Assessing the

Administrative Procedure Act

A Special Report

by

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N.C. Center for Public Policy Research

The North Carolina Center for Public Policy Research is an independent research and educational institution formed to study state government policies and practices without partisan bias or political intent. Its purpose is to enrich the dialogue between private citizens and public officials, and its constituency is the people of this state. The Center's broad institutional goal is the stimulation of greater interest in public affairs and a better understanding of the profound impact state government has each day on everyone in North Carolina.

A non-profit, non-partisan organization, the Center was formed in 1977 by a diverse group of private citizens "for the purpose of gathering, analyzing and disseminating information concerning North Carolina's institutions of government." It is guided by a self-electing Board of Directors and has individual and corporate members across the state.

Center projects include the issuance of special reports on major policy questions; the publication of a quarterly magazine called *North Carolina Insight*; the production of a symposium or seminar each year; and the regular participation of members of the staff and the Board in public affairs programs around the state. An attempt is made in the various projects undertaken by the Center to synthesize the integrity of scholarly research with the readability of good journalism. Each Center publication represents an effort to amplify conflicting views on the subject under study and to reach conclusions based on a sound rationalization of these competing ideas. Whenever possible, Center publications advance recommendations for changes in governmental policies and practices that would seem, based on our research, to hold promise for the improvement of government service to the people of North Carolina.

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Executive Summary

One of the hottest debates of the past few sessions of the North Carolina General Assembly has raged over what also happens to be one of the least understood laws of the state: The Administrative Procedure Act. Probably few citizens have ever heard of it, and fewer still know what it purports to do. But the fact is that the APA, as it is known, has much to do with the way our state government runs, with the way many of our state institutions operate, with such various items as the quality of our drinking water or the way that doctors are licensed.

That's because the APA establishes minimum, uniform standards for the way the state and its agencies adopt rules and regulations implementing state laws and operating government services and program. The 1985 General Assembly is debating changes in the APA law, changes that are designed to cut down on the ballooning number of rules that have been adopted over the past decade. The debate centers on who controls the adoption of rules and who controls contested cases, or appeals, of executive branch decisions based on these rules.

To help the legislature in its decision-making process, the N.C. Center for Public Policy Research has conducted an extensive survey of the scores of agency officials who deal with and administer the Administative Procedure Act on a daily basis. The respondents were asked for specific information on how the APA affects their agencies, how many cases are contested, and what experience they have had on judicial review, for several examples.

This report includes a narrative history of the APA in North Carolina, setting the scene for the current legislative action; a listing of the landmark

dates in the APA; detailed results of the APA survey; and a section of findings and recommendations for legislative changes in the Administrative Procedure Act. The chart that follows summarizes these findings and recommendations.

Editors Note: Unless otherwise noted, all citations to the proposed rewrite of N.C. Administrative Procedure Act refer to HB 52, as passed by the N.C. House of Representatives on May 3, 1985, and as engrossed in the third edition of that bill.

Rep. Watkins' Bill	Survey Findings	Recommendations by N.C. Center for Public Policy Research
1a. Creation of the Office of Administrative Hearings.	Administrative hearings are not extensively used. Most of the appeals (71 percent) are within one division (Social Services) of the Department of Human Resources.	Selection of hearing officers should 1) avoid separation of powers constitutional problems; and 2) be done so that a given agency will be assigned a hearing officer who has both legal and program experience. Program experience can be particularly important for licensing boards. In order to avoid separation of powers objections, the hearing officers should not be elected by the General Assembly (as was proposed in G.S. 143B-555 of HB 52, as introduced).
1b. Gives this Office Final Decision-Making Authority on Administrative Appeals.	In most cases, (74 percent) the hearing officer makes only a tentative decision. The agency head makes the final decision.	To avoid constitutional problems, this office should issue a proposed decision to the agency head, board, or commission. The final agency decision should be made by this agency head, board, or commission.
2. Exemption of Occupational Licensing Boards from the Administrative Appeals Requirements of the APA.	Eleven of the 17 agencies which allow the same person committee, or board to make/interpret the rule, hear a contested case, and make the final decision on that case are licensing boards. In 36 other cases, a different person did one or more of these three functions.	Licensing boards should be covered by administrative appeals section of the APA; they should not be exempted as they are under the proposed 1985 legislation. In addition, removal of licensing boards legislates away the potential cost savings of creating a pool of hearing officers to hear all contested cases in state government.

Rep. Watkins' Bill	Survey Findings	Recommendations
3. Publication of a State Register. The North Carolina Register, to be printed by the Office of Administrative Hearings.	Thirty-nine states have a State Register. Most state registers include more features than contemplated by the proposed legislation.	North Carolina should enact authority for a State Register and publish its rules in a convenient and affordable format. The bill should be amended so that the register includes these additional features: -- Attorney General's opinions, -- Meetings open to the public, -- Hearings to be held, -- Proclamations, and -- State contracts to be let. The bill should also be amended to clarify that all proposed rules should be published in the register. As it now reads, the bill includes only proposed rules which are amendments to existing rules [proposed G.S. 150A-63(d2)].
4a. Revision of the Definition of a Rule.	Agencies were critical of existing definitions of what should be filed as a rule, and of the length of time required to make a rule.	Statute should be revised to make it clearer what should be published as a rule and what should be left out, and to consider means to reduce delays in the rulemaking process.
4b. Requires a Public Hearing on All Proposed Rules.	Main weakness identified was public hearing being mandatory even for minor changes and technical corrections.	Consideration should be given to having proposed rules become final rules without a hearing if 1) a specified time elapsed and 2) no one objected to the proposed changes.

Rep. Watkins' Bill	Survey Findings	Recommendations
5. Increased Restrictions on Agency Rulemaking.	Widespread support for APA exists within state agencies as an efficient way to adopt rules implementing programs and carrying out legislative intent.	Restrictions on rulemaking mean the legislature will in effect have to adopt rules as statutes, creating administrative havoc, burdening the legislative process itself, and inflating the size of the state code. These sections of the bill [G.S. 150A-9 and 150A-59(c)] should be scrapped.
6. Creation of the Administrative Rules Review Commission.	Survey respondents did not identify lack of additional executive oversight as a glaring weakness of the APA.	This commission, which in effect would have veto power by delegation from House and Senate leaders, presents constitutional problems in that: 1) it may represent an unconstitutional delegation of authority by the legislature as a whole to a small group; and 2) it allows the General Assembly to appoint members to a commission in the Department of Justice in the executive branch (G.S. 143A-55.2 in the proposed bill).

Rep. Watkins' Bill	Survey Findings	Recommendations
7. The Right to Petition for Judicial Review and Trial De Novo.	The main weakness identified in the administrative appeals section of the survey was that the APA was "overly legalistic/too complicated for lay people." Since trials de novo would probably cause appeals to become more legalistic and more drawn out, this weakness would be exacerbated.	Article 4 of G.S. Chapter 150A, concerning "Judicial Review," should be retained in its present form. In particular, G.S. 150A-50 should not be amended to allow trials de novo in reviews by courts of administrative decisions. The possibility of a trial de novo -- after a hearing record already has been established -- would make appeals of agency decisions more costly in the long run by requiring attorneys to re-establish evidence and testimony originally presented at the hearing and to introduce that material in court. The present statute already allows judicial review of agency decisions but builds on the hearing record rather than allowing an unsatisfied appellant to make the court start all over again.

Chapter 1: The Politics of the APA

The scene was memorable. On a scale of pure entertainment, it didn't rank up there with, say, the sheer excitement of Annie Oakley's Wild West Show, the subtlety and finesse of baseball's immortal Tinker-to-Evers-to-Chance triple play, or the raw energy of a Bruce Springsteen concert. But for a government hearing, it was pretty good stuff -- at least a 9.3 for artistic interpretation.

What it was, was the Administrative Procedure Act hearing on a proposed revision of state regulations for certifying day care centers. Hardly the stuff of a potboiler, the hearing nonetheless had generated strong interest within the day care industry. Operators of day care centers were split on the proposal. Non-profit centers generally opposed the proposal, which relaxed some certification procedures, but commercial day care center operators supported it.

When the hearing convened on the 8th floor of the Albemarle Building, some 75 people showed up, many carrying signs to protest the revision of the rules. Rule opponents carried toilet plungers or waved signs reading, "Don't Flush Good Day Care Down the Drain." The hearing went on for nearly eight hours, and by the end of the day the opponents of the rule change had persuaded the hearing officer that the rule change went too far. The rule eventually was modified, but not to the extent the commercial operators wanted.

The turnout of participants that day was unusual for an APA hearing. They don't usually generate such heat, and most are attended by relatively few people. But regulation of day care centers perennially arouses controversy over how much control the state should impose. For instance, one hot issue in the current session of the General Assembly involves tougher day care standards, including staff training and staff-pupil ratios.

But the APA hearing was on a much narrower point -- the details of the procedure the state employs to certify day care centers for eligibility for federal funds. And the turnout of supporters and opponents indicates that when

the public gets involved in the otherwise arcane art of government rulemaking, changes can occur. That hearing also demonstrated that the Administrative Procedure Act can work, despite the fact that the act has become a political controversy.

APA's Split Personality

The Administrative Procedure Act (APA) has a split personality. In its public demeanor, the APA prescribes a system of rulemaking and administrative hearings that affects every citizen in the state. In its "private" side, the APA functions "as an intramural ballgame within state government," as one analyst puts it, providing the rules of the game for contesting players. In its 10-year history, the APA has not had an easy time keeping the two sides of its personality in balance. The world of politics seems to sharpen, even exaggerate, the tensions between all public and private personas. And the APA is no exception.

On the public side, doctors, nurses, landscape architects, physical therapists, and dozens of other occupations follow licensing procedures established according to the APA. Boards and commissions, from the State Board of Education to the Environmental Management Commission, must also follow APA procedures. And almost all departments in the executive branch adhere to APA procedures for putting internal policies into formal rules and for having any rule appealed through a judicial-like hearing process. Thus the APA affects everything from water and air quality to Medicaid, from insurance rates to banking regulations. The APA's public demeanor affects every citizen of the state, whether people know it or not.

In its more "private" life, the APA functions for the executive branch of state government much like a rulebook does for a basketball game. The APA prescribes how agency policies must be written into formal rules, how those rules may be appealed, and who manages this system. With significant

exceptions (the University of North Carolina system, the Utilities Commission, and the Employment Securities Commission, most notably, which are all exempt from the APA), every executive branch department has one or more APA coordinators who oversee the rulemaking process -- within the department itself, within the boards and commissions under the rubric of that department, and within any licensing boards that report through that department. In this intramural league, made up of APA coordinators, only a handful of people really understand how the APA functions and why.

A Political Football

One group of people has realized the importance of the APA -- the politicians. From the earliest discussions about an APA in North Carolina, this system of managing government has been a political football (see landmark dates on page 15). The politics first focused on fights between the legislative and executive branch, straining such close Democratic friendships as that between former Gov. James B. Hunt Jr. and current Lt. Gov. Robert B. Jordan III. The political battles over the APA focused on this issue: Would the executive or legislative branch control the process of administrative rulemakings and appeals of these rules? Some members of the legislature became convinced that the General Assembly either delegated too much power or that a voracious bureaucracy had assumed too much power under the APA -- despite the fact that the legislature itself had required most of those rules to be written in order to carry out program initiatives. Several years ago, those legislators began to attempt rewriting the APA in order to cut back on the number of rules and the breadth of authority delegated to the agencies.

In 1983 and again in 1984, the House and Senate became entangled in bitter intramural squabbles over rewrites of the APA, and in 1984 the legislature adjourned in an uproar because of a closing-day deadlock. But the legislature's hand may be forced this time, thanks to the 1983 legislature's action repealing on July 1, 1985, all rules adopted under the current APA law. That has

led directly to House Bill 52, sponsored by Rep. William Watkins (D-Granville) in the 1985 session of the legislature. Watkins' rewrite is still controversial, and now the political penumbra has cast a lengthier shadow over the APA.

With Gov. James G. Martin, a Republican, taking over control over the executive branch, the political stew has thickened. The central APA issue -- legislative-versus-executive control over the mechanisms of government -- now has become part of the larger struggle of partisan politics.

After a brief honeymoon, relations between Governor Martin and the predominantly Democratic legislature quickly soured. Since late March, the squabble over the APA, once primarily a philosophical dispute over which branch of government should make the rules, has become more political than ever. The Governor himself, in a statement to the N.C. Center for Public Policy Research, blames the controversy over the APA on legislative carelessness.

"This problem is not the result of the executive branch usurping the legislative branch," Martin said. "Rather, it is the failure of the General Assembly to exercise appropriate care in delegating rulemaking authority." Martin said the legislature "is overreacting by repealing much of the Administrative Procedure Act in response to this problem.... The better solution is for the General Assembly to exercise more careful control over rulemaking power given in statutes other than the Administrative Procedure Act."

Martin's point is well taken. Contrary to what many legislators believe, it is not the Administrative Procedure Act that gives state agencies the authority to adopt and enforce administrative rules. That authority, in fact, is granted through literally hundreds of separate statutes that have been enacted individually by the General Assembly itself over the years. Similarly, the legislature has granted rulemaking authority to 88 different boards and commissions.* The APA establishes only the process by which those rules may be adopted and appealed.

*For a list of these, see Table 6.2 in the Center's report, Boards, Commissions and Councils in the Executive Branch of N.C. State Government.

Nonetheless, Representative Watkins, a powerful legislative figure and the chief foe of the APA, is a firm believer that the less APA there is, the better. "There are just too many rules," he fumes, "and the ordinary citizen doesn't know what it's all about in the first place. It's gotten so you have to have a lawyer to understand it, and sometimes even then your lawyer may not be able to find the rule, let alone comply with it."

Watkins may be engaging in rhetorical hyperbole, but his view is widely shared -- that the APA is nothing but a massive, unwieldy, unworkable law that might well be nicknamed the Lawyer's Relief Act because it has provided so much gainful employment for so many practicioners of the legal arts. Widely shared, but widely misunderstood.

The fact is that the APA serves as far more than a rulebook between pugilistic purveyors of bureaucratic billingsgate. The APA is the bedrock foundation upon which executive agencies -- the operating arm of government -- can make fair determinations of policy with regular public input. Its principles are ingrained in our democratic tradition: Public participation in decision-making, putting rules and regulations in writing rather than relying on an oral tradition, an impartial hearing with due process, the recourse to judicial review of initial decisions, and a generally open process. Decades of work have gone into refining the APA to the point that most states have adopted versions of the act.

The APA's History

Congress enacted the federal version of the APA for U.S. government agencies in 1946. The National Conference of Commissioners on Uniform State Laws first proposed a model state APA seven years earlier, in 1939. In 1961, that group revised its proposal, producing the basic act that finally was adopted by the North Carolina General Assembly in 1974, to take effect in 1976.

Even before it took effect, North Carolina's APA was controversial. Many state agencies had objected to its adoption in 1974, and they were still unhappy two years later as it began to take effect. In 1976, state Sen. I.C. Crawford, now deceased, asked then-State Auditor Henry L. Bridges to perform an operational audit to determine how the act was functioning. Bridges' audit revealed the depth of opposition to the new law.

Among the respondents was Secretary of State Thad Eure, who declared, "For the benefits and advantages to be derived therefrom compared to the time and tremendous cost incurred in complying with all its provisions, I do not recall a greater waste of public funds."

Similar comments came in from executive department agencies, although some, like the departments of Justice and Human Resources and the Wildlife Resources Division, spoke favorably on the act. There might well have been more official opponents were it not for specific exemptions granted to several agencies, including the Employment Security Commission, the Industrial Commission, the Occupational Safety and Health Review Board, the Department of Correction, the Utilities Commission, the University of North Carolina, and the drivers license review section of the Division of Motor Vehicles.

In the late 1970s, legislative opposition to the APA began to harden, partly because of the sheer volume of paperwork the APA seemed to generate. As of January 1, 1985, there were more than 18,000 pages of rules on file at the state Department of Justice, the official repository of the state's APA rules. Some members of the General Assembly believed the agencies had gone too far and had adopted too many rules. Moreover, some legislators accused agencies of, in effect, writing criminal law.

Legislators opposed to the APA often cite two examples of bureaucratic poaching of their legislative prerogatives. The Division of State Parks in the Department of Natural Resources and Community Development adopted a rule prohibiting the consumption of beer in boats on Kerr Lake, even

though there was no such prohibition in the state's Alcoholic Beverage Control laws. In the second, the Wildlife Resources Commission adopted a rule requiring hunting and fishing licenses to be filled out only with ball point pens. In both cases, violators could be charged with misdemeanor crimes, punishable either by fines, jail terms, or both.

That amounts to the writing of criminal law by government agencies that have no authority -- or responsibility -- to do so, contends Watkins. "This bill will stop these agencies from writing criminal law," says Watkins. "That is the legislature's function, not the executive branch's."

Watkins is also concerned about provisions of the APA that essentially allow agencies to propose a rule, adopt it after public hearings, and then sit in judgment to hear contested cases involving the validity of the rule and violations. To Watkins, that gives agencies too much power, and his rewrite of the APA would remedy that concern. "We are trying to get away from the present practice of a person holding the hearing, making the rule, and then determining if the rule has been broken," says Watkins.

By the 1981 session, legislators who opposed the APA process were demanding the right to actually veto administrative rules that members didn't like. A committee to review such rules had been set up in 1977, but its members soon learned they had no authority to revoke rules formally adopted by agencies. After tedious legislative bickering, a compromise was adopted giving the committee the right to object and refer a rule to the governor or Council of State for reconsideration. Not long after, the state Supreme Court issued its landmark Wallace v. Bone decision on the doctrine of separation of powers, and the state Department of Justice privately advised legislative leaders that their rules review committee was unconstitutional.

The APA debate took a bizarre turn in the 1983 legislative session when the House and Senate got entangled in a bitter dispute over several APA bills. At one point, Rep. Watkins, as chairman of the House Appropriations Committee, was threatening to block any Senator's bill coming to his committee. State agencies which years earlier had vehemently opposed the APA were lobbying frenziedly in favor of retaining it. And Gov. James B. Hunt Jr., attempting to salvage what he could, was lobbying behind the scenes to revive three APA bills that the Senate earlier had killed, dismembered and buried -- or so it thought.

After an exhausting round of back room lobbying, the bills were revived. The Senate and House managed to come up with a compromise that called for repeal of existing APA rules by July 1, 1985 (a tactic which would force the 1985 session to either rewrite the APA or seek an extension of the extant rules); creation of an APA Legislative Study Commission; abolition of the discredited legislative Administrative Rules Review Commission; and creation of the Governor's Administrative Rules Review Commission.

When the 1984 session convened in June, the study commission had developed a rewrite of the APA. That bill easily passed the House of Representatives but again ran into trouble in the Senate, where then-Sen. Robert Jordan, among others, objected to the House's efforts to push the APA rewrite through in a short, so-called "budget" session of the assembly. In the closing days of the session, the House resorted to every conceivable tactic, including attempting to attach the APA rewrite as an amendment to the appropriations bill, to a phosphate removal bill, and to an interstate banking bill. All attempts failed, setting the stage for the APA debate in the 1985 legislature.

Defining the APA's Scope

That debate began in the House early in the 1985 session with the introduction of HB 52 by Rep. Watkins. His bill deals with the precepts of the Administrative Procedure Act and seeks to limit the scope of the act.

Under current law, the APA establishes uniform procedures in two areas, rulemaking and administrative appeals, also called contested cases or administrative hearings. The act also addresses other areas such as the procedures under which a court will review agency decisions, and filing procedures agencies must follow to maintain the N.C. Administrative Code.

Rulemaking is a quasi-legislative function by which an agency proposes and establishes the policies and procedures which govern the operation of a program (Article 2 of G.S. Chapter 150A). Once a rule is adopted, it applies to the entire class of people who are governed by it. For example, if an occupational licensing board goes through rulemaking procedures and adopts a rule, then all persons who are licensed by the board must comply with the rule or risk losing their licenses. Rulemaking, a quasi-legislative function, applies to a class of people.

Administrative appeals, on the other hand, apply to the person or persons whose rights, duties or privileges are being determined (Article 3 of G.S. Chapter 150A). Such appeals are called quasi-judicial because they function like court review of cases. In both instances -- rulemaking and administrative appeals -- the APA establishes minimum, uniform procedural requirements with which agencies must comply.

The APA under current law has proven its worth in more than one instance. Just recently, both environmental groups and business interests used the administrative appeals function of the law to obtain more time for discussion of controversial hazardous waste management rules proposed for adoption by the N.C. Commission for Health Services. The commission, under orders from the legislature to come up with new regulations on hazardous waste management by the end of January 1985, had been tardy in mailing copies of the proposed new rules to interested parties. Both sides in the dispute realized that there wasn't sufficient time to digest the rules changes, and formally sought a delay to allow

more time for discussion. That put environmental groups such as the Sierra Club and the Conservation Council of North Carolina on the one hand, and business interests like the N.C. Citizens for Business and Industry on the other hand, in the unusual position of agreeing on an issue before an APA hearing. A delay was granted by the Commission for Health Services, giving the parties in the dispute time to study the matter and make comprehensive presentations on the waste management rules in an administrative hearing before a final decision was made.

In that case, the Administrative Procedure Act performed in precisely the procedural manner that was intended: public notice, public participation, writte proposals, due process, a fair hearing, and a final decision derived in an open setting. The APA itself had no effect on the substance of the rule.

Altering the APA

The Watkins bill -- under debate by the 1985 legislature -- would radically alter the way the APA works, as well as reduce the number of agencies to which it would apply. Cosponsored by Reps. George Miller and Paul Pulley, Democrats from Durham County, and Martin Lancaster (D-Wayne), the bill proposes recodification of parts of the existing APA, with some significant changes. The bill departs in six significant ways from the existing APA.

1. Creation of the Office of Administrative Hearings (Under a new Article 12 in HB 52, section 2). This new office would consolidate all of the existing hearing officers into a single new agency. The bill provides that as a contested case arises, the case would be assigned to one of the hearing officers. This proposal was intended to assure that the person hearing a contested case was independent of the agency which originally adopted the rule being contested. The bill also proposes to give the hearing officers the authority to make the "final agency decision."

This differs from the current system in two major ways. Currently, the hearing officer is usually an agency staff member. Second, the hearing officer often issues a proposed decision; and the agency's designated decision maker, usually the head of the department, would accept or reject that decision. A "final agency decision," for aficionados of bureaucratese, is not the same thing as a final decision, period. It means only that the agency itself will not review the decision further; additional review is up to the courts.

To be established as an independent, quasi-judicial agency, the office would be directed by a Chief Hearing Officer, with an annual salary of $48,216, and staffed with nine Hearing Officers, each to be paid $41,760 per year. All would be elected by the legislature in a joint session. Currently, the Justice Department is responsible for maintaining the copies of rules that agencies file, and is also responsible for publishing the rules. These functions are proposed to be transferred to the new Office of Administrative Hearings along with the personnel and equipment now under the aegis of the APA Section of the Department of Justice.

(During debate on the House floor on May 1, the method of election of the Chief Hearing Officer and the nine Hearing Officers was dropped from the bill temporarily at Watkins' request. He explained that because the method of election was controversial, it should be displaced for the time being and dealt with later in other legislation. Rep. Jonathan Rhyne (R-Gaston) has since introduced legislation that would allow the governor to appoint members of the commission.)

2. Exemption of Occupational Licensing Boards from the Administrative Appeals Requirements of the APA (Under G.S. 150A-1 and 150A-38[a], as proposed in HB 52). These licensing boards, comprising such professional occupations as doctors, dentists, and therapists, have been among the more vociferous opponents of the APA. With their opposition to inclusion in the bill, the chances for passage of the APA rewrite was questionable. But in March 1985, Watkins pro-

posed a committee substitute that dropped the licensing boards from the the APA's regular requirements on administrative hearings (and created separate minimum procedures for licensing board hearings). This substitute bill guaranteed support -- or at least lack of opposition -- from those licensing boards. These boards would remain subject to the rulemaking provisions of the bill.

In an interview, Watkins said he proposed dropping those boards as a device to enhance the prospects for passage of his bill. "Taking out the licensing boards really was a gimmick," said Watkins. "That was the major opposition."

3. Publication of a State Register (under G.S. 150A-63, as proposed in HB 52). The North Carolina Register, to be printed by the Office of Administrative Hearings, would publish all rules in force under provisions of the APA, and would periodically -- annually or more often if necessary -- publish cumulative supplements. Just as in the Federal Register, both proposed amendments to existing rules and final rules would be published in the state register, as would other information about executive, legislative, or judicial actions relative to the APA.

4. Revision of the Definition of a Rule (under G.S. 150A-2[8a], as proposed in HB 52). The bill proposes a new and lengthy definition of a rule, with the intent of ensuring that those policies and procedures that affect the public would be properly published and filed, and that those matters which do not affect the public would not be filed. The twofold aim of this was to make sure that all appropriate policies and procedures are filed, but that the number of superfluous material on file will be reduced.

5. Restrictions on Agency Rulemaking (under G.S. 150A-9[b], as proposed in HB 52). This bill proposes a number of restrictions on agency rulemaking that had not previously existed. The bill would prohibit any agency from adopting a rule "unless the power, duty or authority to carry out the provisions of the

statute or enactment is specifically conferred on the agency..." (emphasis added).

This section appears to be one of the most significant changes. It indicates that the courts should strictly construe the language of the APA to mean that unless specifically authorized by statute, an agency may not adopt a rule. This appears to be even more restrictive than the state's current judicial interpretation, which prohibits adoption of a rule that alters or adds to a law.

6. Creation of the Administrative Rules Review Commission (under G.S. 143A-55.2, as proposed in section 5 of HB 52). This provision establishes an eight-member commission to be appointed by the legislature and to work under the nominal aegis of the Justice Department. The commission's function would be to review rules and determine whether they are within the agency's authority, whether they are clear, and whether they are "necessary" for the agency to carry out its statutory authority. If the commission objects to a certain rule, the original agency has 30 days to repeal the rule or amend it to satisfy the commission. If an agency fails to take action, the commission shall veto the rule. In essence, this commission -- appointed by the legislature --would have virtually final authority over all administrative branch rulemaking. Some analysts have construed this as violating the constitutional provision on separation of powers in light of the Wallace v. Bone decision.

7. The Right to Petition for Judicial Review and Trial De Novo (under G.S. 150A-50, as proposed in HB 52). In addition to maintaining the existing APA's avenues of judicial review, HB 52 also provides for yet another judicial route: trials de novo. Under this procedure, either litigant in a contested case may request a trial de novo, meaning that the entire proceeding would begin anew in state Superior Court. Among other things, this means that the earlier steps -- the investigation by the agency and the hearing procedure conducted by the Office of Administrative Hearings -- would not be used as background or as part of the record to be considered on judicial review. Some analysts believe this

could well extend the time and cost of a contested case hearing, as well as making the process overly legalistic. The legal costs might rise due to two factors: 1) Clients might retain lawyers earlier (from the moment a contested case begins), and 2) lawyers may have more billable hours if they have to reconstruct the entire evidentiary record in a trial de novo, rather than just reintroducing the hearing record as they do now under G.S. 150A-47.

The Political Forecast

If the legislature goes along with the exemption for licensing boards, the new APA would apply to fewer government agencies than ever before in its decade-long history. In addition to the existing exemptions from the APA (G.S. 150A-1) for the Employment Security Commission, the Industrial Commission, the drivers license hearings in the Division of Motor Vehicles, the Occupational Safety and Health Review Board, the Utilities Commission, and the University of North Carolina and its affiliated boards and commissions, Watkins' bill would also add at least partial exemptions for the N.C. National Guard, the Department of Insurance, and the Banking Commission and Commissioner of Banks.

Lt. Gov. Robert Jordan, who as a senator opposed the House's effort in 1984 to ramrod the APA rewrite through, is hoping to facilitate passage of an APA bill in this session. For that reason, he agrees with Watkin's dropping of licensing boards but adds that they might well be put back under the bill's coverage in future sessions. "The political realities are such that it may be more beneficial to leave them out and do the do-able at this time," says Jordan. "Perhaps we can add them back in a future session."

Since March, the bill has progressed slowly through the House Judiciary IV Committee, and was approved by the House 72-26 on its third reading on May 3. The much-revised HB 52 will be taken up by the Senate Judiciary I committee in late May. Historically, the APA bills have run into trouble in the Senate. This year, with Jordan backing an APA rewrite in the Senate, the likelihood of new APA legislation before the end of the current session is enhanced. "I'll be surprised if we don't get a major (APA) bill passed this session," said Jordan.

# # #

Landmark Dates: Administrative Procedure Act

1939 National Conference of Commissioners on Uniform State Laws first proposes model act for states.

1946 Internal task force by the U.S. Attorney General results in proposed model federal act being approved at the federal level.

1961 National Conference of Commissioners on Uniform State Laws approves revised version of model state act.

1971 General Statutes Commission, a standing legislative study commission, begins work on an Administrative Procedure Act for North Carolina.

1974 General Assembly enacts Administrative Procedure Act. APA covers all executive branch agencies, with the notable exceptions of the Employment Security Commission, Industrial Commission, Occupational Safety and Health Review Board, Department of Correction, Utilities Commission, Division of Motor Vehicles (drivers license hearings), and University of North Carolina.

1976 APA takes effect on July 1.

1976 State Sen. I.C. Crawford (D-Buncombe), chairman of the Senate Government Operations Committee, requests State Auditor Henry L. Bridges to conduct an operational audit of the APA.

1977 General Assembly creates a standing committee, the Administrative Rules Review Committee, to review all agency rules filed under the APA. Committee realizes that it has no enforcement authority to prevent an agency from adopting a rule deemed inappropriate.

1980 General Assembly, at the request of Attorney General Rufus Edmisten, creates the APA Study Commission, which is staffed by the Department of Justice. This commission holds public hearings, conducts surveys, and makes recommendations to the 1981 General Assembly

1981 Sen. Robert B. Jordan III (D-Montgomery), introduces SB 250 to give the Administrative Rules Review Committee the power to suspend the effective date of agency rules up to 60 days. Gov. James B. Hunt Jr. opposes the bill as a "legislative veto" of agency rules and as a violation of the Constitutional protection of separation of powers. A compromise prevails, where the Administrative Rules Review Committee can object to a rule and refer it either to the Governor or to the Council of State for consideration.

1981 Senator Cecil Jenkins (D-Caburrus) introduces SB 305, a proposed rewrite of the APA which includes the creation of a state register and the publication of the N.C. Administrative Code. The bill fails, but in a compromise bill, the legislature appropriates funds to have the N.C. Administrative Code published on microfiche and to allow local governments to purchase microfiche readers.

1982 (Jan.) N.C. Supreme Court hands down Wallace v. Bone, popularly known as the "Separation of Powers" decision. In this decision, the Court held that the separation of powers provision of the N.C. Constitution prohibited the General Assembly from choosing current legislators as members of the Environmental Management Commission (and by implication other rulemaking boards or commissions in the executive branch).

1982 (Feb.) N.C. Center for Public Policy Research releases "Separating the Executive and Legislative Branches: Boards, Commissions, and Councils with Legislative Members," listing 90 boards with legislators and 36 boards that violate the separation of powers provision of the state constitution.

1982 (March) The Administrative Rules Review Committee meets in executive session where Senior Deputy Attorney General Andrew A. Vanore Jr. opined that the committee's power to suspend regulations issued by state agencies and departments was probably unconstitutional.

1982 (June) General Assembly creates a Separation of Powers Study Commission.

1983 General Assembly approves a lengthy bill developed by Separation of Powers Study Commission, which, among other things, removes legislators from 36 boards.

1983 (March) Rep. Billy Watkins (D-Granville) introduces HB 524, which would repeal the APA. The bill passes the House and goes to the Senate.

(July) The Senate takes up HB 524 in the same debate with two related bills: one would create a new APA Study Commission, and one would authorize the use of legislative standing committees between sessions to monitor executive branch rulemaking. In the legislative jockeying that ensues, the Senate puts the "clincher" on the three House-passed bills (the "clincher," a parliamentary maneuver, is the surest way to kill a bill).

(July) Governor Hunt lobbies to break the House-Senate logjam, and the Senate removes the clinchers. A compromise three-part package passes the legislature which: 1) replaces the legislative Administrative Rules Review Commission with the Governor's Administrative Rules Review Commission; 2) creates a new APA Study Commission; and 3) repeals the rulemaking provisions of the APA, effective July 1, 1985. The package is designed to force the 1985 legislature to revise the APA in a "now or never" fashion.

1983 (Oct.) APA Study Commission meets and creates a subcommittee to rewrite the definition of a "rule" under the APA. The subcommittee never meets.

1984 (June) APA Study Commission meets for the first time since October 1983 and approves an entire rewrite of the APA.

Rep. George Miller (D-Durham) introduces the rewrite of the APA as HB 1784. The bill passes the House but dies in the Senate after attempts by the House to add the bill to the Appropriations Act, the phosphate ban bill, and the interstate banking bill. The

main opponents in the House-Senate squabble were the same in 1983 and 1984: Representatives Watkins, Miller, and Al Adams (D-Wake) versus Sen. Robert Jordan, now the Lieutenant Governor.

1985 (Jan.) N.C. Center releases Boards, Commissions, and Councils in the Executive Branch of N.C. State Government, a three-year project documenting the role of these boards and commissions. The study included a discussion of the APA and a listing of boards with rulemaking power (pages 85-86).

1985 (Feb.) Rep. Billy Watkins introduces HB 52, to rewrite the APA. The bill, while similar to his 1984 proposal, contains a significant change, reflecting the political struggle between the Democrat-controlled legislature with the Republican administration of Gov. James G. Martin. The legislature would elect the chief administrative judge of the new Office of Administrative Hearings; in the 1984 proposal, the governor would have appointed this judge.

1985 (March) Watkins introduces a "committee substitute" for HB 52 in the House Judiciary IV Committee. The substitute bill deletes occupational licensing boards from coverage by the APA regarding administrative appeals.

1985 (May) House passes committee substitute in a vote along party lines.

Chapter 2: How Has the APA Worked in North Carolina?

In analyzing the life of the APA in North Carolina, six model principles can serve as guideposts. These six, which have evolved from the earliest meetings of the National Conference of Commissioners on Uniform State Laws, fall into three general categories: public participation and access, uniform process, and judicial fairness/due process.

Public Participation and Access. The Administrative Procedure Act prescribes how government agencies must go about adopting rules that have the effect of law. A well-designed APA gives the public -- citizens, business groups, affected licensees, trade associations, etc. -- access to this process. Three of the six principles for a model APA fall into this category of public participation and access:

1. To allow groups affected by policies to know of the policies before they go into effect.

2. To allow citizen input into agency policymaking and rulemaking.

3. To allow public access to rules once they are adopted.

Provide a Uniform Process for Government Administration. If the APA works well, it will provide a uniform system of procedures for state agencies. In short, it will improve the efficiency of government. To accomplish this, an APA must meet two principles:

4. To insure that all significant agency policies have been put into writing.

5. To establish a uniform system of administrative procedures for state agencies.

Judicial Fairness/Due Process. In addition to prescribing how rules are to be adopted, the APA also specifies the process citizens and agencies must follow when a citizen appeals an agency action. For the appeal process -- called

a contested case hearing -- to work fairly, an appellant would be able to correct any error made in the executive branch. Hence, principle number six:

6. To establish a uniform system of appeals concerning agency decisions or rules through the executive branch and, if necessary, into the courts.

Center Survey Examines APA Track Record

Of the six principles, only one (principle 5) is explicitly included as a purpose of the APA in the North Carolina law: establish "a uniform system of administrative procedure for State agencies."[1] The act (Chapter 150A of the N.C. General Statutes) addresses the other five principles as well. Article 2 of the act covers rulemaking issues (principles 1 and 2 and to some extent principle 4); Articles 3 (administrative hearings) and 4 (judicial review) cover principle 6, and Article 5 covers publication of administrative rules (principle

Regarding each of these six purposes, analysts must ask: Since the APA took effect in North Carolina in 1976, how well has the APA met this purpose? To help answer that question, the N.C. Center for Public Policy Research mailed a six-page survey on the Administrative Procedures Act in January 1985 to every state agency required to comply with the APA. Of the 92 people sent the survey, 65 completed and returned it, according to this breakdown:

Segment of Executive Branch	Number of Surveys Sent	Returned
Cabinet Departments (those under the governor)	44	34
Council of State	13	11
Board of Community Colleges	2	2
Occupational Licensing Boards	33	18
TOTAL	92	65, or 71 percent

The survey was divided into three parts: rulemaking, administrative appeals/contested case hearings, and state register. Through the rulemaking and administrative appeals sections of the survey, the Center hoped to provide a data base for assessing the performance of the APA in North Carolina. With the section on state registers, the Center in essence took a poll on what kind of state register (if any) should exist in North Carolina (see Chapter 3 for more on state registers).

The survey asked the APA coordinators in each state agency to rank these six model principles (see Appendix 1, question 7). Principle 4 (ensuring that policies have been put into writing) edged out principle 2 (allow citizen input into rulemaking) as the most important principle, in the opinion of those who completed the survey. The 65 survey respondents rated principle 6 -- establishing a uniform system of appeals -- as the least important of the six. The other findings of the Center's survey might help explain why the respondents ranked these principles this way.

The survey results serve two other important purposes as well. First, they provide an evaluation of how well the N. C. APA has met the six model principles. Secondly, the findings provide a basis for testing the assumptions put forward in the current legislative debate.

Principle 1: Public Notice

The first step for public access to the process of governmental rulemaking is informing the public that a proposed new rule is under consideration. The APA prescribes the process for how rules are adopted; it does not authorize agencies to adopt the rules. Separate statutes provide that authorization, and

in some cases, these statutes also prescribe how the agency must publish the notice of an upcoming rulemaking hearing. When the statute authorizing an agency to adopt a rule does not specify the notice provision, then the APA statute comes into play.

"The agency . . . shall publish the notice in a manner selected by the agency as best calculated to give notice to persons likely to be affected by the proposed rule," reads the APA law.[2] "Methods that may be employed by the agency, depending upon the circumstances, include publication of the notice in one or more newpapers of general circulation, or, when appropriate, in trade, industry, governmental or professional publications." The law goes on to require agencies to publish the notice as a "display advertisement in at least three newspapers" when the people likely to be affected by the proposed rule are unorganized or diffuse in character and location.

As a practical matter, almost all agencies have established a mailing list of persons who have requested to be notified of rulemaking or of persons who are likely to be affected by the rulemaking. In addition to this mailing list, almost all agencies routinely place a notice of rulemaking hearing in three newspapers across the state. Each rulemaking notice on the average costs $75 to $100.

In theory, then, the N.C. APA meets the first model principle. The law is specific on the notice requirements, and most agencies keep mailing lists that serve to keep affected parties notified of proposed rules. But how effective is this notice process? How many people and groups actually comment on proposed rules? How much impact do these comments have on the rulemaking process? Once adopted, how available are these rules? The Center survey attempted to answer these questions.

Principle 2: Allow Citizen Input into Rulemaking

The Center's survey asked APA coordinators to estimate the number of people attending a public hearing (see Appendix 1, question 3a). The responses can be viewed as a half-empty or half-full glass of water. On the one hand, 10 or fewer persons attended about half the rulemaking hearings. Some would consider this a rather dismal record for adequate public input.

On the other hand, 9 percent of the survey respondents said that over 50 people came to public hearings, a significant expression of public involvement. Similarly, 13 percent of the survey respondents said that 11 to 30 people came to hearings, and another 13 percent said that 31 to 50 people attended rulemaking hearings. In other words, more than 10 people came to 35 percent of the hearings. Moreover, many respondents said that the number depended upon the rule. When controversial rules came up, people showed up.

The survey produced similar results regarding comments in writing from the public (see Appendix 1, question 3b). Five or fewer written comments were received by rulemaking agencies, said 59 percent of the survey respondents. But 25 percent said that more then six written comments came in on each proposed rule -- not an insignificant number. In addition, 16 percent of the respondents said that more than 10 written comments on a rule came to them, a significant volume indeed.

Deciding if these percentages represent true citizen input into rulemaking hearings requires subjective judgments. If 10 people showed up at a legislative hearing considering, say the Equal Rights Amendment, then the lawmakers could rightly assume that this high-profile issue had lost interest for the time being, that citizen input was minimal. But if 10 people came to a hearing on modifying the fine print of an insurance regulation statute, that might be a

significant number -- depending upon who those 10 people were. And more importantly, how much did the presence or comments of these 10 people affect the final outcome of the issue under consideration?

To flesh out the subjective judgments regarding citizen input, the Center survey asked who commented most frequently on proposed rules, how the APA coordinators responded to the comments, and what impact the public input usually has on the final version of a rule (see Appendix 1, questions 4, 5, and 6). Significantly, nearly half of the respondents said that business interest groups (47 percent) and regulated persons, i.e., licensees (45 percent) commented on proposed rules. In a distant third were public interest groups (22 percent of the respondents); "interested citizens" ranked fifth (17 percent).

Comments from the public had "considerable impact" on the final version of rule, said 28 percent of the respondents. Another 33 percent said the impact vari according to the rule. But 25 percent said the comments had "very little impact."

The N.C. APA has a mixed record on meeting model principle number 2. There has been significant citizen input, especially when important rules were under consideration. The most significant input has come from the business community and those persons who must get licensed by occupational licensing boards. Through trade associations and paid lobbyists, business interests have had by far the greatest input into the APA rulemaking process. Interested public citizens, however, have had some input as well, especially through public interest groups.

Principle 3: Public Access to Adopted Rules

Currently, the rules are not published. If someone would like a complete set of the rules, then a microfiche of the rules can be purchased for $26.00 from

the APA Section of the Department of Justice. Of course, to read your new purchase, you will need a microfiche reader, which can cost hundreds of dollars. If you would like to be able to print out what you are reading, then you need a more sophisticated reader that will also print copies.

On the other hand, you could go to the APA Section and ask them to photocopy pages for you. The first 10 pages are free, but after that it will cost you 10 cents per page. The survey seems to indicate that most persons wishing copies of the rules have been going to agencies instead of the Justice Department.

Four of every five agencies send out copies of adopted rules upon request. In addition, 23 percent of the respondents send out adopted rules routinely. But 13 percent of the respondents refer requests for copies of adopted rules to the Attorney General's office, the central depository for all rules adopted and codified into the North Carolina Administrative Code.

The survey attempted to identify if agencies charged for the copies and if so, how much. But 66 percent of the respondents either made no response or some comment other than the options given on the survey (see Appendix 1, question 9). Fourteen of the respondents (22 percent) indicated they did not charge for copies of the rules. Because of the high number of no responses, however, a generalization about the cost of getting copies of rules directly from the agency cannot be made.

The N.C. APA law has failed to meet principle 3, primarily because rules must currently be read on a microfiche reader. Agencies do mail out adopted rules upon request, but often a person does not necessarily know what rule might be needed for a particular task. The Administrative Code is not published, nor is there a State Register where adopted rules are published.

Departments might publish important rules in separate pamphlets, but such efforts have real limitations. The Department of Public Instruction, for example, publishes the rules passed by the State Board of Education, but often the State Board passes new rules between issues of the DPI publication. Advocates of schoolchildren are then at a severe disadvantage in keeping up with the current rules required in identifying an academically gifted child, for example.

Principle 4: Agency Policies Put into Writing

There are currently some 18,000 pages of rules in the APA Section in the Department of Justice, the depository for all rules officially adopted under the APA. But there is no way to determine how many rules this represents. (It should be noted that not all of these pages are filed with the text of state agency rules; some pages, because of format requirements, include only limited information.)

With 18,000 pages of rules, it would seem difficult for anyone to argue that state policies and procedures have not been reduced to writing and filed as rules. Nevertheless, the issue has come up. Typically, the issue arises because some agencies maintain a policies and procedures manual in addition to the rules that have been filed with the Attorney General. Many agency APA officers have reviewed these policies and procedures manuals to ensure that any appropriate policies and procedures are also filed as rules. And well they should.

"No rule hereafter adopted is valid unless adopted in substantial compliance with this Article," reads the rulemaking section of the APA.[3] In effect, this means that if an agency does not put its policy in writing, give

notice of it as a proposed rule, and subsequently file it as a rule, then the rule is invalid and cannot be enforced.

In the Center survey, 33 percent of the respondents said the APA process was "too time consuming for a rule to become effective." This ranked as the greatest weakness among the rulemaking aspects of the act, according to the survey. (For more on the strengths and weaknesses of the act, see the last section of this chapter and Appendix 1, questions 10, 11, 20, and 21).

Despite problems with the rulemaking process sometimes taking too much time and money, the survey respondents ranked the principle of "putting all agency policies into writing" as the most important purpose of the APA (see Appendix 1, question 7). The rulemaking provisions of the APA require a formal procedure --including putting the rules into writing -- in order for an agency policy to have the force of law. This is especially important if the policy is tested through an administrative appeal and possibly into the courts. Given the volume of rules filed with the Attorney General, it appears that most agencies have recognized the importance of formalizing agency policies into rules. Hence, the N.C. APA appears to have successfully met principle 4, putting rules into writing.

Principle 5: Uniform Procedures for State Agencies

Uniform procedures are standardized for state agencies which are covered by the APA for two reasons: the APA law itself and the Attorney General's manual on how to administer the APA. The APA specifies that agencies must have rules, must put rules in writing and keep them in two places (Attorney General's office and the agency itself), and must hold administrative appeals under normal due process standards. In other words, the APA itself gives

uniform procedures to follow in both rulemaking and administrative hearings.

In addition to the act, the Department of Justice released in September 1980 The Attorney General's Manual on Rulemaking and Filing. This 62-page manual (with another 150 pages of appendices) explains how rules should be drafted, what rules require a hearing, public notice provisions, adopting the rules, filing and distributing the rules, and other special requirements. The book includes forms to be used and explains the organization of the N.C. Administrative Code.

For those agencies covered by the APA, then, the state's APA has met this model principle. There is a significant weakness in meeting this principle, however. Some large and important agencies are exempt from the APA, such as the Employment Security Commission and others. These agencies may or may not be following the same rulemaking and hearings procedures as do agencies covered by the APA. To the extent that the exempt agencies follow their own procedures in filing whatever rules they may adopt and conduct administrative appeal hearings according to their own process, there is not a uniform procedure for all state agencies.

Principle 6: Establish a Uniform System of Appeals

While this is only one of the six principles of a model APA, it has generated much of the controversy over the administration of the act. Some of the controversy appears to be based on an important myth, however: that there are large numbers of appeals filed. The Center's survey, which covered fiscal year (FY) 1984, found that with a few significant exceptions very few appe were filed at all. Of the respondents, 34 percent had no appeals, and another

24 percent had less than 10 appeals during the year. Only two respondents (3 percent) had more than 100 appeals, and 13 respondents (19 percent) had 11-100 appeals (see Appendix 1, question 12).

So few appeals have been filed under the APA partially because many agencies that regularly deal with appeals to administrative decisions are exempt from the APA, or from this portion of the act. Note these important exemptions: the Employment Security Commission, which conducts administrative appeals for denial of Unemployment Insurance; the Industrial Commission, which conducts appeals for Workers Compensation claims; the Utilities Commission, which conducts ratemaking appeals for utility companies; the Division of Motor Vehicles, which conducts appeals on denial of driver's licenses; and state employee personnel grievances prior to their being heard by the State Personnel Commission.

The agency with the most appeals filed in FY 84 was the Department of Human Resources with 1,580, according to the Center survey. Almost all of these were in the Division of Social Services, which received 1,539 appeals. All of these dealt with eligibility for public assistance programs (Aid to Families with Dependent Children, Medicaid, food stamps, etc.).

The Department of Natural Resources and Community Development (NRCD) ranked a distant second in the number of appeals with 81. Most of these were license and permit appeals (mostly before the Coastal Resources Commission), but there were also some variance appeals and civil penalty hearings for violations of environmental regulations.

When discussing administrative appeals under the APA, it is important to separate the experience of occupational licensing boards from other agencies (cabinet and Council of State departments). During past legislative debates, various occupational licensing boards have often complained about the APA appeals process. And indeed, during the 1985 legislative considerations, the

occupational licensing boards have been deleted from the appeals portion of the proposed APA bill.

One might expect there to be a number of contested cases heard by occupational licensing boards. (For licensing boards, the term "contested case" refers more accurately to the hearing process than does "administrative appeal," say licensing board officials.) After all, these boards grant, deny, revoke, and suspend individual's and facilities' licenses. But 10 of the 18 licensing boards that responded to the survey had no contested cases in FY 84. The eight with such cases were the N.C. Board of Architecture (1 appeal), N.C. Auctioneer Licensing Board (4), N.C. State Board of Dental Examiners (4), N.C. Alarm Systems Licensing Board (4), N.C. Private Protective Services Board (5), N.C. State Board of Registration for Professional Engineers & Land Surveyors (13), N.C. Board of Nursing (31), and the N.C. Real Estate Commission (35).

One aspect of the appeals process has received particular attention in the 1985 legislative debate: whether the person, committee, or board hearing an appeal -- and making the final decision on that appeal -- is the same person, committee, or board that made the rule which is being appealed. The proposed legislation would create a new Office of Administrative Hearings which would provide all hearing officers for administrative appeals. These hearing officers would make the final decision on an appeal. This new pool of hearing officers hence would be outside of the agency making the rule.

Some opponents of the current APA structure believe that such an independent hearing officer agency is necessary to prevent the same agency from serving as "prosecutor, judge, and jury." Such an assertion assumes that most of the agencies covered by the APA in fact use the same person, committee, or board to make rules, hear appeals on those rules, and make the final decision on those appeals. To test that theory, the Center survey asked a series of

questions about administrative appeals (see Appendix 1, questions 14 - 18). Viewing these answers, together with the answers to question 2 -- Who conducts rulemaking hearings? -- provides important data regarding the need for a new separate agency of hearing officers.

The Center survey found that in 17 agencies, the criticism of the APA appeals procedure proved to be true: that the same person, committee, or board made the rule, heard the appeal, and made the final decision on that appeal (see Table 1 for a list of the 17). In 36 cases, a different person did one or more of these three functions. Finally, in 17 cases, the question was not applicable since there had never been an appeal or the agency was exempt from the appeals section.

The most significant aspect of these results, however, was that of the 17 agencies using the same persons to make rules, hear the appeal, and make the final decision on the appeal, 11 of them were occupational licensing boards. And remember, these agencies have been exempted from the appeals section of the act under the bill now under consideration. If the point of creating a separate agency of hearing officers was to have appeals heard by a separate agency, such a result will be accomplished in the case of only six agencies, according to the Center survey. The places where Representative Watkins had identified a problem of the power of prosecutor, judge, and jury resting in one place or board are the very places that are exempt from the appeals section of his bill -- the occupational licensing boards.

In some situations, the hearing officer was a part of the same department in which the final decision on an appeal was made, usually by the cabinet secretary or a division director (see Appendix 1, questions 17 and 18). Hence, a hearing officer might feel the pressure of the cabinet secretary -- i.e., the

hearing officer's boss -- hanging over the appeals hearing. In 56 percent of the cases where a hearing officer heard an appeal (19 of 34), the hearing officer was in fact an agency employee (see Appendix 1, question 15a.) But the hearing officer either came from another agency, was a lawyer on contract, or came from some other source (prescribed in law, etc.) in 19 situations as well (also 56 percent). (Several agencies had more than one type of hearing officer for different functions within the same department; hence the total of 38 situations and only 34 agencies.) In other words, the hearing officer came from outside the department in as many instances as from within.

The Center survey revealed another important point about how contested cases have been heard. In FY 84, there were 2,160 contested cases but only 49 appeals into the courts (see Appendix 1, question 19). Of the 49, the court actually heard only 34, ruling in favor of the agency 26 times and in favor of the appellant 8 times. As a practical matter, then, the APA judicial review process applies to very few cases (in FY 84, 49 of 2,160 or 2 percent). Great persistence and stamina appear to be required for a person to take an appeal all the way through the administrative appeals process and then into the courts.

In North Carolina, the system of administrative appeals appears to have met principle 6 -- providing a uniform system of appeals through the executive branch, and if necessary, into the courts. What appears surprising, however, is how few people have actually used this appeals procedure, especially outside the Division of Social Services in the Department of Human Resources.

The main area of disagreement within this principle is whether it is good public policy to have hearing officers come from the same agency that initially adopted the rule being contested. Does the advantage of having a hearing officer from <u>within the department</u> who is more likely to have knowledge of the

program in question outweigh the advantage of having a hearing officer from outside the department who is more likely to be impartial?

Strengths and Weaknesses of the APA

In addition to testing the degree to which state agencies have met the six model principles, the Center survey also asked APA coordinators to name the main strengths and weaknesses of the APA, both in terms of rulemaking and administrative appeals. The top strengths regarding rulemaking fell into the same general areas as the model principles. The top two strengths listed were citizen input and the uniform system of administrative procedures, followed by public access to adopted rules, and public knowledge of policies before they go into effect (see Appendix 1, question 10). Regarding weaknesses on rulemaking (question 11), respondents most frequently cited the fact that it was too time consuming for a rule to become effective (32 percent of the respondents). Another 15 percent said that a weakness was the APA requiring public hearings even for minor changes and technical corrections.

These questions on the survey were open ended, requiring the respondents to frame their own strengths and weaknesses. Hence, many strengths and weaknesses did not fall into convenient categories. Miscellaneous reasons, which could not be grouped into large categories, appeared from 34 percent of the respondents regarding strengths and from 25 percent on weaknesses.

The survey included open ended questions regarding the strengths and weaknesses of the administrative appeals portion of the APA also. The responses were similar to the rulemaking questions in that a "miscellaneous" category ranked high for both strengths and weaknesses (see Appendix 1, questions 20 and

21). One significant difference, however, was that far more respondents had no response on this section. Many of those with no response added such notes as, "Have not had enough experience with appeals to answer these questions." In other words, as the earlier discussion under Principle 6 pointed out, there have not been a large number of appeals of any sort in many agencies.

Among those who did name strengths of the appeals process, 17 respondents named as a strength the "uniform system of appeals and legal procedures" (25 percent). The fact that the APA "protects due process" ranked next (12 percent), and that it "allows board/agency to use an experienced hearing officer" came in third (9 percent).

No more than five respondents identified the same weakness in the appeals process. Five respondents (7 percent) said the APA is "overly legalistic/ too complicated for lay people." Four other weaknesses were listed by four respondents each: "board attorney plays role of prosecutor and board advisor," "overly broad standard for standing to challenge agency decisions/too many people can intervene," "too costly," and "no weaknesses."

Footnotes to Chapter 2:

[1]NCGS 150A-1(b).

[2]NCGS 150A-12(c).

[3]NCGS 150A-9.

Table 1. Agencies Responding to Center Survey Where the Same Person or Board Makes/Interprets the Rule, Conducts the Contested Case Hearing, and Makes the Final Decision on that Hearing

Agency with Such Power	No. of Appeals Agency Had in Fiscal Year 84
Cabinet Agencies (Department/Division)	
1. Human Resources/Governor's Waste Management Board	0
2. Natural Resources and Community Development (Coastal Resources Commission)	3
3. Natural Resources and Community Development (Marine Fisheries Commission)	15
4. Commerce/Milk Commission	1
5. Commerce/Credit Union	0
Council of State	
6. Secretary of State	0
Occupational Licensing Boards	
7. N.C. Auctioneer Licensing Board	0
8. N.C. Board of Architecture	1
9. N.C. State Board of Dental Examiners	4
10. State Board of Examiners of Electrical Contractors	7
11. N.C. State Board of Registration for Professional Engineers and Land Surveyors	13
12. N.C. Real Estate Commission	35
13. N.C. Board of Medical Examiners	20
14. N.C. Board of Nursing	31
15. N.C. State Board of Examiners of Practicing Psychologists	0
16. N.C. Alarm Systems Board	4
17. N.C. Private Protective Services Board	5
TOTALS: 17 agencies	139

Chapter 3. State Registers

North Carolina is the only state in the South that does not have a state register and 1 of only 11 in the country without a register (see Table 2). Of the 39 registers, almost all of them publish emergency agency rules (37), proposed rules (34), adopted rules (33), and hearing notices (30), as shown in Table 4. Most of the state registers around the country are inexpensive, ranging from $0 to $50 per subscription (see Table 5).

In its survey of APA coordinators, the N.C. Center asked three questions about a possible North Carolina State Register, concerning the main purposes of the register, the frequency of publication, and the cost. The legislation currently under consideration calls for the new Office of Administrative Hearings to publish the North Carolina Register [G.S. 150A-63(d1), as proposed in HB 52]. The legislation specifies what types of information must be included in the register, ranging from all proposed amendments and adopted rules to executive orders of the governor. The register, according to the current proposed legislation, must be published at least monthly, with an annual edition covering all the rules in force. The cost, to be determined by the chief hearing officer in this office, will cover publication and mailing costs.

The respondents to the Center survey, choosing from a list of 15 categories of information that could be included in a state register, generally ranked as most important the same information most often contained in other state registers. In fact, the three top purposes, according to the survey respondents, were the same as three of the top four in Table 2: notices of proposed rulemaking by an agency, text of proposed rules, and text of newly adopted final rules (see Appendix 1, question 22). (The top category in Table 2, "emergency agency rules," was not given as an option in the Center's survey,

and hence does not appear in the list in question 22 in the appendix.)

Feelings often ran strong either for or against a state register. Respondents from licensing boards often said that it would not be useful to their work. But some of the APA coordinators most familiar with the act emphasized how important the state register was. "All of the purposes are very important," wrote Kevin Eddinger, formerly of the Department of Agriculture.

Regarding frequency and cost, about 30 percent of the respondents did not respond to these questions, which included those who felt a state register was not necessary for their work (see Appendix 1, questions 23 and 24). More respondents preferred a monthly (30 percent) or twice-per-month (20 percent) register than any other frequency. The most popular cost ranges were $50-$74 (25 percent) and $125-$150 (10 percent).

It should be noted that there is a significant difference between the proposed State Register and the current N.C. Administrative Code. That is, the State Register will print periodically -- at the Chief Hearing Officer's discretion -- the entire Administrative Code, but interim issues of the register will contain cumulative supplements of newly adopted rules, not the entire code. The Administrative Code will remain on file in one central office in Raleigh.

There are two important issues regarding a new State Register which the proposed APA bill does not resolve: 1) whether <u>all</u> proposed rules would be published in the register; and 2) whether the new register should or could be used to eliminate the requirement for public hearings on minor changes in rules (currently, a public hearing is mandatory for all rule changes).

Under the current Watkins bill, only proposed rules which are amendments to existing rules would be included in the new register. The bill does not provide

for proposed rules which are totally new. The bill should be amended to clarify that all proposed rules should be published in the register.

Second, it should be noted that the new State Register proposed under HB 52 would not serve precisely the same function as the Federal Register. Federal rules can be adopted without hearings. The Federal Register publishes proposed rules, usually allowing a given time period for comments. After an agency receives comments, it publishes final rules -- often without holding a public hearing. Some analysts consider this process through the Federal Register as a way to reduce unnecessary and time-consuming public hearings for minor rules.

The problem remains, however: how to distinguish a "minor" from a "substantive" rule change. In other words, what circumstances should require a public hearing? The Center's survey indicated that the method of dealing with minor rule changes is a serious concern. The two main weaknesses of the rulemaking section of the APA, said the respondents, were "too time consuming for a rule to become effective" (21 responses, 32 percent) and "requires public hearings for minor changes and technical corrections" (10 responses, 15 percent). Keep in mind that these were responses to an open-ended question, where respondents wrote in these weaknesses; they did not check a box listing such a weakness.

The federal system does not offer clear guidance on this point. It does not specify when a hearing is necessary. At the state level, the proposed rewrite of the APA in 1981 addressed the issue by having a new state register include all proposed rules. If 25 or more citizens objected to the proposed rule, then the agency was required to have a public hearing; otherwise, the rule would go into effect after a stated period of time.

This process would allow routine and non-controversial rule changes to be implemented without a hearing. However, by using a threshold number (in the

case of the 1981 bill, 25 objections), this system could mean that an important rule change could go into effect without adequate public consideration. The number of persons commenting on a change does not always indicate the importance of that change.

Resolving this issue will require imagination and clear-headed discussion. One solution to consider is that a proposed rule published in the State Register would become a final rule after a stated time if no one objected to the proposed rule.

Table 2. States With and Without Registers

States With Registers (39)

Alabama	Louisiana	Oregon
Arizona	Maryland	Pennsylvania
Arkansas	Massachusetts	Rhode Island
California	Michigan	South Carolina
Delaware	Minnesota	South Dakota
Washington, D.C.	Mississippi	Tennessee
Florida	Missouri	Texas
Georgia	Montana	Utah
Illinois	New Hampshire	Vermont
Indiana	New Jersey	Virginia
Iowa	New York	Washington
Kansas	Ohio	West Virginia
Kentucky	Oklahoma	Wisconsin

States Without Registers (11)

Alaska	Maine	North Carolina
Connecticut	Nebraska	North Dakota
Hawaii	Nevada	Wyoming
Idaho	New Mexico	

Table 3. Where Registers Are Placed Administratively

Type of Agency	Number of States
Secretary of State	13
Legislative Services Office	8
Code Editor/Commission	3
State Regulations	5
Office of Documents	2
Office of Administrative Law	2
State Archives	2
Other	4

Source for Tables 2, 3, 4, and 5: 1983 Administrative Codes and Registers, State and Federal Survey, National Association of Secretaries of State. For more information, contact Charlotte R. Scroggins, ACR Committee, P.O. Box 13824, Austin, Texas 78711, (512) 475-788

Table 4. Features in Registers

Feature	Number of States With this Feature	Does HB 52 (§150A-63) Include this Feature in Proposed N.C. Register?
Emergency Rules	37	yes
Proposed Rules	34	not clear: bill does include proposed amendments to existing rules
Adopted Rules	33	yes
Hearings	30	no
Executive Orders	28	yes
Index	21	yes
Open Meetings	16	no
Judicial Items	13	no
Attorney General's Opinions	13	no
Proclamations	11	no
Legislative Items	11	no
Executive Items	10	no
State Contracts	7	no

Table 5. Cost of Registers

Price Range (one year subscription)	Number of States
$ 0 - 50	21
51 - 100	6
101 - 150	6
151 and up	3
Gave no information	4

Chapter 4: Findings and Recommendations

The 1985 legislature will, in essence, adopt an entire new Administrative Procedure Act for the state. Consequently, perhaps the best way to summarize the findings of the Center survey and the recommendations of this report is in relationship to the central features of the proposed new APA (HB 52). The chart that follows lists the main elements of HB 52 in the first column. Findings from the Center survey that speak to each feature in the bill are summarized in column two. Finally, Center recommendations regarding the new APA are summarized in column three. The chart summarizes the most important features of the bill. But many other concerns about the proposed new APA have also surfaced in recent months.

For example, S. Thomas Rhodes, secretary of the Department of Natural Resources and Community Development (NRCD), and Victoria Voight, APA coordinator for the Department of Human Resources (DHR), testified before the House Judiciary IV Committee that the new bill might put the state out of compliance with various federal regulations and hence raise the possibility of the state losing federal funds. Sec. Rhodes said that $62 million in federal funds coming to NRCD would be under question while Ms. Voight said that as much as $825 million coming to DHR could be jeopardized if the state were out of compliance with federal regulations. Ms. Voight pointed out, for example, that various federal guidelines regarding four federal programs -- Medicaid, Aid to Families with Dependent Children, Vocational Rehabilitation, and food stamps -- may not allow an agency other than the Department of Human Resources to hear and have final power over contested case appeals. Under HB 52, the new Office of Administrative Hearings would have such power.

Various constitutional questions also have been raised by close observers of HB 52. Regarding the proposed Office of Administrative Hearings, for example, the method of appointment of the hearing officers raises questions of separation of powers, depending upon the involvement of the legislature in the appointment process. In addition, giving this new office final decision-making authority, in the view of some, in effect vests this office with the powers of a new court of law, in violation of Article 4, Section 1 of the N.C. Constitution: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article." Other constitutional questions arise regarding the proposed Administrative Rules Review Commission (see item number 6 in the chart that follows).

Being out of compliance with federal regulations and various constitutional questions are just some of the many concerns various analysts have raised with HB 52. The chart that follows summarizes the most pressing issues.

Rep. Watkins' Bill	Survey Findings	Recommendations by N.C. Center for Public Policy Research
1a. Creation of the Office of Administrative Hearings.	Administrative hearings are not extensively used. Most of the appeals (71 percent) are within one division (Social Services) of the Department of Human Resources.	Selection of hearing officers should 1) avoid separation of powers constitutional problems; and 2) be done so that a given agency will be assigned a hearing officer who has both legal and program experience. Program experience can be particularly important for licensing boards. In order to avoid separation of powers objections, the hearing officers should not be elected by the General Assembly (as was proposed in G.S. 143B-555 of HB 52, as introduced).
1b. Gives this Office Final Decision-Making Authority on Administrative Appeals.	In most cases, (74 percent) the hearing officer makes only a tentative decision. The agency head makes the final decision.	To avoid constitutional problems, this office should issue a proposed decision to the agency head, board, or commission. The final agency decision should be made by this agency head, board, or commission.
2. Exemption of Occupational Licensing Boards from the Administrative Appeals Requirements of the APA.	Eleven of the 17 agencies which allow the same person committee, or board to make/interpret the rule, hear a contested case, and make the final decision on that case are licensing boards. In 36 other cases, a different person did one or more of these three functions.	Licensing boards should be covered by administrative appeals section of the APA; they should not be exempted as they are under the proposed 1985 legislation. In addition, removal of licensing boards legislates away the potential cost savings of creating a pool of hearing officers to hear all contested cases in state government.

Rep. Watkins' Bill	Survey Findings	Recommendations
3. Publication of a State Register. The North Carolina Register, to be printed by the Office of Administrative Hearings.	Thirty-nine states have a State Register. Most state registers include more features than contemplated by the proposed legislation.	North Carolina should enact authority for a State Register and publish its rules in a convenient and affordable format. The bill should be amended so that the register includes these additional features: -- Attorney General's opinions, -- Meetings open to the public, -- Hearings to be held, -- Proclamations, and -- State contracts to be let. The bill should also be amended to clarify that all proposed rules should be published in the register. As it now reads, the bill includes only proposed rules which are amendments to existing rules [proposed G.S. 150A-63(d2)].
4a. Revision of the Definition of a Rule.	Agencies were critical of existing definitions of what should be filed as a rule, and of the length of time required to make a rule.	Statute should be revised to make it clearer what should be published as a rule and what should be left out, and to consider means to reduce delays in the rulemaking process.
4b. Requires a Public Hearing on All Proposed Rules.	Main weakness identified was public hearing being mandatory even for minor changes and technical corrections.	Consideration should be given to having proposed rules become final rules without a hearing if 1) a specified time elapsed and 2) no one objected to the proposed changes.

Rep. Watkins' Bill	Survey Findings	Recommendations
5. Increased Restrictions on Agency Rulemaking.	Widespread support for APA exists within state agencies as an efficient way to adopt rules implementing programs and carrying out legislative intent.	Restrictions on rulemaking mean the legislature will in effect have to adopt rules as statutes, creating administrative havoc, burdening the legislative process itself, and inflating the size of the state code. These sections of the bill [G.S. 150A-9 and 150A-59(c)] should be scrapped.
6. Creation of the Administrative Rules Review Commission.	Survey respondents did not identify lack of additional executive oversight as a glaring weakness of the APA.	This commission, which in effect would have veto power by delegation from House and Senate leaders, presents constitutional problems in that: 1) it may represent an unconstitutional delegation of authority by the legislature as a whole to a small group; and 2) it allows the General Assembly to appoint members to a commission in the Department of Justice in the executive branch (G.S. 143A-55.2 in the proposed bill).

Rep. Watkins' Bill	Survey Findings	Recommendations
7. The Right to Petition for Judicial Review and Trial De Novo.	The main weakness identified in the administrative appeals section of the survey was that the APA was "overly legalistic/too complicated for lay people." Since trials de novo would probably cause appeals to become more legalistic and more drawn out, this weakness would be exacerbated.	Article 4 of G.S. Chapter 150A, concerning "Judicial Review," should be retained in its present form. In particular, G.S. 150A-50 should not be amended to allow trials de novo in reviews by courts of administrative decisions. The possibility of a trial de novo -- after a hearing record already has been established -- would make appeals of agency decisions more costly in the long run by requiring attorneys to re-establish evidence and testimony originally presented at the hearing and to introduce that material in court. The present statute already allows judicial review of agency decisions but builds on the hearing record rather than allowing an unsatisfied appellant to make the court start all over again.

Appendix 1: Results on APA Survey Conducted by N.C. Center for Public Policy Research

On January 30, 1985, the N.C. Center for Public Policy Research mailed a six-page survey on the Administrative Procedures Act (APA) to every state agency required to comply with the APA. Of the 92 agencies receiving the survey, 65 completed and returned it, according to this breakdown:

Segment of Executive Branch	Number of Surveys Sent	Returned
Cabinet Departments (those under the governor)	44	34
Council of State	13	11
Board of Community Colleges	2	2
Occupational Licensing Boards	33	18
TOTAL	92	65

The questions in the survey are summarized below. In most cases, the responses are totaled for all four segments of the executive branch. Where the responses differed significantly among the four segments, the responses are broken down.

RULEMAKING

1. Has your agency adopted rules under the APA?

Yes	61 (94%)
No	1 (2%)
No Response	2 (3%)

2. Who generally conducts your agency's rulemaking hearings?
(Respondents could check more than one, so percentages total more than 100.)

Commission or Board	33	(51%)	Agency Head	9	(14%)
Hearing Officer	18	(28%)	Other	7	(11%)

3. How is public input received into your agency's rulemaking process?

a. Number of citizens attending a public hearing ("citizens" refers to any person, from the public or representing a business or organization):

No. of Citizens Per Hearing	Responses	Percent of Respondents
0	7	11%
few (all hearings)	4	6%
1-10	19	29%
11-30	8	12%
31-50	8	12%
over 50	6	9%
No Response	12	18%

b. Number of persons or groups who comment in writing on a proposed rule:

No. of Citizens Per Hearing	Responses	Percent of Respondents
0/minimal	15	23%
1-5	23	35%
6-10	6	9%
over 10	10	15%
No Response	10	15%

4. Who are the persons or groups who comment most frequently on proposed rules?
(Survey asked respondents to list three, so percentage totals more than 100.)

Persons/Groups Who Comment	No. of Responses	Percent of Respondents
Business Interest Groups	30	46%
Regulated Persons (i.e., licensees)	29	45%
Public Interest Groups	14	22%
Other State Agencies	14	22%
Interested Citizens	11	17%
Local Government Agencies	11	17%
Individual Businesses	10	15%
Clients (receiving benefits)	2	3%
Elected Officials	1	2%

5. How do you respond to public input? (Many respondents checked more than one.)

	No. of Responses	Percent of Respondents
Explanation to citizens at the public hearing	38	58%
Modification of proposed rules with changes reflected in final rules	38	58%
Written responses when requested	35	54%
Written responses to written comments	30	46%
Varies, depending on the rule	7	11%

6. What impact does public input usually have on the final version of the rule? (Some respondents checked more than one, saying it varied depending on the rule.)

Very little impact	16	25%
Some impact	8	12%
Considerable impact	18	28%
Varies according to the rule	21	32%

7. What do you think are the main purposes of the Administrative Procedure Act?
Note: The choice with the lowest cumulative number got the best score.

(Survey asked respondents, if they checked more than one purpose, to rank the six purposes listed below. The cumulative ranking came by: 1) adding all the responses for each purpose (first choice got "1"; second choice "2", etc.); and 2) dividing this sum by the number of responses for each purpose.)

Main Purposes of APA	Cumulative Ranking by Respondents
Ensure that all significant agency policies have been put into writing	2.29
Allow citizen input into agency policymaking and rulemaking	2.33
Establish a uniform system of administrative procedures for state agencies	2.83
Allow groups affected by policies to know of the policies before they go into effect	2.90
Allow public access to rules once they are adopted	3.98
Establish a uniform system of appeals concerning agency deciions or rules through the executive branch and, if necessary, int the courts	4.30

8. Does your agency make copies of rules available to the public?
(Some respondents checked more than one answer.)

Yes, upon request	51	(78%)
Yes, routinely	15	(23%)
No, we refer them to the Attorney General's office	8	(12%)

9. What do you charge per page for sending out rules?

	No. of Responses	Percent of Respondents
No charge	14	22%
5 cents	3	5%
10 cents	5	8%
No response or other	42	66%

10. With respect to rulemaking, what are the strengths of the current APA? (Answers to this open-ended question were grouped according to the general categories below.)

Citizen input into rulemaking	23	35%
A uniform system of administrative procedures	15	23%
Public access to adopted rules	9	14%
Public allowed to know of policies before they go into effect	8	12%
Establishes a uniform system of appeals	5	8%
Exempt from APA	2	3%
No response	2	3%
Miscellaneous	22	34%

11. With respect to rulemaking, what are the weaknesses of the current APA? (Answers to this open-ended question were grouped according to the general categories below.)

Too Time consuming for a rule to become effective	21	32%
Requires public hearings for minor changes and technical corrections	10	15%
Costs too much (for small agency, for publication, for notice, etc.)	8	12%
Generates too much paper; too complicated	8	12%
Definition of a rule and what needs to be filed is unclear	7	11%
Inconsistent application (some agencies exempt)	5	8%
No response	5	8%
Difficulty in complying with filing procedures	3	5%
No weaknesses	3	5%
Lack of interest by citizens	2	3%
Benefits of act do not justify cost	2	3%
Exempt	2	3%
Miscellaneous	16	25%

Administrative Appeals/Contested Case Hearings

NOTE: On this section of the survey, the Division of Medical Assistance in the Department of Human Resources completed four separate surveys for the four different appeals functions it serves. Hence, the total number of respondents increases from 65 to 68 and the total number of responses from cabinet departements (under the governor) increases from 34 to 37; these changes affect the denominator in the percentage calculations shown below.

12. For how many administrative hearings did your agency conduct contested case hearings between 7/1/83 and 6/30/84?

Number of Appeals	Number of Respondents
0	23 (34%)
1-2	10 (15%)
3-10	6 (9%)
11-100	13 (19%)
over 100	2 (3%)

13. What type of administrative appeals does your agency conduct?

License and permit appeals	19 (28%)
Rate appeals	2 (3%)
Audit appeals	8 (12%)
Personnel appeals	5 (7%)
Exceptions to standards, rules, etc.	11 (16%)
Eligibility	13 (19%)
Other (civil penalities, other)	15 (22%)

14. Who usually conducts these contested case hearings on administrative appeals? (Some respondents checked more than one.)

	Depts. under the Governor	Council of State	Licensing Boards	Commun. Colleges	Total
Hearing officer	20 (54%)	8 (73%)	6 (33%)	0 (0%)	34 (50%)
Hearing committee	5 (14%)	1 (9%)	0 (0%)	0 (0%)	6 (9%)
Board/commission	2 (5%)	0 (0%)	12 (67%)	2 (100%)	16 (24%)
Other	2 (5%)	1 (9%)	0 (0%)	0 (0%)	3 (4%)
Not Aplicable	12 (32%)	2 (18%)	2 (11%)	0 (0%)	16 (24%)

NOTE: In questions 15 through 18, the divisor used for the percentage calculations is 34 In some cases, a single agency uses different kinds of hearing officers. Hence, some checked more than one response, and percentages total more than 100.

15a. If hearing officers conduct these hearings, who is the hearing officer?

Agency employee	19 (56%)
Lawyer under contract	6 (18%)
Another agency's employee	5 (15%)
Other	8 (24%)

15b. Who appoints the hearing officer?

	No. of Responses	Percent of Respondents Using Hearing Officers
Division director or agency head	21	62%
Cabinet secretary	4	12%
Other	11	32%

16a. What types of education or experience does your hearing officer have?

Legal training and degree	29	85%
Knowledge of the program involved	25	74%
Training in conducting hearings in the appeal	21	62%
Other	12	35%

16b. Which type of training, in your opinion, is most valuable?

Legal training and degree	16	47%
Training in conducting hearings	7	21%
Knowledge of the program involved in the appeal	16	47%
Other	5	15%

17. What power does your hearing officer have?

Make a "proposal for decision" to someone else	30	88%
Make a final agency decision (before it can be appealed to the courts)	9	26%

18. If the hearing officer's decision is reviewed by someone else, who has the power to make the final decision?

Policymaking board or commission	11	32%
Secretary/agency head	9	26%
Division director	6	18%
Licensing board	5	15%
Other agency official	2	6%
Governor	1	3%

19. Please follow a year's worth of appeals through the system, from 7/1/83 through 6/30/84 (FY 84), according to the chart below.
(Several respondents noted that the appeals totaled in column 1 are not necessarily the ones at the end of the contested case appeal system, shown in column 5.)

	Within the Department					In Court		
	(1) Give number of appeals from the initial agency decision in Department from 7/1/83 to 6/30/84		(2) Give number of cases in which hearing officers upheld the initial agency decision	(3) Give the number of cases in which the final decision-maker upheld:		(4) Give the number of cases in which judicial review was sought by the person appealing	(5) Give the number of cases in which the court upheld	
				(a) hearing officer's decision or proposal for decision	(b) initial agency decision		(a) the agency	(b) the person appealing
	No. of Appeals	% of Total						
Cabinet:								
Div. of Social Services (DHR)*	1,539	71%	1,258	55	44	15	4	7
Other	382	18%	246	160	87	12	5	1
Total:	1,921	89%	1,504	215	131	27	9	8
Council of State:	128	6%	45	6	12	7	3	0
Licensing Boards:	106	5%	5	13	13	15	14	0
Community Colleges:	0	0	0	0	0	0	0	0
TOTAL:	2,155	100%	1,554	234	156	49	26	8

* The total from this single response is shown because of the large portion of the total contested cases that occurred in this agency.

20. With respect to administrative appeals, what are the strengths of the APA?

No response	24 (35%)
Uniform system of appeals & legal procedures	17 (25%)
Protects due process	8 (12%)
Allows board to use experienced hearing officer	6 (9%)
Hearings open to public	4 (6%)
Uses agency expertise	3 (4%)
Relaxed use of evidentiary rules	3 (4%)
No strengths	2 (3%)
Respondents are exempt	5 (7%)
Miscellaneous	16 (24%)

21. With respect to administrative appeals, what are the weaknesses of the APA?

No response	10 (15%)
Overly legalistic/too complicated for lay people	5 (7%)
Board attny. plays role of prosecutor & board advisor	4 (6%)
Overly broad standard for standing to challenge agency decisions/too many people can intervene	4 (6%)
Too costly	4 (6%)
No weaknesses	4 (6%)
Appeals process to court takes too long	3 (4%)
Not well designed for licensing boards	3 (4%)
Lack of knowledge about procedures for appeal	3 (4%)
Same agency adopts rules and makes final decision	3 (4%)
Respondents are exempt	3 (4%)
Ineffective use of agency staff & time; too time consuming for personnel with other duties	2 (3%)
Miscellaneous	17 (25%)

STATE REGISTER

22. If the General Assembly were to authorize a State Register, which of the following would be most useful to you and the citizens of North Carolina?
Note: The choice with the lowest cumulative number is the most useful.

(Survey asked respondents, to rank the items which would be of use. The cumulative ranking came by: 1) adding all the responses for each item (first choice got "1"; second choice "2", etc.); and 2) dividing this sum by the number of responses for each item.)

Purposes of a State Register	Cumulative Ranking by Respondents
Notice of proposed rulemaking by an agency	1.36
Text of proposed rules	2.21
Text of newly adopted final rules	3.14
Notice of public meetings of agencies, boards, & comms.	4.11
Formal opinions of the Attorney General	4.64
Executive Orders of the Governor	5.30
Federal legislation or regulations	5.46
Summarized decisions in contested cases	6.11
Invitation to bid on, and the awards of, state contracts	6.40
Meetings of legislative study commissions	6.72
Organization/personnel changes in state agencies	6.82
Lists of state documents available to the public	7.37
Final decisions by the Utilities Commission	7.64
Special editions, e.g., phone directory	8.43
Quarterly and annual cumulative indices	9.14

23. How often would you like to receive a State Register?

Weekly	4 (6%)
Twice per month	13 (20%)
Monthly	19 (29%)
Quarterly	3 (5%)
Semi-annual	1 (2%)
No interest	7 (11%)
No response	17 (26%)

24. How much would you pay for an annual subscription?

$125 - 150	10 (15%)
$100 - 124	5 (8%)
$ 75 - 99	5 (8%)
$ 50 - 74	16 (25%)
More than $150	7 (11%)
Should be free for state agencies	2 (3%)
No response	19 (30%)

Administrative Procedure Act

North Carolina Administrative Code, by Title and Department

TITLE #	DEPARTMENT NAME
1	Administration
2	Agriculture
3	State Auditor
4	Commerce
5	Correction
6	Council of State
7	Cultural Resources
8	Board of Elections
9	Office of Governor
10	Human Resources
11	Insurance
12	Justice
13	Labor
14	Crime Control & Public Safety
15	Natural Resources & Community Development
16	Education
17	Revenue
18	Secretary of State
19	Transportation
20	State Treasurer
21	Occupational Licensing Boards
22	Administrative Procedures Model Rules
23	Community Colleges
24	Independent Agencies
25	Office of State Personnel

APA

North Carolina Administrative Code Chapters

Pertaining to the Department of Human Resources*

Chapter(s)	DHR Division in the Chapter(s)
1	DHR General Rules
2	Confederate Women's Home
3	Facility Services
4-13	Health Services
14-18	Mental Health, Mental Retardation, Substance Abuse Services (MH/MR/SAS)
19	Services for the Blind
20	Vocational Rehabilitation
21	Governor Morehead School
22	Aging
23	Schools for the Deaf
24-42	Social Services (DSS)
43	Title XX
44	Youth Services
45	MH/MR/SAS (Alcohol and Drug Abuse)
46	Day Care
47	DSS (State-County Special Assistance)
48	Governor's Waste Management Board
49	DSS (AFDC)
50	Medical Assistance

* This is a sample of what every department has, that is, the chapters within the department's title of the N.C. Administrative Code. For DHR, Chapters 2, 13, 31, 32, and 38 have been repealed.