

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003**

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SENATE BILL 1138*

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

Sponsors: Senators Nesbitt; Foxx, Hartsell, and Kerr.

Referred to: Judiciary I.

May 18, 2004

1 A BILL TO BE ENTITLED
2 AN ACT TO MAKE TECHNICAL AND CLARIFYING CHANGES TO THE
3 ADMINISTRATIVE PROCEDURE ACT.

4 The General Assembly of North Carolina enacts:

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

6 "**§ 150B-21.1. Procedure for adopting a temporary rule.**

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

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

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

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

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

10 (11) The need for the State Board of Elections to adopt a temporary rule
11 after prior notice or hearing or upon any abbreviated notice or hearing
12 the agency finds 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
15 the State Board of Elections has been authorized to adopt rules.

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

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

23 a. Repealed by Session Laws 2000-148, s. 5, effective July 1,
24 2002.

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

26 (13) (14) Reserved.

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

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

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

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

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

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

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

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

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

- 17 (1) Submit the rule and a notice of public hearing to the Codifier of Rules,
18 and the Codifier of Rules shall publish the proposed temporary rule
19 and the notice of public hearing on the Internet to be posted within five
20 business days.
- 21 (2) Notify persons on the mailing list maintained pursuant to
22 G.S. 150B-21.2(d) and any other interested parties of its intent to adopt
23 a temporary rule and of the public hearing.
- 24 (3) Accept written comments on the proposed temporary rule for at least
25 15 business days prior to adoption of the temporary rule.
- 26 (4) Hold at least one public hearing on the proposed temporary rule no
27 less than five days after the rule and notice have been published.

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

35 (b) Review. – When an agency adopts a temporary rule it must submit the rule
36 and the agency's written statement of its findings of the need for the rule to the Rules
37 Review Commission. Within 15 business days after receiving the proposed temporary
38 rule, the Commission shall review the agency's written statement of findings of need for
39 the rule and the rule to determine whether the statement meets the criteria listed in
40 subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9. The
41 Commission shall direct a member of its staff who is an attorney licensed to practice
42 law in North Carolina to review the statement of findings of need and the rule. The staff
43 member shall make a recommendation to the Commission, which must be approved by
44 the Commission or its designee. The Commission's designee shall be a panel of at least

1 three members of the Commission. In reviewing the statement, the Commission or its
2 designee may consider any information submitted by the agency or another person. If
3 the Commission or its designee finds that the statement meets the criteria listed in
4 subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9, the
5 Commission or its designee must approve the temporary rule and deliver the rule to the
6 Codifier of Rules within two business days of approval. The Codifier of Rules must
7 enter the rule into the North Carolina Administrative Code on the sixth business day
8 following receipt from the Commission or its designee.

9 (b1) If the Commission or its designee finds that the statement does not meet the
10 criteria listed in subsection (a) of this section or that the rule does not meet the standards
11 in G.S. 150B-21.9, the Commission or its designee must immediately notify the head of
12 the agency. The agency may supplement its statement of need with additional findings
13 or submit a new statement. If the agency provides additional findings or submits a new
14 statement, the Commission or its designee must review the additional findings or new
15 statement within five business days after the agency submits the additional findings or
16 new statement. If the Commission or its designee again finds that the statement does not
17 meet the criteria listed in subsection (a) of this section or that the rule does not meet the
18 standards in G.S. 150B-21.9, the Commission or its designee must immediately notify
19 the head of the agency and return the rule to the agency.

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

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

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

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

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

- 1 (1) The date specified in the rule.
2 (2) The effective date of the permanent rule adopted to replace the
3 temporary rule, if the Commission approves the permanent rule.
4 (3) The date the Commission returns to an agency a permanent rule the
5 agency adopted to replace the temporary rule.
6 (4) The effective date of an act of the General Assembly that specifically
7 disapproves a permanent rule adopted to replace the temporary rule.
8 (5) 270 days from the date the temporary rule was published in the North
9 Carolina Register, unless the permanent rule adopted to replace the
10 temporary rule has been submitted to the Commission.

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

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

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

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