

# 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

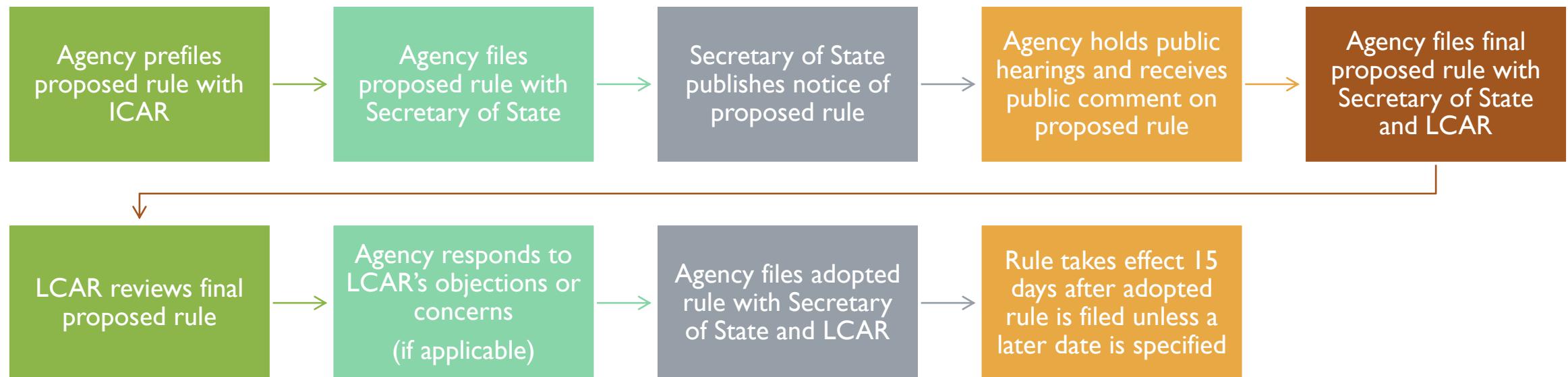
## The Legislative Committee on Administrative Rules (LCAR)

- 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 prefiles a corresponding permanent rule on day emergency rule is adopted

# OTHER AUTHORITY PROVIDED TO LCAR

- 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?

