

I. Background

Often the General Assembly finds it has neither the time nor the expertise to provide a sufficient level of detail in legislation. As a result, the General Assembly delegates rulemaking authority to various State agencies.¹ For example, the Agency of Natural Resources has the authority to adopt air quality standards, the Department of Labor has the authority to adopt occupational safety and health standards, the Board of Optometry has the authority to adopt rules relating to the licensure of optometrists, and the Traffic Committee has the authority to adopt rules relating to traffic and public safety on the limited access and controlled access highways within this State.²

“Rules” implement, interpret, and even prescribe law or policy and are binding on persons they affect. The General Assembly has established a process, known as the Vermont Administrative Procedure Act or APA, that State agencies must adhere to when adopting rules. Toward the end of this process, the Legislative Committee on Administrative Rules (LCAR) is required to review State agency rules.

A. Legislative Committee on Administrative Rules

The Legislative Committee on Administrative Rules is “composed of eight members of the General Assembly . . . appointed for two-year terms ending on February 1 of odd-numbered years[,]” which roughly coincides with the biennium, “as follows: four members of the House of Representatives, appointed by the Speaker of the House, not all from the same party; and four members of the Senate . . . appointed by the Senate Committee on Committees, not all from the same party.” LCAR elects a chair and a vice chair from among its members.³ LCAR reviews final proposed rules an may object. More on this role is discussed below.

B. Interagency Committee on Administrative Rules

The Interagency Committee on Administrative Rules (ICAR) was established to assist in the review, evaluation, and coordination of programs and activities of State agencies. Members of ICAR are appointed by the Governor from the Executive Branch. ICAR’s duties include:

- (a) reviewing existing and proposed rules for “style, consistency with the law, legislative intent, and the policies of the Governor[;]”
- (b) prescribing strategies for maximizing public input during the rulemaking process; and
- (c) making reports and recommendations concerning programs and activities of designated agencies.⁴

¹ The definition of “agencies” in [3 V.S.A. § 801\(b\)\(1\)](#) includes “a State board, commission, department, agency, or other entity or officer of State government, other than the Legislature, the courts, the Commander in Chief, and the Military Department, authorized by law to make rules or to determine contested cases.”

² [23 V.S.A. § 1004](#).

³ [3 V.S.A. § 817\(a\)](#).

⁴ [3 V.S.A. § 820](#).

II. Overview of APA Rulemaking Process⁵

1. [Agency prefiles the proposed rule with ICAR](#)
2. [Agency files the proposed rule with the Secretary of State](#)
3. [Secretary of State publishes the proposed rule](#)
4. [Agency holds public hearings and receives public comment on the proposed rule](#)
5. [Agency files the final proposed rule with the Secretary of State and LCAR](#)
6. [LCAR reviews the final proposed rule](#)
7. [Agency responds to LCAR's objections or concerns \(if applicable\)](#)
8. [Agency files adopted rule with the Secretary of State and LCAR](#)
9. [Rule takes effect 15 days after adopted rule is filed unless rule specifies a later date](#)

III. Details Regarding APA Rulemaking Process

The following paragraphs elaborate on the steps of the rulemaking process described in the previous section. The paragraph numbers correspond to each numbered step.

1. Agency prefiles the proposed rule with ICAR

Agencies must prefile their proposed rules, except for emergency rules, with ICAR at least 15 days before filing with the Secretary of State.⁶ ICAR reviews the proposed rule for style,⁷ consistency with the law, legislative intent, and policies of the Governor. ICAR will also work with the agency to prescribe a strategy for maximizing public input and may prescribe a specific strategy and consequences for failing to adhere to the prescribed strategy.⁸

2. Agency files the proposed rule with the Secretary of State

Required contents of filing delineated in [3 V.S.A. § 838](#), including the contents of the economic impact analysis (subsection (b)) and the environmental impact analysis (subsection (c)).

⁵ [3 V.S.A. § 836](#).

⁶ [3 V.S.A. § 837](#).

⁷ [3 V.S.A. § 833](#) (Style consists of clear and coherent manner with respectful language).

⁸ [3 V.S.A. § 820](#).

3. *Secretary of State publishes the proposed rule*

The Secretary of State is required to give notice of the proposed rule within two weeks after filing by the agency, and detailed notices are published online with abbreviated notices in newspapers of record designated by the Secretary. Required contents of the notices is delineated in statute and includes (in the online posting) the details of scheduled public hearings and the deadline for receiving comments.⁹ Hearings can be scheduled no sooner than 30 days after the first notice given.¹⁰

4. *Agency holds public hearings and receives public comment on the proposed rule*

An agency must afford all persons a reasonable opportunity to submit data, views, or arguments, orally or in writing. If one or more public hearings is scheduled, the deadline for public comment is seven days after the last hearing date. An agency must schedule one or more public hearings if requested by 25 persons, a state agency or governmental subdivision, ICAR, or an organization with at least 25 members. An agency must also adhere to the strategy for maximizing public input prescribed by ICAR (step 1).¹¹

An agency may revise a rule prior to filing its final proposed rule with the Secretary of State and LCAR.¹²

5. *Agency files the final proposed rule with the Secretary of State and LCAR*

After considering public comment on the rule, an agency files its final proposal with the Secretary of State and LCAR. The filing must include all the information required to be filed with the original proposal, amended accordingly, and statements that address: how the proposed rule is within agency authority; why it is not arbitrary; compliance with ICAR's prescribed strategy for maximizing public input; sufficiency of the economic and environmental impact analyses; and a description of why the agency decided not to revise the rule in response to comments it received, if applicable. LCAR may require an agency to include an electronic copy of the final proposal with its filing.¹³

LCAR staff from the Office of Legislative Operations accepts filings of proposed final rules on behalf of LCAR and distributes them to the chairs of the appropriate standing committees—including to the Chairs of the House and Senate Committees on Government Operations when the filing identifies a Public Records Act exemption in the rule. In addition, upon request, each member of the appropriate standing committee will be notified by e-mail or in summary fashion that the final proposed rule has been filed and the date of filing and, upon request, will be

⁹ [3 V.S.A. § 839](#).

¹⁰ [3 V.S.A. § 840\(a\)](#).

¹¹ [3 V.S.A. § 840](#).

¹² [3 V.S.A. § 841\(b\)](#).

¹³ [3 V.S.A. § 841\(a\), \(b\)](#).

provided with a copy of the filing.¹⁴ One of the attorneys in the Office of Legislative Counsel who staffs the standing committee with jurisdiction over the subject matter of the rule will also review the rule and advise whether the rule violates any of the grounds for LCAR's objections.

6. *LCAR reviews the final proposed rule*

LCAR must act on a final proposed rule within 45 days after it is filed, unless the agency consents to an extension of LCAR's review period.¹⁵ When reviewing a rule, LCAR may: approve;¹⁶ approve with modifications agreed to by the agency;¹⁷ take no action;¹⁸ or object, but only under certain grounds—the proposed final rule is beyond the authority of the agency, contrary to the intent of the General Assembly, arbitrary, or not written in a satisfactory style; the agency did not adhere to ICAR's strategy for maximizing public input; or due to specified deficiencies in the economic and environmental impact analyses.¹⁹

LCAR may also review existing rules and object to them in the same manner, and based upon the same standards, as those for final proposed rules;²⁰ and also has the power to compel an agency to initiate rulemaking to adopt as a rule an existing practice or procedure, but LCAR does not have the power to compel adoption of a rule,²¹ and, by a majority vote of LCAR, request that a standing committee review issues relating to a final proposed rule that it considers.²²

7. *Agency responds to LCAR's objections or concerns (if applicable)*

If LCAR objects, which must be done by a majority vote of LCAR, the agency has 14 days to respond.²³ If the agency's response is satisfactory to LCAR, then LCAR may withdraw its objection.²⁴ If the agency's response is not satisfactory, LCAR may, based on a majority vote of LCAR, file its objection in certified form with the Secretary of State.²⁵ An agency's failure to respond to LCAR's objection will prevent a rule from taking effect.²⁶

¹⁴ [3 V.S.A. § 841\(c\)](#).

¹⁵ [3 V.S.A. § 842\(a\)](#).

¹⁶ [3 V.S.A. § 843\(a\)\(2\)](#).

¹⁷ [3 V.S.A. § 843\(b\)](#).

¹⁸ [3 V.S.A. § 843\(a\)\(1\)](#). "The failure of [LCAR] to object to a rule is not an implied legislative authorization of its substantive or procedural lawfulness." [3 V.S.A. § 842\(c\)\(3\)](#).

¹⁹ [3 V.S.A. § 842\(b\)](#).

²⁰ [3 V.S.A. § 817\(d\)](#).

²¹ [3 V.S.A. § 831\(c\)](#).

²² [3 V.S.A. § 817\(e\)](#).

²³ [3 V.S.A. § 842\(a\)](#).

²⁴ [3 V.S.A. § 842\(a\)\(3\)](#).

²⁵ [3 V.S.A. § 842\(c\)\(1\)](#).

²⁶ [3 V.S.A. § 846\(a\)\(4\)](#).

If an LCAR objection is filed in certified from with the Secretary of State then the portion of the rule objected to will no longer be presumed valid by a court. If the rule is challenged in court, the agency will bear the burden of proving that the portion of the rule objected to is within the authority delegated to the agency, consistent with the intent of the General Assembly, not arbitrary, and written in accordance with the style requirements; the agency adhered to ICAR's strategy for maximizing public input; and its economic and environmental impact analyses do not fail to recognize a substantial economic or environmental impact.²⁷ Notice of the objection must also be included on all copies of the rule distributed to the public.²⁸

8. Agency files adopted rule with the Secretary of State and LCAR

The final step an agency must take in the rulemaking process is filing the adopted rule, which can be done: 45 days after filing a final proposed rule, provided the agency has not received notice of objection from LCAR; after receiving notice of approval from LCAR; or after responding to an objection from LCAR.²⁹ An agency must adopt a rule within eight months after the filing of the proposed rule with the Secretary of State, unless this deadline is extended by LCAR, and an agency is required to correct an adopted rule within 30 days after discovering that the text of the rule deviates from the text of the rule as approved by LCAR.³⁰ The required contents of this final filing is delineated in [3 V.S.A. § 843\(d\)](#).

9. Rule takes effect 15 days after adopted rule is filed unless rule specifies a later date

By taking effect, a rule is valid and binding on persons it affects and has the force of law unless amended or revised or unless a court of competent jurisdiction determines otherwise.³¹

IV. Emergency Rules

When an agency believes that there exists an imminent peril to public health, safety, or welfare, it may adopt an emergency rule. The rule may be adopted without having been prefiled with ICAR or filed in proposed or final proposed form and may be adopted after whatever notice and hearing that the agency finds to be practicable under the circumstances. The agency shall make reasonable efforts to ensure that emergency rules are known to persons who may be affected by them. Emergency rules shall not remain in effect for more than 180 days. An agency may propose a permanent rule on the same subject at the same time that it adopts an emergency rule. Emergency rules must be filed with the Secretary of State and with LCAR and the required contents of this filing is delineated in statute.³²

²⁷ [3 V.S.A. § 842\(c\)](#).

²⁸ [3 V.S.A. § 842\(d\)](#).

²⁹ [3 V.S.A. § 843\(a\)](#).

³⁰ [3 V.S.A. § 843\(c\)](#).

³¹ [3 V.S.A. § 845](#).

³² [3 V.S.A. § 844\(a\)-\(c\)](#).

An emergency rule is adopted and is typically effective when filed. As a result, LCAR normally reviews emergency rules even though they are already in effect. An agency may make a germane change to an emergency rule in response to LCAR's expressed concern but such a change does not extend the period during which the emergency rule remains in effect.³³ Moreover, an agency may withdraw an emergency rule if LCAR objects.³⁴

LCAR may object, based on a majority vote of LCAR, to an emergency rule if the rule is beyond the authority of the agency; contrary to the intent of the General Assembly; arbitrary; or not necessitated by an imminent peril to public health, safety, or welfare sufficient to justify adoption of an emergency rule. This objection, if filed in certified form based on a majority vote of LCAR, will shift the burden to the agency of proving in court that the emergency rule is within the authority delegated to the agency, consistent with legislative intent, not arbitrary, and is justified by an imminent peril to the public health, safety, or welfare.³⁵

An agency may also make emergency amendments to existing rules that implement a program controlled by federal law or a multistate entity, due to time-sensitive changes required for that program. Statute provides grounds for LCAR objection, based on a majority vote of LCAR, that are specifically tailored to these types of emergency amendments to existing rules.³⁶

V. Effect of Committee's Objection

Occasionally, a lawsuit is brought to challenge the validity of a rule. In a court challenge to a rule, a person aggrieved by the effect of a rule will typically argue that the agency lacks the authority to adopt the rule, the rule is contrary to legislative intent, or the rule is arbitrary. Lawsuits are usually unsuccessful because courts traditionally grant a great deal of deference to the expertise of State agencies. A court's analysis of the validity of a rule generally begins with a "presumption of validity" in favor of the rule, i.e., the rule is presumed valid so the person bringing the lawsuit bears the burden of proving the rule's invalidity.

However, when LCAR files an objection to a rule in certified form and the validity of the rule is thereafter challenged, the burden of proof shifts to the State agency to prove the validity of a rule. In other words, LCAR's objection effectively removes the "presumption of validity" of the rule. The agency would then have to prove that it does have the authority to adopt the rule, that the rule is not contrary to legislative intent, that the rule is not arbitrary, or that the rule meets the other criteria set forth in [3 V.S.A. § 842\(c\)\(2\)](#) for standard rules or in [3 V.S.A. § 844\(e\)\(2\)](#) for emergency rules. As a result, State agencies generally prefer that LCAR approves their rules so as to avoid the time and expense of defending in court a rule LCAR objected to, and also because LCAR represents the General Assembly, which is the lawmaking branch of State government.

³³ [3 V.S.A. § 844\(f\)](#).

³⁴ [3 V.S.A. § 844\(e\)\(3\)](#).

³⁵ [3 V.S.A. § 844\(e\)\(1\) and \(2\)](#).

³⁶ [3 V.S.A. § 844\(g\)](#).