

From: Senator Christopher Bray [cbray@leg.state.vt.us]
Sent: Friday, May 20, 2016 10:12 PM
To: Springer, Darren
CC: Tony Klein; Brian Campion
Subject: Fwd: S.230 of 216, Sec. 12(b) - temporary rules on sound levels from wind generation facilities
Attachments: 14-E03 first page.pdf; ATT00001.htm; LCAR Memo re Use of Emergency Rules.pdf; ATT00002.htm

Darren,

Please find below information assembled by Aaron.

The first piece is his email of this afternoon—which explains his assertion that the language used in the bill explicitly was required because there was no imminent peril — and had there been, there would have been no need to state that the bill was invoking the apparatus of emergency rulemaking without any actual emergency taking place.

Second, he provides a number of statutory cites in which this mechanism was previously used without any question of having created the implication of an imminent peril.

Third, he includes a 17 Jan 2013 letter from LCAR to the Speaker and Pro-Tem establishing this mechanism as the agreed-upon method for rapid rule making while also kicking off a full-blown rulemaking:

We understand that occasionally members believes there is a need to put a new or amended rule in place rapidly. In that case, the emergency rule making process would be used because that process allows a new or amended rule to be put into effect immediately on a temporary basis while the usual rulemaking procedure is followed contemporaneously. **If the circumstances do not meet the normal statutory criteria for emergency rulemaking, then in session law the legislature can adopt simple language to allow that process to be used.**

The **highlighted sentence** seems particularly clear what the legislative judgement is (there is no imminent peril) while also indicating the legislative intent (write a rule quickly).

Perhaps you can share these documents with your team. I hope that they will conclude that the argument by the PSB and Annette Smith is at variance with numerous prior examples against which no such charges were made. In addition, I find the LCAR document clear about the legislature's thinking on the invocation of immediate, non-emergency rulemaking.

If I can be of any help, please let me know.

Best,
—Chris

Begin forwarded message:

From: Aaron Adler <AAdler@leg.state.vt.us>
Subject: FW: S.230 of 216, Sec. 12(b) - temporary rules on sound levels from wind generation facilities
Date: May 20, 2016 at 12:07:04 PM GMT-4
To: Christopher Bray <CBray@leg.state.vt.us>
Cc: Tony Klein <twk@tonyklein.com>

Hello. Per our conversation, am forwarding this e-mail I sent to Rep. Klein, which he has authorized me to do. In addition, as we discussed, the section does not declare that there is in fact an imminent peril under 3 V.S.A. § 844(a). Instead, it states that the rules are deemed to meet this standard in order to allow the apparatus of emergency rulemaking to be used.

I would disagree with persons who claim this language creates an implication that there is or is not an imminent peril to health from wind sound because the legislature did not make such a declaration. However, if an implication does arise from the language, the implication would be that the legislature does *not* think there actually is an imminent peril because it felt it necessary to include language deeming the rules to meet the § 844(a) standard. If there were an actual imminent peril to health, it would have been unnecessary to include such language.

Best, Aaron

Aaron Adler, Legislative Counsel
Vermont Legislative Council
115 State Street – State House
Montpelier, VT 05633-5201
p: 802-828-2236
[Vermont Legislature](#)

From: Aaron Adler
Sent: Friday, May 13, 2016 9:48 AM
To: Tony Klein
Subject: S.230 of 216, Sec. 12(b) - temporary rules on sound levels from wind generation facilities

You asked whether, under Sec. 12(b) of S.230 of 2016, the Public Service Board would need to make a determination on the “imminent peril” standard of 3 V.S.A. § 844(a). The Board would not have to make a determination regarding that standard. The section will render such a determination irrelevant because it states that the temporary rules to be issued under Sec. 12(b) are deemed to meet the standard under 3 V.S.A. § 844(a).

As passed by the General Assembly, Sec. 12(b) of S.230 states that “[o]n or before 45 days after the effective date of this section, the Board shall adopt temporary rules on sound levels from wind generation facilities using the process under 3 V.S.A. § 844.” It then specifically states, in Sec. 12(b)(1) that “Rules issued pursuant to this subsection (b) shall be deemed to meet the standard under 3 V.S.A. § 844(a).”

This language – deeming the standard under § 844(a) to be met – represents a common formulation employed by the General Assembly when it seeks to have an agency perform rulemaking quickly but the situation to be addressed does not necessarily meet the “imminent peril” standard. Examples of similar enactments by the General Assembly include:

- 2016 Acts and Resolves No. 58, Sec. E.306 (conform Vt. Health Benefit Exchange rules to federal guidance and regulations)
- 2014 Acts and Resolves No. 195, Sec. 2, enacting 13 V.S.A. § 7554c(d)(3) (control of confidential information re pretrial risk assessments)
- 2014 Acts and Resolves No. 179, Sec. E.306.1 (conform Vt. Health Benefit Exchange rules to federal guidance and regulations)
- 2013 Acts and Resolves No. 79, Sec. 51 (conform Vt. Health Benefit Exchange rules to federal guidance and regulations)
- 2013 Acts and Resolves No. 69, Sec. E.307.3 (implementing legislative amendments to Catamount and other health insurance programs)
- 2010 Acts and Resolves No. 156, Sec. E.309.3 (changes to Medicaid coverage)

In these situations, the agency adopting the rules does not make a finding regarding imminent peril. Rather, in its filing with the Secretary of State and the Legislative Committee on Administrative Rules pursuant to 3 V.S.A. § 844, the agency need only reference or quote the legislative provision that deems the § 844(a) standard to be met. An example is attached.

The use of language deeming the § 844(a) standard to be met also implements a recommendation of the Legislative Committee on Administrative Rules (LCAR). At its meeting of Jan. 17, 2013, the Legislative Committee on Administrative Rules voted to approve the attached memorandum to the Speaker of the House and the President Pro Tempore. The memorandum acknowledges that there are situations in which rulemaking needs to be done quickly and recommends using the emergency rulemaking process for these situations, stating: “If the circumstances do not meet the normal statutory criteria for emergency rulemaking, then in session law the legislature can adopt simple language to allow that process to be used.”

Please let me know if you need anything more.

Best, Aaron

Aaron Adler, Legislative Counsel
Vermont Legislative Council
115 State Street – State House
Montpelier, VT 05633-5201

p: 802-828-2236

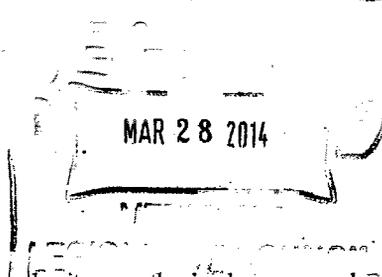
[Vermont Legislature](#)

Administrative Procedures – Emergency Rule Coversheet

Instructions:

In accordance with Title 3 Chapter 25 of the Vermont Statutes Annotated and the “Rule on Rulemaking” adopted by the Office of the Secretary of State, this emergency filing will be considered complete upon filing of the following components with the Office of the Secretary of State, the Legislative Committee on Administrative Rules and submitting a copy to the Chair of the Interagency Committee on Administrative Rule:

- Emergency Rule Coversheet
- Adopting Page
- Economic Impact Statement
- Public Input Statement
- Scientific Information Statement (if applicable)
- Incorporated by Reference Statement (if applicable)
- Clean text of the rule (Amended text without annotation)
- Annotated text (Clearly marking changes from previous rule)



All forms requiring a signature shall be original signatures of the appropriate adopting authority or authorized person, and all filings are to be submitted at the Office of the Secretary of State, no later than 3:30 pm on the last scheduled day of the work week.

The data provided in text areas of the emergency coversheet form will be used to generate a notice of rulemaking in the newspapers of record if the rule is marked for publication. Publication of notices will be charged back to the promulgating agency based on the word count of the notices. This emergency rule will be effective for a total of 120 days from the date it takes effect.

Certification Statement: As the adopting Authority of this rule (see 3 V.S.A. § 801(b)(11) for a definition), I believe there exists an imminent peril to public health, safety or welfare, requiring the adoption of this emergency rule.

The nature of the peril is as follows (*PLEASE USE ADDITIONAL SHEETS IF SPACE IS INSUFFICIENT*). Section 51 of Act 79 (2013) authorizes emergency rulemaking regarding health eligibilty and enrollment. This rule incorporates changes in federal law that were issued too late to include in the last emergency rule.

I approve the contents of this filing entitled:

Rule Title: Health Benefits Eligibility and Enrollment (HBEE) Amendment #3

Douglas A. Racine, on 3/25/14
(signature) (date)

Printed Name and Title:
Douglas A. Racine
Secretary, Agency Of Human Services

RECEIVED BY: _____

- Emergency Rule Coversheet
- Adopting Page
- Economic Impact Statement
- Public Input Statement
- Scientific Information Statement (if applicable)
- Incorporated by Reference Statement (if applicable)
- Clean text of the rule (Amended text without annotation)
- Annotated text (Clearly marking changes from previous rule)



Rep. Richard Marek, Chair
Rep. Patsy French
Rep. Robert Krebs
Rep. Linda K. Myers

Sen. Mark A. MacDonald, Vice-Chair
Sen. Ann E. Cummings
Sen. Diane B. Snelling
Sen. Richard Westman

STATE OF VERMONT
LEGISLATIVE COMMITTEE ON
ADMINISTRATIVE RULES

MEMORANDUM

To: Rep. N. Shapleigh Smith, Speaker of the House
Sen. John Campbell, President Pro Tempore

From: Legislative Committee on Administrative Rules
Rep. Richard Marek, Chair
Sen. Mark MacDonald, Vice-Chair

Date: January 17, 2013

Subject: Rulemaking Categories

There are two categories of rulemaking under the Vermont Administrative Procedure Act (APA), 3 V.S.A. chapter 25: (a) emergency rules and (b) proposed rules adopted with notice to the public and an opportunity to comment.

The APA requires broad public notice of proposed rules and a meaningful opportunity for the public to participate. It also requires this committee to review permanent rules before they are put into effect, so that the committee can perform its tasks effectively.

We understand that occasionally members believe there is a need to put a new or amended rule in place rapidly. In that case, the emergency rulemaking process should be used because that process allows a new or amended rule to be put into effect immediately on a temporary basis while the usual rulemaking procedure is followed contemporaneously. If the circumstances do not meet the normal statutory criteria for emergency rulemaking, then in session law the legislature can adopt simple language to allow that process to be used.

This procedure allows an agency to give notice and take public comment while a temporary rule is in place. It ensures a meaningful process because it allows public participation and the work of this committee to occur before a rule is made permanent.

We know that some members believe that use of this procedure requires an agency to go through rulemaking twice. But a common practice is that an agency simultaneously files the same text as both the emergency rule and the normal proposed rule and then goes through the public notice and comment process once, on the proposed rule.

If any legislator perceives that the use of this procedure is not satisfactory for a given circumstances, we would welcome the opportunity to work with that legislator.

