

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

S

1

SENATE BILL 1103*

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

Sponsors: Senators Foxx, Nesbitt; Allran, Apodaca, Berger, Bingham, Carpenter, Carrington, Forrester, Garwood, Hargett, Hartsell, Horton, Hoyle, Kerr, Rucho, Shubert, Sloan, Smith, Stevens, Webster, Weinstein, and White.

Referred to: Judiciary I.

May 17, 2004

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.

(b) Time. – An agency must grant or deny a ~~rule-making~~ petition authorized by this section submitted to it within 30 days after the date the ~~rule-making~~ petition is

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

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

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

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

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

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