, the RRC must first determine that the rule has been adopted in accordance with the APA. If it has not, the RRC must return the rule to the agency for republication. If the rule was properly adopted, the RRC goes on to determine that the rule meets the standards of statutory authority, clarity, and necessity.

This bill would become effective October 1, 2004, and apply to temporary and permanent rules adopted on or after that date.

**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003**

S/H

D

**BILL DRAFT 2003-ROz-11\* [v.4] (5/5)**

**(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)  
5/11/2004 4:59:20 PM**

Short Title: Standards for Review of Rules by RRC.

(Public)

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Sponsors:

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Referred to:

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A BILL TO BE ENTITLED

AN ACT TO AMEND THE ADMINISTRATIVE PROCEDURE ACT TO CREATE A DISTINCTION BETWEEN THE STANDARD FOR REVIEW OF THE ADOPTION OF RULES AND THE STANDARD FOR REVIEW OF THE CONTENT OF RULES TO BE USED BY THE RULES REVIEW COMMISSION IN REVIEWING TEMPORARY AND PERMANENT RULES AND TO MAKE OTHER CONFORMING CHANGES.

The General Assembly of North Carolina enacts:

**SECTION 1.** G.S. 150B-21.9 is repealed.

**SECTION 2.** Part 3 of Article 2A of Chapter 150B of the General Statutes is amended by adding a new section to read:

**"§ 150B-21.9A. Standards and timetable for review by Commission.**

(a) Adoption Standards. - After receipt of a rule from an agency the Commission shall determine whether the rule was adopted in accordance with Part 2 of this Article. If the Commission determines that the rule was not adopted in accordance with Part 2 of this Article, the Commission shall then return the rule to the agency that adopted the rule, and shall notify the agency of the specific violation of Part 2 of this Article. If the Commission determines that the rule was adopted in accordance with Part 2 of this Article, the Commission shall review the rule based on the content standard set forth in subsection (b) of this section.

(b) Content Standards. - The Commission shall not consider questions relating to the quality or efficacy of the rule or the specific means by which the agency has chosen to execute its statutory authority but shall restrict its review to determination of the standards set forth in this subsection. The Commission shall determine whether a rule meets all of the following criteria:

- (1) The subject matter of the rule is within the authority delegated to the agency by the General Assembly.
- (2) The rule is clear and unambiguous.

1           (3) The rule is reasonably necessary to implement or interpret an enactment of the  
2 General Assembly, or of Congress, or a regulation of a federal agency. The  
3 Commission shall consider the cumulative effect of all rules adopted by the  
4 agency related to the specific purpose for which the rule is proposed.

5           (c) Fiscal Notes. - The Commission may ask the Office of State Budget and Management  
6 to determine if a rule has a substantial economic impact and is therefore required to have a fiscal  
7 note. The Commission must ask the Office of State Budget and Management to make this  
8 determination if a fiscal note was not prepared for a rule and the Commission receives a written  
9 request for a determination of whether the rule has a substantial economic impact.

10          (d) Timetable. – The Commission shall review a permanent rule submitted to it on or  
11 before the twentieth of a month by the last day of the next month. The Commission shall review a  
12 rule submitted to it after the twentieth of a month by the last day of the second subsequent month.  
13 The Commission shall review a temporary rule in accordance with the timetable and procedure  
14 set forth in G.S. 150B-21.1."

15           **SECTION 3.** G.S. 150B-21.10 reads as rewritten:

16           **"§ 150B-21.10. Commission action on permanent rule.**

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

- 19           (1) Approve the rule, if the Commission determines that the rule meets the content  
20           standards for ~~review~~, review set out in G.S. 150B-21.9A(b).
- 21           (2) Object to the rule, if the Commission determines that the rule does not meet the  
22           content standards for ~~review~~, review set out in G.S. 150B-21.9A(b).
- 23           (3) Extend the period for reviewing the rule, if the Commission determines it needs  
24           additional information on the rule to be able to decide whether the rule meets the  
25           content standards for review.

26           (b) In reviewing a new rule or an amendment to an existing rule, the Commission may  
27 request an agency to make technical changes to the rule and may condition its approval of the rule  
28 on the agency's making the requested technical changes."

29           **SECTION 4.** G.S. 150B-21.11 reads as rewritten:

30           **"§ 150B-21.11. Procedure when Commission approves permanent rule.**

31           (a) When the Commission approves a permanent rule, it must notify the agency that  
32 adopted the rule of the Commission's approval, deliver the approved rule to the Codifier of Rules,  
33 and include the text of the approved rule and a summary of the rule in its next report to the Joint  
34 Legislative Administrative Procedure Oversight Committee.

35           (b) If the approved rule will increase or decrease expenditures or revenues of a unit of local  
36 government, the Commission must also notify the Governor of the Commission's approval of the  
37 rule and deliver a copy of the approved rule to the Governor by the end of the month in which the  
38 Commission approved the rule.

39           (c) Entry into the Code. - Entry of a rule in the North Carolina Administrative Code after  
40 review by the Commission creates a rebuttable presumption that the rule was adopted in  
41 accordance with Part 2 of this Article."

42           **SECTION 5.** G.S. 150B-21.12 reads as rewritten:

43           **"§ 150B-21.12. Procedure when Commission objects to a permanent rule.**



1 (a) ~~Action.~~ Notification of Objection. – When the Commission objects to a permanent rule,  
2 it must send the agency that adopted the rule a written statement of the objection and the specific  
3 reason for the objection. The Commission shall identify each provision of the rule that fails to  
4 satisfy any of the content standards set out in G.S. 150B-21.9A(b) and explain how the provision  
5 fails to satisfy the standards.

6 (a1) Agency Action. - ~~The~~ Upon notification of objection, the agency that adopted the rule  
7 must take one of the following actions:

8 (1) Change the rule to satisfy the Commission's objection and submit the revised  
9 rule to the Commission.

10 (2) Submit a written response to the Commission indicating that the agency has  
11 decided not to change the rule.

12 (b) Time Limit. – An agency that is not a board or commission must take one of the actions  
13 listed in subsection ~~(a)~~ (a1) of this section within 30 days after receiving the Commission's  
14 statement of objection. A board or commission must take one of these actions within 30 days after  
15 receiving the Commission's statement of objection or within 10 days after the board or  
16 commission's next regularly scheduled meeting, whichever comes later.

17 (c) ~~Changes.~~ Changes to the Rule. – When an agency changes a rule in response to an  
18 objection by the Commission, the Commission ~~must~~ shall determine whether the change satisfies  
19 the Commission's objection. If it does, the Commission ~~must~~ shall approve the rule. If it does not,  
20 the Commission ~~must~~ shall send the agency a written statement of the Commission's continued  
21 objection and the specific reason for the continued objection. The Commission ~~must~~ shall also  
22 determine whether the change is substantial. In making this determination, the Commission shall  
23 use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall  
24 be published and reviewed in accordance with the procedure set forth in ~~G.S. 150B-21.1(a3) and~~  
25 ~~(b).~~ G.S. 150B-21.1.

26 (d) Return of Rule. – A rule to which the Commission has objected remains under review  
27 by the Commission until the agency that adopted the rule decides not to satisfy the Commission's  
28 objection and makes a written request to the Commission to return the rule to the agency. When  
29 the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its  
30 action and must send a copy of the record of the Commission's review of the rule to the Joint  
31 Legislative Administrative Procedure Oversight Committee in its next report to that Committee.  
32 If the rule that is returned would have increased or decreased expenditures or revenues of a unit of  
33 local government, the Commission must also notify the Governor of its action and must send a  
34 copy of the record of the Commission's review of the rule to the Governor. The record of review  
35 consists of the rule, the Commission's letter of objection to the rule, the agency's written response  
36 to the Commission's letter, and any other relevant documents before the Commission when it  
37 decided to object to the rule."

38 **SECTION 6.** This act becomes effective October 1, 2004, and applies to temporary and  
39 permanent rules adopted on or after that date.

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BILL ANALYSIS

## LEGISLATIVE PROPOSAL #6: APA Technical/Clarifying Changes.

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**Committee:** Joint Legislative Administrative  
Procedure Oversight Committee  
**Date:** May 6, 2004  
**Version:** 2003-ROz-9 [v.4]

**Introduced by:**  
**Summary by:** Karen Cochrane Brown  
Committee Counsel

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**SUMMARY:** *This bill makes technical changes to conform the formatting of the temporary rule section of the APA. It also clarifies that written objections requesting legislative review of a rule must be received on or before the date the RRC reviews the rule.*

### **BILL ANALYSIS:**

In 2003, the General Assembly made major changes to the rule-making provisions of the APA. As a result of the restructuring of the temporary rule section made by House Bill 1151, and changes to that section made by other bills, the sequencing of temporary rule authorizations is now inconsistent. This bill makes technical amendments to the temporary rule section to conform the formatting.

In addition, the bill clarifies that written objections requesting legislative review of a rule must be received on or before the date the RRC reviews the rule.

This bill would become effective when it becomes law.

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**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003**

**H/S**

**D**

**BILL DRAFT 2003-ROz-9\* [v.6] (5/3)**

**(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)  
5/11/2004 5:00:54 PM**

Short Title: APA Technical/Clarifying Changes. (Public)

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Sponsors:

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Referred to:

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A BILL TO BE ENTITLED

AN ACT TO MAKE TECHNICAL AND CLARIFYING CHANGES TO THE  
ADMINISTRATIVE PROCEDURE ACT.

The General Assembly of North Carolina enacts:

**SECTION 1.** G.S. 150B-21.1 reads as rewritten:

**"§ 150B-21.1. Procedure for adopting a temporary rule.**

(a) Adoption. – An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) The effective date of a recent act of the General Assembly or the United States Congress.
- (3) A recent change in federal or State budgetary policy.
- (4) A recent federal regulation.
- (5) A recent court order.
- (6) The need for the rule to implement or be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan.
- (7) The need for the Wildlife Resources Commission to establish any of the following:
  - a. No wake zones.
  - b. Hunting or fishing seasons.
  - c. Hunting or fishing bag limits.
  - d. Management of public game lands as defined in G.S. 113-129(8a).
- (8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes, to adopt

1 uniform Statements of Policy that have been officially adopted by the North  
2 American Securities Administrators Association, Inc., for the purpose of  
3 promoting uniformity of state securities regulation, and to adopt rules governing  
4 the conduct of hearings pursuant to this Chapter.

5 (9) The need for the Commissioner of Insurance to implement the provisions of  
6 G.S. 58-2-205.

7 (10) The need for the Chief Information Officer to implement the information  
8 technology procurement provisions of Article 3D of Chapter 147 of the General  
9 Statutes.

10 (11) The need for the State Board of Elections to adopt a temporary rule after prior  
11 notice or hearing or upon any abbreviated notice or hearing the agency finds  
12 practical for one or more of the following:

13 a. In accordance with the provisions of G.S. 163-22.2.

14 b. To implement any provisions of state or federal law for which the State  
15 Board of Elections has been authorized to adopt rules.

16 c. The need for the rule to become effective immediately in order to  
17 preserve the integrity of upcoming elections and the elections process.

18 (12) The need for an agency to adopt a temporary rule to implement the provisions of  
19 any of the following acts until all rules necessary to implement the provisions of  
20 the act have become effective as either temporary or permanent rules:

21 a. Repealed by Session Laws 2000-148, s. 5, effective July 1, 2002.

22 b. Repealed by Session Laws 2000-69, s. 5, effective July 1, 2003.

23 (13), (14) Reserved.

24 (15) The need for the Department of Health and Human Services to adopt temporary  
25 rules concerning the placement of individuals in facilities licensed under Article  
26 2 of Chapter 122C of the General Statutes and the enrollment of providers of  
27 services to such individuals in the Medicaid program.

28 ~~(a1) — (16) \_\_\_\_\_ (Expires July 1, 2005) Notwithstanding the provisions of subsection (a) of~~  
29 ~~this section, The need for the Department of Transportation may\_ to adopt temporary rules~~  
30 ~~concerning logo signs pursuant to G.S. 136-89.56. After having the proposed temporary rule~~  
31 ~~published in the North Carolina Register and at least 30 days prior to adopting a temporary rule~~  
32 ~~pursuant to this subsection, the Department shall:~~

33 ~~(1) — Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and~~  
34 ~~any other interested parties of its intent to adopt a temporary rule.~~

35 ~~(2) — Accept oral and written comments on the proposed temporary rule.~~

36 ~~(3) — Hold at least one public hearing on the proposed temporary rule.~~

37 ~~When the Department adopts a temporary rule pursuant to this subsection, the Department shall~~  
38 ~~submit a reference to this subsection as the Department's statement of need to the Codifier of~~  
39 ~~Rules.~~

40 ~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the~~  
41 ~~North Carolina Register a proposed temporary rule received from the Department in accordance~~  
42 ~~with this subsection.~~

1       ~~(a2)~~ (a1) A recent act, change, regulation, or order as used in subdivisions (2) through (5) of  
2 subsection (a) of this section means an act, change, regulation, or order occurring or made  
3 effective no more than 210 days prior to the submission of a temporary rule to the Rules Review  
4 Commission. Upon written request of the agency, the Commission may waive the 210-day  
5 requirement upon consideration of the degree of public benefit, whether the agency had control  
6 over the circumstances that required the requested waiver, notice to and opposition by the public,  
7 the need for the waiver, and previous requests for waivers submitted by the agency.

8       ~~(a3)~~ (a2) Unless otherwise provided by law, at least 30 business days prior to adopting a  
9 temporary rule, the agency shall:

- 10           (1) Submit the rule and a notice of public hearing to the Codifier of Rules, and the  
11           Codifier of Rules shall publish the proposed temporary rule and the notice of  
12           public hearing on the Internet to be posted within five business days.
- 13           (2) Notify persons on the mailing list maintained pursuant to G.S. 150B-21.2(d) and  
14           any other interested parties of its intent to adopt a temporary rule and of the  
15           public hearing.
- 16           (3) Accept written comments on the proposed temporary rule for at least 15  
17           business days prior to adoption of the temporary rule.
- 18           (4) Hold at least one public hearing on the proposed temporary rule no less than five  
19           days after the rule and notice have been published.

20       (a3) An agency must also prepare a written statement of its findings of need for a temporary  
21 rule stating why adherence to the notice and hearing requirements in G.S. 150B-21.2 would be  
22 contrary to the public interest and why the immediate adoption of the rule is required. If the  
23 temporary rule establishes a new fee or increases an existing fee, the agency shall include in the  
24 written statement that it has complied with the requirements of G.S. 12-3.1. The statement must  
25 be signed by the head of the agency adopting the temporary rule.

26       (b) Review. – When an agency adopts a temporary rule it must submit the rule and the  
27 agency's written statement of its findings of the need for the rule to the Rules Review  
28 Commission. Within 15 business days after receiving the proposed temporary rule, the  
29 Commission shall review the agency's written statement of findings of need for the rule and the  
30 rule to determine whether the statement meets the criteria listed in subsection (a) of this section  
31 and the rule meets the standards in G.S. 150B-21.9. The Commission shall direct a member of its  
32 staff who is an attorney licensed to practice law in North Carolina to review the statement of  
33 findings of need and the rule. The staff member shall make a recommendation to the  
34 Commission, which must be approved by the Commission or its designee. The Commission's  
35 designee shall be a panel of at least three members of the Commission. In reviewing the  
36 statement, the Commission or its designee may consider any information submitted by the agency  
37 or another person. If the Commission or its designee finds that the statement meets the criteria  
38 listed in subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9, the  
39 Commission or its designee must approve the temporary rule and deliver the rule to the Codifier  
40 of Rules within two business days of approval. The Codifier of Rules must enter the rule into the  
41 North Carolina Administrative Code on the sixth business day following receipt from the  
42 Commission or its designee.

1       **(b1)** If the Commission or its designee finds that the statement does not meet the criteria  
2 listed in subsection (a) of this section or that the rule does not meet the standards in G.S.  
3 150B-21.9, the Commission or its designee must immediately notify the head of the agency. The  
4 agency may supplement its statement of need with additional findings or submit a new statement.  
5 If the agency provides additional findings or submits a new statement, the Commission or its  
6 designee must review the additional findings or new statement within five business days after the  
7 agency submits the additional findings or new statement. If the Commission or its designee again  
8 finds that the statement does not meet the criteria listed in subsection (a) of this section or that the  
9 rule does not meet the standards in G.S. 150B-21.9, the Commission or its designee must  
10 immediately notify the head of the agency and return the rule to the agency.

11       **(b2)** If an agency decides not to provide additional findings or submit a new statement when  
12 notified by the Commission or its designee that the agency's findings of need for a rule do not  
13 meet the required criteria or that the rule does not meet the required standards, the agency must  
14 notify the Commission or its designee of its decision. The Commission or its designee shall then  
15 return the rule to the agency. When the Commission returns a rule to an agency in accordance  
16 with this subsection, the agency may file an action for declaratory judgment in Wake County  
17 Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes.

18       **(b3)** Notwithstanding any other provision of this subsection, if the agency has not complied  
19 with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

20       **(c)** Standing. – A person aggrieved by a temporary rule adopted by an agency may file an  
21 action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter  
22 1 of the General Statutes. In the action, the court shall determine whether the agency's written  
23 statement of findings of need for the rule meets the criteria listed in subsection (a) of this section  
24 and whether the rule meets the standards in G.S. 150B-21.9. The court shall not grant an ex parte  
25 temporary restraining order.

26       **(c1)** Filing a petition for rule making or a request for a declaratory ruling with the agency  
27 that adopted the rule is not a prerequisite to filing an action under this subsection. A person who  
28 files an action for declaratory judgment under this subsection must serve a copy of the complaint  
29 on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

30       **(d)** Effective Date and Expiration. – A temporary rule becomes effective on the date  
31 specified in G.S. 150B-21.3. A temporary rule expires on the earliest of the following dates:

- 32           (1) The date specified in the rule.
- 33           (2) The effective date of the permanent rule adopted to replace the temporary rule, if  
34 the Commission approves the permanent rule.
- 35           (3) The date the Commission returns to an agency a permanent rule the agency  
36 adopted to replace the temporary rule.
- 37           (4) The effective date of an act of the General Assembly that specifically  
38 disapproves a permanent rule adopted to replace the temporary rule.
- 39           (5) 270 days from the date the temporary rule was published in the North Carolina  
40 Register, unless the permanent rule adopted to replace the temporary rule has  
41 been submitted to the Commission.

42       **(e)** Publication. – When the Codifier of Rules enters a temporary rule in the North Carolina  
43 Administrative Code, the Codifier must publish the rule in the North Carolina Register."



1           **SECTION 2.** G.S. 150B-21.3(b2) reads as rewritten:

2           "(b2) Objection. – Any person who objects to the adoption of a permanent rule may submit  
3 written comments to the agency. If the objection is not resolved prior to adoption of the rule, a  
4 person may submit written objections to the Commission. If the Commission receives written  
5 objections from 10 or more ~~persons~~ persons, on or before the date it reviews the rule, clearly  
6 requesting review by the legislature in accordance with instructions contained in the notice  
7 pursuant to G.S. 150B-21.2(c)(9), and the Commission approves the rule, the rule will become  
8 effective as provided in subsection (b1) of this section. When the requirements of this subsection  
9 have been met and a rule is subject to legislative disapproval, the agency may adopt the rule as a  
10 temporary rule if the rule would have met the criteria listed in G.S. 150B-21.1(a) at the time the  
11 notice of text for the permanent rule was published in the North Carolina Register."

12           **SECTION 3.** This act is effective when it becomes law.

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# **Review of Phase II Stormwater Management Rules**

Prepared by Karen Cochrane-Brown and Jeff Hudson, Committee Counsel  
Joint Legislative Administrative Procedure Oversight Committee

*This is an overview of the administrative review process followed in connection with the Phase II Stormwater rules adopted by the Environmental Management Commission (EMC).*

## **July 10, 2003**

The EMC adopted a set of permanent rules addressing stormwater management.

*These rules are subject to legislative disapproval under the "old process" because they were adopted prior to October 1, 2003, the applicability date of HB 1151.*

**G.S. 150B-21.3(b) provides that a permanent rule must be approved by the RRC before it can go into effect.**

## **October 16, 2003**

The Rules Review Commission (RRC) reviewed the rules and objected on the basis of lack of statutory authority and ambiguity.

**G.S. 150B-21.9 provides that when a rule is submitted to the RRC, the RRC may determine whether the rule was adopted in accordance with Part 2 of Article 2A of the APA (Procedures for adopting rules). If the RRC determines that the rule was not adopted in accordance with Part 2, the RRC must return the rule to the agency.**

**G.S. 150B-21.10 provides that after reviewing a rule, the RRC must take one of the following actions:**

- **Approve the rule.**
- **Object to the rule (based on lack of statutory authority, ambiguity, or necessity).**
- **Extend the period for reviewing the rule.**

## **November 5, 2003**

The RRC notified the EMC, in writing, that it objected to the rules and stated the reasons for the objection.

**G.S. 150B-21.12(a) provides that when an agency is notified of the RRC's objection, the agency must take one of the following actions:**

- **Change the rule and submit the revised rule to the RRC.**
- **Notify the RRC, in writing, that the agency has decided not to change the rule.**

## **January 2003**

The EMC revised the rules and resubmitted them to the RRC for further consideration.

**G.S. 150B-21.12(c)** provides that when an agency changes and resubmits a rule, the RRC must determine whether the change satisfies the objection. If the change satisfies the objection, the RRC must approve the rule. If the change does not satisfy the objection, the RRC must again notify the agency of its continued objection and the reason for it.

**G.S. 150B-21.12(d)** provides that a rule remains under review by the RRC until the agency notifies the RRC, in writing, that it has decided not to satisfy the objection and requests the return of the rule.

#### **January 15, 2004**

The RRC considered the EMC's response to the objections.

*An unofficial transcript of the meeting indicates that the agency initially requested an extension of the period of review so that they could continue to work with opponents of the rules and also to respond to some of the RRC staff's concerns. A motion to extend the period of review failed for lack of a second. Members of the RRC had received several complaints about the revised rules from various parties. The complaints centered around the fact that the revisions would affect a different class of people who had not had notice or an opportunity to be heard on the rule. The members accepted the argument that the revisions constituted an entirely new rule that had not been adopted in accordance with the APA.*

**G.S. 150B-21.5(a)(6)** provides that an agency is not required to republish or hold a public hearing if it changes a rule in response to a request or an objection by the RRC.

**G.S. 150B-21.14** authorizes the RRC to call a public hearing when it extends the period of review.

**It should be noted that the General Assembly changed the law last year to authorize the RRC to determine whether a change to a rule made in response to an objection by the RRC is substantial. If the RRC determines that the change is substantial the revised rule must be republished using the temporary rulemaking procedure. The law was changed when it was recognized that a rule change could affect parties who had no notice of the rule and that under the prior law the RRC had no authority to require republication. The change in the law is not applicable to these rules because they were adopted prior to October 1, 2003.**

#### **February 5, 2004**

The RRC notified the EMC, in writing, that the rules were being returned to the agency because they had not been adopted in accordance with the APA.

*The letter from the RRC to the EMC cites G.S. 150B-21.9(a) (cited above) as the basis for this action. The consequence of this action was that all consideration of these rules by the RRC was terminated. The agency must begin rulemaking from the beginning. In addition, as a result of the termination of the permanent rule, the temporary rule that had been in place was also terminated.*

*The letter also states that the RRC objected to the revised rules on the basis of lack of statutory authority, ambiguity, and as not responsive to the previous objections of the RRC. However, the consequence of a*

*continued objection is entirely different. As noted above, G.S. 150B-21.12 provides that a rule remains under review until the agency indicates that it does not intend to satisfy the objection. Since the first paragraph of the letter stated that the rules were being returned and therefore all further review terminated, the remainder of the letter relating to objections was unnecessary.*

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GENERAL ASSEMBLY OF NORTH CAROLINA SESSION 2003

H

D

BILL DRAFT 2003-LDz-118A [v.3] (5/6)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)

5/12/2004 11:00:43 AM

Short Title: Phase II Stormwater for Small Municipalities. (Public)

Sponsors:

Referred to:

A BILL TO BE ENTITLED

AN ACT TO REQUIRE THE DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES TO COMPLETE STORMWATER CONTROL PROGRAMS REQUIRED UNDER THE PHASE II STORMWATER RULES FOR MUNICIPALITIES WITH A POPULATION OF TWO THOUSAND OR LESS, AS RECOMMENDED BY THE JOINT LEGISLATIVE ADMINISTRATIVE PROCEDURE OVERSIGHT COMMITTEE.

The General Assembly of North Carolina enacts:

**SECTION 1.** G.S. 143-214.7(c) reads as rewritten:

"(c) The Commission shall develop model stormwater management programs that may be implemented by State agencies and units of local government. Model stormwater management programs shall be developed to protect existing water uses and assure compliance with water quality standards and classifications. ~~A-Subject to subsection (c1), a~~ State agency or unit of local government may submit to the Commission for its approval a stormwater control program for implementation within its jurisdiction. To this end, State agencies may adopt rules, and units of local government are authorized to adopt ordinances and regulations necessary to establish and enforce stormwater control programs. Units of local government are authorized to create or designate agencies or subdivisions to administer and enforce the programs. Two or more units of local government are authorized to establish a joint program and to enter into any agreements that are necessary for the proper administration and enforcement of the program."

**SECTION 2.** G.S. 143-214.7 is amended by adding a new subsection to read:

"(c1) The Department shall, on behalf of any municipality with a population of 2,000 or less, complete any stormwater control program and any application for a National Pollutant Discharge Elimination System (NPDES) wastewater discharge permit required under the Phase II stormwater rules adopted by the Environmental Management Commission or the federal Clean Water Act."

**SECTION 3.** This act is effective when it becomes law.