

ADMINISTRATIVE RULEMAKING AND LCAR'S ROLE

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SUMMARY OF PRESENTATION

- Overview of Administrative Rulemaking
- Players in Vermont's Rulemaking Process
- Outline of Vermont's Rulemaking Process
- Behind the Scenes: What Happens Before LCAR Considers a Proposed Rule
- LCAR's Consideration of a Proposed Rule
- Effect of an LCAR Objection
- Emergency Rules
- Other Authority Provided to LCAR

OVERVIEW OF ADMINISTRATIVE RULEMAKING

- Under the Vermont Constitution, the General Assembly has the authority to enact laws
- However, in some cases it lacks the time or expertise to address every detail in legislation
- To address this, the General Assembly can delegate rulemaking authority to State agencies
- Rules adopted by agencies:
 - Implement laws
 - Interpret statutes and legislative language
 - Establish policies
- Rules are legally binding on the persons they affect provided they are consistent with statute and the Constitution

PLAYERS IN VERMONT'S RULEMAKING PROCESS

The Agency adopting the rule

- Includes State boards, commissions, departments, agencies, and other entities of State government authorized to adopt rules

The Interagency Committee on Administrative Rules (ICAR)

- Appointed by the Governor to assist in adopting rules by reviewing the proposed rules for style, consistency with law and legislative intent, and the policies of the Governor
- Also prescribes strategies for maximizing public input during rulemaking process

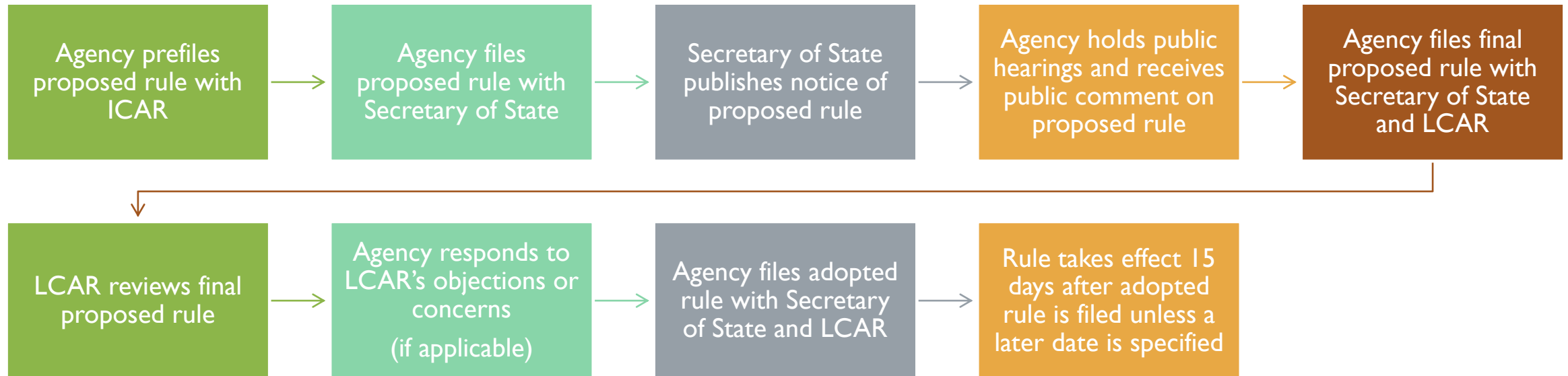
The Legislative Committee on Administrative Rules (LCAR)

- Reviews rules for consistency with the law and legislative intent

The Secretary of State

- Maintains the State's rule system, publishes notices of rulemaking, and assists agencies with rulemaking process

APA RULEMAKING PROCESS



BEHIND THE SCENES: WHAT HAPPENS BEFORE LCAR CONSIDERS A PROPOSED RULE?

- Rule is filed with Committee Assistant and placed on LCAR's calendar
- Rule is distributed to LCAR's counsel, chairs of committees with jurisdiction over rule's subject matter, and subject matter attorney in Office of Legislative Counsel
 - Also goes to chairs of House and Senate Committees on Government Operations if rule contains a Public Records Act exemption
- Rule is reviewed to determine if grounds may exist for LCAR to object, as well as for technical and typographical errors
- Attorneys will contact agency to identify potential issues
- Agency may file proposed changes to rule in advance of LCAR meeting to consider the rule
- Committee Assistant provides LCAR with agenda and copies of documents
- LCAR's counsel provides summary of rules, identifies potential issues, and provides model language for approval motions

LCAR'S CONSIDERATION OF A PROPOSED RULE

LCAR must act, if it so chooses, on a final proposed permanent rule within 45 days after it is filed with LCAR, unless the adopting agency consents to an extension of LCAR's review period.

When reviewing a rule, LCAR may: approve; approve with modifications agreed to or proposed by the agency; take no action; or object.

Objections to permanent rules can only be on the following grounds and with a majority vote of LCAR:

- 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;
- the economic impact analysis fails to recognize a substantial economic impact; or
- the environmental impact analysis fails to recognize a substantial environmental impact.

LCAR may also, by a majority vote of LCAR, request that a standing committee review issues relating to a final proposed rule that it considers. This can happen whether or not LCAR objects.

LEGAL EFFECT OF AN LCAR OBJECTION

- If LCAR objects, the adopting agency has 14 days to respond
- If the agency's response is satisfactory to LCAR, then LCAR may withdraw its objection
- If the agency's response is not satisfactory to LCAR, then LCAR may, based on a majority vote of LCAR, file its objection in certified form with the Secretary of State
- If there is a certified objection, then the rule, or portion of the rule, is no longer presumed valid by a court and, if challenged in court, the burden of proof to show that there was not a ground for objection shifts to the agency
 - LCAR cannot prevent a rule from being adopted or invalidate a rule
- Notice of the certified objection must also be included on all copies of the rule distributed to the public
- Failure to object is “not an implied authorization of [rule's] substantive or procedural lawfulness”

EMERGENCY RULES (IMMINENT PERIL TO PUBLIC HEALTH, SAFETY, OR WELFARE)

- May be adopted when agency “believes that there exists an imminent peril to public health, safety, or welfare”
- Not required to prefile with ICAR or file in proposed or proposed final form
- Agency may adopt the rule “after whatever notice and hearing [it] finds to be practicable under the circumstances”
- Cannot remain in effect for more than 180 days
- LCAR reviews and may object if:
 - the rule is beyond the authority of the agency, contrary to the intent of the General Assembly, or arbitrary; or
 - the rule is not necessitated by an imminent peril to public health, safety, or welfare sufficient to justify adoption of an emergency rule

EMERGENCY RULES (IMPLEMENTATION OF FEDERAL OR MULTISTATE PROGRAM)

- Agency may also adopt emergency amendments to existing rules for programs controlled by federal law or a multistate entity if:
 - Controlling federal statute or rule has been amended, or multistate entity has changed the program, in a way that requires a change in an existing rule
 - Change must be implemented in 120 days or less
 - Agency finds:
 - Agency could not adopt a final rule by date required
 - Failure to amend rules by date required would cause significant harm to public health, safety, or welfare or significant financial loss to State
- Agency profiles a corresponding permanent rule on day emergency rule is adopted

OTHER AUTHORITY PROVIDED TO LCAR

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- May review existing rules in the same manner it reviews proposed rules
 - May compel an agency to initiate rulemaking to adopt an existing practice or procedure as a rule
 - Cannot force agency to actually adopt a rule
 - May cause an existing rule or part of a rule to expire in one year if it “has not been adopted, readopted or substantially amended during the preceding six years”
 - May request that a standing committee of the General Assembly investigate an issue that is raised to LCAR but is not within its jurisdiction

ANY
QUESTIONS?

