

SEN. MARK A. MACDONALD, VICE CHAIR
SEN. CHRISTOPHER BRAY
SEN. VIRGINIA "GINNY" LYONS
SEN. DAVID WEEKS



REP. TREVOR SQUIRRELL, CHAIR
REP. SETH BONGARTZ
REP. MARK HIGLEY
REP. CAROL ODE

STATE OF VERMONT

Legislative Committee on Administrative Rules (LCAR)

MEMO TO: Chairs, Standing Committees of Jurisdiction
Jennifer Carbee, Director and Chief Counsel, Office of Legislative Counsel

CC: Speaker Jill Krowinski, Vermont House of Representatives
President *Pro Tempore* Philip Baruth, Vermont Senate

FROM: Legislative Committee on Administrative Rules

DATE: April 13, 2023

SUBJECT: Rulemaking Considerations

This is the second of two memorandums that the Legislative Committee on Administrative Rules (LCAR) is sending to chairs of standing committees of jurisdiction and the Office of Legislative Counsel related to what is included in codified and session law when rulemaking is authorized. Members of LCAR can be available for a discussion on this at future chairs meetings.

Legislative intent was addressed in the first memorandum, dated February 2, 2023, and the enclosed flowchart and considerations address the following broad themes in rulemaking:

1. whether to require rulemaking;
2. whether to establish a timeline and/or deadlines for rulemaking; and
3. whether to require checkbacks to the General Assembly related to rulemaking.

This document is intended to be used as a tool to guide discussion when a standing committee of jurisdiction is considering permitting or requiring rulemaking, but it does not need to be followed. These are all policy decisions to be made unique to the particular circumstances of the legislation.

While not addressed in the enclosed, it is important to remember both the limitations of what LCAR has the statutory authority to do and means of recourse available to the General Assembly if a deadline for rulemaking is not met.

In general, LCAR has the statutory authority to:

1. object to final proposed, emergency, and existing rules on limited grounds;¹
2. hold hearings on proposed and previously adopted rules;²

¹ 3 V.S.A. §§ [817\(d\)](#), [842](#), and [844\(c\)](#).

² 3 V.S.A. § [817\(c\)](#).

3. request that standing committees of the General Assembly review certain matters within the standing committees' jurisdiction;³
4. request, just like 25 or more persons, that an agency initiate rulemaking to adopt an existing practice or procedure, which is not the same as requiring the adoption of a rule;⁴ and
5. request the periodic review of certain existing rules.⁵

LCAR does not have the statutory authority to require that a rule be adopted, even if a law (session or codified) directs an agency to adopt a rule; to compel an agency to adopt a rule; to penalize an agency for failing to adopt a rule; or to object to a final proposed rule on the grounds that it was not timely filed in accordance with a law mandating the adoption of a rule by a particular date.

Further, the Office of Legislative Counsel is not aware of any instances where the Administration has been sued for failure to adopt a rule⁶ nor any instances where an employee of the Administration has been prosecuted for failure to adopt a rule.⁷

We are asking all chairs of the standing committees of jurisdiction to be cognizant of these themes and considerations when working on rulemaking to authorize or require rulemaking and encourage you to work with attorneys from the Office of Legislative Counsel to craft legislation that meets your committees' specific policy goals.

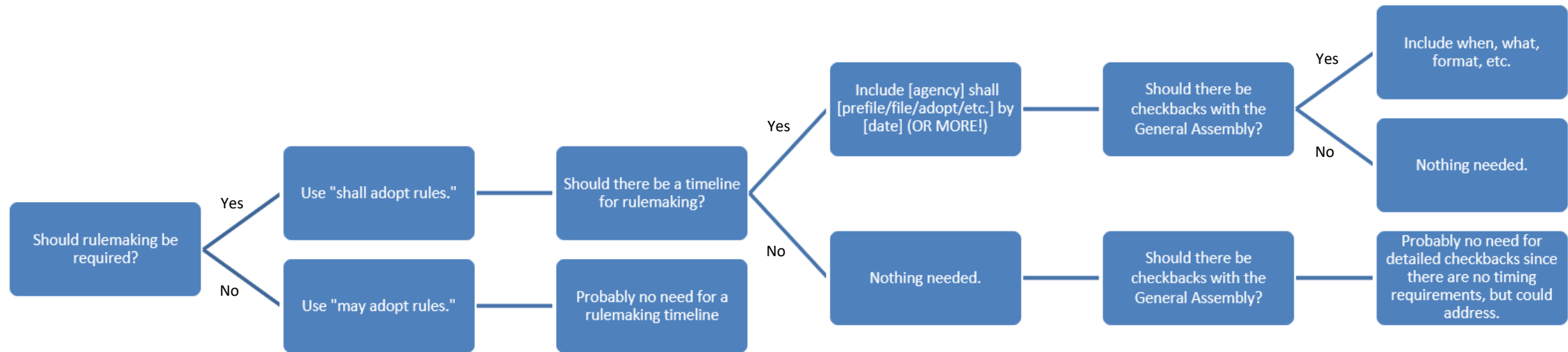
³ 3 V.S.A. § [817\(e\)](#).

⁴ 3 V.S.A. §§ [831\(c\) and \(f\)](#) and [832\(d\)](#); *see also* 3 V.S.A. § [806](#) (“A person may submit a written request to an agency asking the agency to adopt, amend, or repeal a procedure or rule” or “to adopt a guidance document as a rule[.]” “Within 30 days after receiving the request, the agency shall initiate rulemaking proceedings; shall adopt, amend, or repeal the procedure; or shall deny the request, giving its reasons in writing.”).

⁵ 3 V.S.A. § [834\(a\)](#).

⁶ *See* [V.R.C.P. 75](#) (“Any action or failure or refusal to act by an agency of the state or a political subdivision thereof, including any department, board, commission, or officer, that is not reviewable or appealable under Rule 74 of these rules or Rule 4 or 5 of the Vermont Rules for Environmental Court Proceedings may be reviewed in accordance with this rule if such review is otherwise available by law.” Possible procedural issues on lack of standing and meeting the time limits in V.R.C.P. 75(c.) and [V.R.A.P. 21](#) (This would be a mandamus action, a type of action the Vermont Supreme Court has long recognized that permits a court to order a government actor to perform a legally imposed duty. However, the person bringing the action would have to establish that they had no other adequate legal remedy and that they had standing to bring the action because they were injured by the failure to adopt the rule. *See* [Wool v. Menard](#), 207 Vt. 25, 31 (2018)). There could also be a cause of action specific to a particular required rule. *See, e.g.,* [10 V.S.A. § 594](#) (The Global Warming Solutions Act enacted a cause of action section that allows “[a]ny person [to] commence an action based upon the failure of the Secretary of Natural Resources to adopt or update rules pursuant to the deadlines in section 593 of this chapter.”).

⁷ *See* [13 V.S.A. § 3006](#) (“A State, county, town, village, fire district, or school district officer who willfully neglects to perform the duties imposed upon him or her by law, either express or implied, shall be imprisoned not more than one year or fined not more than \$1,000.00, or both.”). Note that standard is going to be high with regards to “willful neglect” (something quite a bit more than an adopting agency being busy or not having the staff to adopt rules, just yet), there would need to be a State’s Attorney willing to charge a State officer, and there could be constitutional issues with attempting to apply a sanction to certain governmental officers of another branch of government.



Considerations for Requiring Rulemaking:	Considerations for Establishing Rulemaking Timeline:	Considerations for Requiring Checkback(s):
<ul style="list-style-type: none"> - Whether a rule or rules are necessary in the near term. - Whether there is sufficient detail in statute for necessary regulation without any rules. - Cost/staffing necessary to adopt a rule or rules. - Whether a guidance document, policy, practice, procedure, etc. is more appropriate. 	<ul style="list-style-type: none"> - Statutory length of time to complete the process (100+ days), which does not include outreach or drafting the rule prior to pre-filing with ICAR. - Other variables (dependent on federal review, promulgation of a federal regulation, adoption of a rule in another state, etc.). - Whether there is an actual need for rule(s) to be adopted by a particular date. - What happens if there is a decrease in staff capacity. - What step the rulemaking timeline should be linked to (pre-filing with ICAR, one of the intermediary filings, adoption, etc.). 	<ul style="list-style-type: none"> - Timing for when checkback(s) should be required (no matter what, if there is going to be a delay, at designated intervals, etc.). - Form of the checkback(s) (oral v. written). - Recipients of the checkback(s). - Contents of the checkback(s). - Whether something with more “teeth” is necessary (consult with Legislative Counsel).