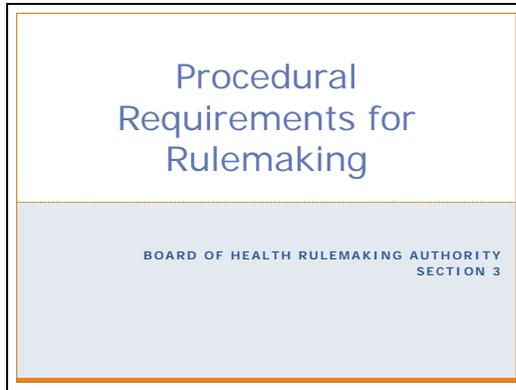
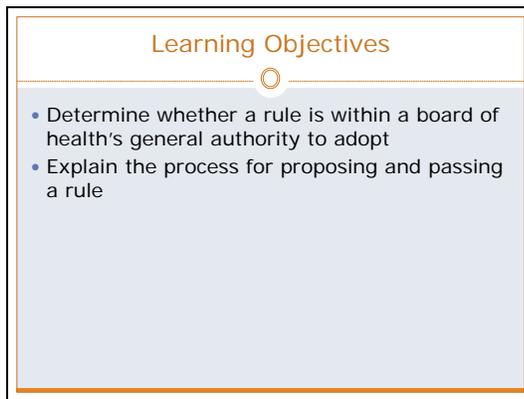


Slide 1



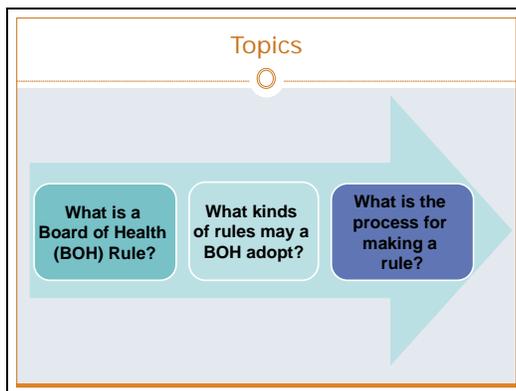
Welcome to Section 3 of our Board of Health Rulemaking Authority training module. This section will help boards prepare for the rulemaking process.

Slide 2



Once you complete this section, you will be able to determine whether a rule is within a board of health's general authority to adopt. You also will be able to explain the process for proposing and passing a rule.

Slide 3



As a reminder, in Section 1 of this module, we discussed the important foundational question -- what is a board of health rule?

In Section 2, we reviewed the scope of a board's authority to adopt rules as well as some limitations on that authority.

Section 3 is designed to help a board prepare for the rulemaking process. First, we will walk through a rulemaking checklist. The purpose of the checklist is to help boards apply the concepts we covered in the first two sections of the module. When you are interested in adopting a board of health rule, I hope you will find the checklist helpful to making sure you are acting within

your authority. Second, we will discuss some additional legal requirements that apply to the rulemaking process.

Slide 4

Local Boards of Health

- Board of Health
 - County
 - District
- Consolidated human services board
- Public health authority board
- Board of county commissioners

Before we get started, here's a quick reminder about the different names some counties may have for the board that is responsible for exercising board of health rule-making authority. Depending on your local structure, the board with responsibility for public health may be a county board of health, a district board of health, a consolidated human services board, a public health authority board, or the board of county commissioners. Each of these types of boards may exercise the board of health rule-making authority described in this module. I use the general term "local board of health" to refer to all of them.

Slide 5

BOH Rulemaking Checklist

✓ Is the rule within the BOH's general rulemaking authority?

1. Is it necessary to protect and promote the public health?



Let's begin now with the checklist.

When considering a new board of health rule, board members should determine whether the proposed action falls within the board's general rulemaking authority. When I say "general rulemaking authority," I am referring to the board's authority in G.S. 130A-39 to adopt rules necessary to protect and promote the public's health.

And that is the first question the board should consider: Is the rule necessary to protect and promote the public health? This question assumes that you know what the

public health needs are in your jurisdiction, and indeed this is something boards of health should know. Your local health department has this information. It regularly conducts community health assessments that provide the big picture of public health in your community, and the professionals who work in your local health department should have information about strategies to address public health concerns. Local rule-making can be among those strategies.

When you identify concerns that you may want to address with a local rule, I recommend starting by reviewing what, if anything, other policy-making bodies have done. Has the state addressed the issue? Are there other local laws on the issue?

If you find that there is a void in a particular area, then you may well conclude that it is necessary for the board to step in to protect and promote the public's health. In that case, your answer to the first question on the checklist should be yes.

If another law already regulates the issue or if approaches other than rulemaking would be a reasonable, appropriate and effective, the answer to this question may be no – that a rule is not necessary to protect or promote the public health.

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BOH Rulemaking Checklist

✓ Is the rule within the BOH's general rulemaking authority?

2. Is it reasonable in light of the health risk addressed?

3. Does it treat similarly situated persons equally?

If the answer is yes, the next question to ask is whether the rule is reasonable in light of the health risk addressed. You may recall that this question comes out of the five-part test established by the Court of Appeals in the Halifax County smoking case that we discussed in section 2 of the module. This question is asking you to balance the burden of regulation against the risk involved.

If the board concludes that it is reasonable, the next question to ask is whether it discriminates – does the proposed rule treat similarly situated persons equally? Again, remember the lessons of the Halifax county case. In that case, the local rule protected some restaurant employees from second-hand smoke but not others. This differential treatment of similarly situated individuals was one of the reasons the court struck down the local rule.

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BOH Rulemaking Checklist

✓ Is the rule within the BOH's general rulemaking authority?

4. Does it take into account factors other than health?

- ✦ If so, does the BOH have specific authority to do so?



If your answers to the first three questions were yes, then you should ask whether the rule takes into account factors other than health, such as economic factors. This is another question that comes from the five-part test established in the Halifax county case. Remember that in that case, the court concluded that the board of health lacked the authority to take the economic concerns of local businesses into account, because nothing in the laws authorizing the rule in question allowed the board to consider factors other than health.

What does this mean for board of health rule-making? I do not think it means that the board must pretend that factors other than health don't exist. However, if a board uses factors other than health to craft a rule that may be applied differently - to different people or different locations or different circumstances based factors other than health - then the board may be acting outside its authority. To guard against that, board members must investigate whether the board has specific authority to balance other factors along with health. Any specific authority would likely be found in a state statute, or possibly a local ordinance. In the absence of specific authority to balance health concerns with other factors, the board may lack the authority to adopt the rule.

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BOH Rulemaking Checklist

✓ Is the rule within the BOH's general rulemaking authority?

5. Are there state statutes or rules on the same subject?

If so, local BOH rules allowed if:

- ✦ Necessary to protect the public health
- ✦ More stringent than state law
- ✦ Local conditions provide rationale for local health rules more stringent than state

Another question to ask is whether there are state statutes or rules on the same subject. Remember the hog farm case out of Chatham County? If there are state laws, that doesn't mean local rules aren't allowed. However, it does mean that the local rules must meet all three of the criteria you see here:

- They must be necessary to protect the public health,
- They must be more stringent than the state law addressing the same issue, and
- There must be a reason for needing local health rules that are more stringent than those followed by the rest of the state.

That reason would likely be grounded in local conditions. For

example, the different types of soils found throughout the state may provide the rationale for local on-site wastewater rules that are more stringent than the state rules.

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BOH Rulemaking Checklist

○

✓ Do special limitations on rulemaking authority apply?

- Food and lodging
- Wells
- On-site wastewater
- Smoking



The final question on our checklist is whether any of the special limitations on rulemaking authority apply. Remember that we reviewed four types of special limitations in the areas of food and lodging sanitation, private drinking water wells, on site wastewater systems and smoking in public places.

If the rule does fall within one of these four areas, the board should go back and carefully review the special limitations to ensure that the rule is both substantively and procedurally sound.

Okay – that is the end of our checklist. I hope it is a helpful tool for boards of health pursuing a new rulemaking effort. Now we need to discuss some general legal requirements that govern the rulemaking process as well.

Slide 10

Two Key Procedural Issues

- Open meetings law
- Public notice of rulemaking



Different local boards may have different approaches to the details of the rulemaking process. But there are two key procedural issues that should be uniform throughout the state. Those are compliance with the North Carolina Open Meetings Law, and the legal requirements for giving the public notice of your rulemaking actions.

Slide 11

Subject to Open Meetings Law

- Applies to all official meetings of public bodies
 - Boards of Health are “public bodies”
 - Meetings to discuss rules would be “official”
- Notice required before rulemaking discussion
 - Regular board meetings
 - Meeting schedule filed in place where public may access (such as with county clerk) and posted on website
 - Special meetings
 - Provide at least 48 hours’ advance notice on website and principal bulletin board
 - Provide notification to anyone who has previously requested it

Let’s start with the Open Meetings Law. A local board of health’s rulemaking activities are subject to this law. This law applies to official meetings of public bodies. Boards of Health are public bodies, and meetings related to rulemaking are official meetings that are subject to the law.

A key component of the law is the duty to give public notice of official meetings. If the board has a regular schedule of meetings that it follows, it may provide public notice by maintaining the schedule somewhere the public can access it readily. One way to do this is to provide the schedule to the county clerk. In addition, if the local health department has a website—and most if not all do—the regular meeting schedule should be posted there as well.

If a board of health schedules a meeting that is not on the regular schedule, the open meetings law calls that a “special meeting.” For a special meeting, notice must be posted on the department’s website and the department’s principal bulletin board, plus it must be sent to anyone who has asked to be

notified of the board's meetings. All of these actions must be taken at least 48 hours before the special meeting. Notice of a special meeting must set out the time, place, and purpose of the meeting.

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Resources on Open Meetings Law

- Open Meetings book
 - By David M. Lawrence
- Open Meetings website



www.sog.unc.edu/programs/openmeetings/

G.S. Ch. 143, Art. 33C

I am not going to go into further detail about the Open Meetings Law in this module. But I would encourage Board members and health directors to learn more about them. My colleague, David Lawrence, has published a book that describes those laws in great detail. The book is available through the School of Government's publications division. The School of Government also maintains an open meetings website – the URL is on the slide.

If you'd like to read the law yourself, the citation is at the bottom right of the slide. There's also a link to the law through the School of Government's open meetings website.

Public Notice of Rulemaking Actions

- Different from open meeting notice
- Must be provided in addition to open meeting notice
- Ten days before proposed action
 - Copy of the rule in each clerk's office
 - Publish a notice in a newspaper of general circulation stating:
 - ✦ Substance of proposed rule or a description
 - ✦ Proposed effective date
 - ✦ That copies are available at the health department

G.S. 130A-39(d)

The second procedural matter we need to discuss is rule-making notice. The board (or the secretary to the board) must provide the public with notice when a board plans to adopt, amend or repeal a rule. This is different from the notice that is required under the Open Meetings Law. It's also in addition to the notice that's required by the Open Meetings Law. You have to provide both, open meetings notice and rule-making notice. The citation to the law that requires specific rulemaking notice is at the bottom of this slide.

This notice provision requires two things to be done at least ten days before the board of health takes action on a rule.

First, a copy of the rule that is proposed to be adopted, amended, or repealed must be placed in the county clerk's office for each county in the board's jurisdiction. For multi-county departments, this means providing multiple copies—one for each county.

As you'll see in the next bullet point, copies also need to be available to the public at the health department, because the second form of notice that is required is this: the board must publish a notice in the newspaper at least 10 days before the proposed action. The newspaper notice must state:

- The substance of the proposed rule or a description of the subjects and issues involved;
- The proposed effective date; and also
- That copies of the rule are

available at the health department.

The law says that the notice must be published in a paper of general circulation within the jurisdiction. This means that boards serving multiple jurisdictions may have to publish more than one notice, depending on the papers available in the area.

What about websites? When this law was written, there were no websites, and unlike the open meetings law, this law has not been updated to include them. Since they aren't mentioned, there is no requirement to give notice of rulemaking on the health department or board of health website, or to provide access to copies of the rule through the website. However, you certainly may do those things. Just be sure that paper copies can also be produced at the health department for anyone who requests one.

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Summary

- Checklist:
 - Is the rule within the BOH's general rulemaking authority?
 - ✦ Is it necessary to protect and promote the public health?
 - ✦ Is it reasonable in light of the health risk addressed?
 - ✦ Does it treat similarly situated persons equally?
 - ✦ Does it take into account factors other than health? If so, does the board have the authority to do that?
 - ✦ Are there state statutes or rules on the same subject? If so, is there a local rationale for a more stringent rule?
 - Do special limitations on rulemaking authority apply?

In this section, we walked through a rulemaking checklist. When a board of health is considering adopting a new rule, the checklist will help the board apply some of the concepts discussed in the first two sections of this training module.

When considering a new board of health rule, it is important to determine whether the proposed action falls within the board's general rulemaking authority. There are several sub-parts to this question:

- Is it necessary to protect and

- promote the public health?
- Is it reasonable in light of the health risk addressed?
- Does it treat similarly situated persons equally?
- Does it take into account factors other than health? If so, does the board have the authority to do that?
- Are there state statutes or rules on the same subject? If so, is there a local rationale for a more stringent rule?

If after answering those questions the board determines a rule is within its general rulemaking authority, the board should then determine whether special limitations apply to the topic area of the new rule.

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Summary, continued

- Two key procedural issues
 - Open meetings law
 - Public notice of rulemaking

Finally, in this section we discussed some key legal requirements that govern the rulemaking process. While the rulemaking process may vary from jurisdiction to jurisdiction, there are two key procedural issues that apply throughout the state.

Those are compliance with our Open Meetings Law and the legal requirements related to public notice of board of health rulemaking actions.

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Resources

- Additional information available at www.ncphlaw.unc.edu
 - Law outlines
 - Law bulletins
 - FAQs



For additional information on board of health rule-making and other issues in public health law, visit the UNC School of Government's North Carolina Public Health Law website at www.ncphlaw.unc.edu. There you will find links to law outlines, law bulletins, and in some cases webinars, presentations, and handouts. The information is organized by topic.

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**Public Health Law
UNC School of Government**

Jill Moore
919.966.4442
moore@sog.unc.edu

www.ncphlaw.unc.edu

We have reached the end of the Board of Health Rulemaking module.

I want to thank the North Carolina Institute for Public Health for allowing me to be part of this important program.

If you have follow up questions about the material covered during this program, please do not hesitate me at the School of Government. You can reach me at the phone number or the email listed on the slide.

Also, remember that you can find lots of helpful legal information on our public health law website – www.ncphlaw.unc.edu

Thank you and goodbye.

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References

- North Carolina General Statutes. Available at <http://www.ncleg.net/gascripts/statutes/Statutes.asp>
 - G.S. 130A-39. Powers and duties of a local board of health.
 - G.S. 87-97. Permitting, inspection, and testing of private drinking water wells.
 - G.S. 130A-335. Wastewater collection, treatment and disposal; rules.
 - G.S. 130A-498. Local governments may restrict smoking in public places.
 - G.S. 14-313. Youth access to tobacco products, tobacco-derived products, vapor products, and cigarette wrapping papers.

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References, continued

- North Carolina Court Cases
 - Craig v. County of Chatham, 356 N.C. 40 (2002).
 - King v. Town of Chapel Hill, 367 N.C. 400 (2014).
 - City of Roanoke Rapids v. Peedin, 124 N.C. App. 578 (1996).
- Moore, JD. 2015. Public health In Bluestein, FS (Ed), *County and municipal government in North Carolina*. UNC School of Government (In press).
- UNC School of Government. North Carolina Public Health Law. Available at <http://www.sog.unc.edu/programs/ncphl/>