
SENATE BILL 6211

State of Washington

53rd Legislature

1994 Regular Session

By Senators Moore, Anderson, Sheldon, Amondson, McAuliffe, Bauer, Winsley, Williams and Ludwig

Read first time 01/17/94. Referred to Committee on Labor & Commerce.

1 AN ACT Relating to state agency rule making; amending RCW
2 34.05.325, 34.05.330, 34.05.350, 34.05.370, 34.05.620, 34.05.630, and
3 34.05.640; and adding a new section to chapter 34.05 RCW.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 34.05.325 and 1992 c 57 s 1 are each amended to read
6 as follows:

7 (1) The agency shall make a good faith effort to insure that the
8 information on the proposed rule published pursuant to RCW 34.05.320
9 accurately reflects the rule to be presented and considered at the oral
10 hearing on the rule. Written comment about a proposed rule, including
11 supporting data, shall be accepted by an agency if received no later
12 than the time and date specified in the notice, or such later time and
13 date established at the rule-making hearing.

14 (2) The agency shall provide an opportunity for oral comment to be
15 received by the agency in a rule-making hearing.

16 (3) If the agency possesses equipment capable of receiving
17 telefacsimile transmissions or recorded telephonic communications, the
18 agency may provide in its notice of hearing filed under RCW 34.05.320
19 that interested parties may comment on proposed rules by these means.

1 If the agency chooses to receive comments by these means, the notice of
2 hearing shall provide instructions for making such comments, including,
3 but not limited to, appropriate telephone numbers to be used; the date
4 and time by which comments must be received; required methods to verify
5 the receipt and authenticity of the comments; and any limitations on
6 the number of pages for telefacsimile transmission comments and on the
7 minutes of tape recorded comments. The agency shall accept comments
8 received by these means for inclusion in the official record if the
9 comments are made in accordance with the agency's instructions.

10 (4) The agency head, a member of the agency head, or a presiding
11 officer designated by the agency head shall preside at the rule-making
12 hearing. Rule-making hearings shall be open to the public. The agency
13 shall cause a record to be made of the hearing by stenographic,
14 mechanical, or electronic means. Unless the agency head presides or is
15 present at substantially all the hearings, the presiding official shall
16 prepare a memorandum for consideration by the agency head, summarizing
17 the contents of the presentations made at the rule-making hearing. The
18 summarizing memorandum is a public document and shall be made available
19 to any person in accordance with chapter 42.17 RCW.

20 (5) Rule-making hearings are legislative in character and shall be
21 reasonably conducted by the presiding official to afford interested
22 persons the opportunity to present comment. Rule-making hearings may
23 be continued to a later time and place established on the record
24 without publication of further notice under RCW 34.05.320.

25 (6) Before the adoption of a final rule, an agency shall prepare a
26 written summary of all comments received regarding the proposed rule,
27 and a response to the comments by subject matter, indicating how the
28 final rule reflects agency consideration of the comments, or why it
29 fails to do so. The agency shall provide the written summary and
30 response to any person upon request or from whom the agency received
31 comment.

32 **Sec. 2.** RCW 34.05.330 and 1988 c 288 s 305 are each amended to
33 read as follows:

34 (1) Any person may petition an agency requesting the adoption,
35 amendment, or repeal of any rule. Each agency may prescribe by rule
36 the form for such petitions and the procedure for their submission,
37 consideration, and disposition. Within sixty days after submission of
38 a petition, the agency shall ~~((+1))~~ (a) either deny the petition in

1 writing, stating its reasons for the denial, or ~~((+2))~~ (b) initiate
2 rule-making proceedings in accordance with this chapter.

3 (2) If an agency denies a petition to repeal or amend a rule
4 submitted under subsection (1) of this section, the petitioner may
5 appeal the denial to the governor. The governor shall file notice of
6 the appeal with the code reviser for publication in the Washington
7 State Register. Within sixty days after publication of the notice, the
8 governor shall either reject the appeal in writing, stating his or her
9 reasons for the rejection, or order the agency to initiate rule-making
10 proceedings in accordance with this chapter. In ruling on the appeal,
11 the governor shall consider:

12 (a) Whether the rule was adopted in compliance with section 5 of
13 this act;

14 (b) Whether the agency has established an adequate internal rules
15 review process, allowing public participation, and has subjected the
16 rule to that review;

17 (c) The nature of complaints and other comments received from the
18 public concerning the rule;

19 (d) Whether the rule conflicts with, overlaps, or duplicates any
20 other provision of federal, state, or local law and, if so, whether the
21 agency has taken steps to mitigate any adverse effects of the conflict,
22 overlap, or duplication;

23 (e) The extent to which technology, social or economic conditions,
24 or other relevant factors have changed since the rule was adopted, and
25 whether, given those changes, the rule continues to be necessary and
26 appropriate;

27 (f) Whether the statute that the rule implements has been amended
28 or repealed by the legislature, or ruled invalid by a court.

29 The governor shall file a copy of the ruling with the code reviser
30 for publication in the Washington State Register.

31 **Sec. 3.** RCW 34.05.350 and 1989 c 175 s 10 are each amended to read
32 as follows:

33 (1) If ~~((an agency))~~ the governor for good cause finds:

34 (a) That immediate adoption, amendment, or repeal of a rule is
35 necessary for the preservation of the public health, safety, or general
36 welfare, and that observing the time requirements of notice and
37 opportunity to comment upon adoption of a permanent rule would be
38 contrary to the public interest; or

1 (b) That state or federal law or federal rule or a federal deadline
2 for state receipt of federal funds requires immediate adoption of a
3 rule,
4 the governor may order the agency (~~(may)~~) to dispense with those
5 requirements and adopt, amend, or repeal the rule on an emergency
6 basis. The (~~(agency's)~~) governor's finding and a concise statement of
7 the reasons for (~~(its)~~) the finding shall be incorporated in the order
8 for adoption of the emergency rule or amendment filed with the office
9 of the code reviser under RCW 34.05.380 and with the rules review
10 committee.

11 (2) An emergency rule adopted under this section takes effect upon
12 filing with the code reviser, unless a later date is specified in the
13 order of adoption, and may not remain in effect for longer than one
14 hundred twenty days after filing. Identical or substantially similar
15 emergency rules may not be adopted in sequence unless conditions have
16 changed or the agency has filed notice of its intent to adopt the rule
17 as a permanent rule, and is actively undertaking the appropriate
18 procedures to adopt the rule as a permanent rule. This section does
19 not relieve any agency from compliance with any law requiring that its
20 permanent rules be approved by designated persons or bodies before they
21 become effective.

22 **Sec. 4.** RCW 34.05.370 and 1988 c 288 s 313 are each amended to
23 read as follows:

24 (1) Each agency shall maintain an official rule-making file for
25 each rule that it (a) proposes by publication in the state register, or
26 (b) adopts. The file and materials incorporated by reference shall be
27 available for public inspection.

28 (2) The agency rule-making file shall contain all of the following:

29 (a) Copies of all publications in the state register with respect
30 to the rule or the proceeding upon which the rule is based;

31 (b) Copies of any portions of the agency's public rule-making
32 docket containing entries relating to the rule or the proceeding on
33 which the rule is based;

34 (c) All written petitions, requests, submissions, and comments
35 received by the agency and all other written material regarded by the
36 agency as important to adoption of the rule or the proceeding on which
37 the rule is based;

1 (d) Any official transcript of oral presentations made in the
2 proceeding on which the rule is based or, if not transcribed, any tape
3 recording or stenographic record of them, and any memorandum prepared
4 by a presiding official summarizing the contents of those
5 presentations;

6 (e) The concise explanatory statement required by RCW 34.05.355;

7 (f) All petitions for exceptions to, amendment of, or repeal or
8 suspension of, the rule; (~~and~~)

9 (g) All data and other factual information, technical, theoretical,
10 and empirical studies or reports, if any, on which the agency relies in
11 the adoption of the rule;

12 (h) The written summary and response required by RCW 34.05.325(6);
13 and

14 (i) Any other material placed in the file by the agency.

15 (3) Internal agency documents are exempt from inclusion in the
16 rule-making file under subsection (2) of this section to the extent
17 they constitute preliminary drafts, notes, recommendations, and intra-
18 agency memoranda in which opinions are expressed or policies formulated
19 or recommended, except that a specific document is not exempt from
20 inclusion when it is publicly cited by an agency in connection with its
21 decision.

22 (4) Upon judicial review, the file required by this section
23 constitutes the official agency rule-making file with respect to that
24 rule. Unless otherwise required by another provision of law, the
25 official agency rule-making file need not be the exclusive basis for
26 agency action on that rule.

27 NEW SECTION. Sec. 5. A new section is added to chapter 34.05 RCW
28 to read as follows:

29 (1) In addition to other requirements imposed by law, an agency may
30 not adopt a rule the violation of which subjects a person to a penalty
31 or administrative sanction; that establishes, alters, or revokes a
32 qualification or standard for the issuance, suspension, or revocation
33 of a license to pursue a commercial activity, trade, or profession; or
34 that establishes, alters, or revokes a mandatory standard for a product
35 or material that must be met before distribution or sale, unless:

36 (a) The rule-making file provides substantial evidence that: (i)
37 The particular rule is necessary to fulfill the purpose and intent of
38 a specific statute; (ii) the agency evaluated the probable benefits of

1 the particular rule relative to its probable costs; (iii) the agency
2 considered other less-intrusive or less-costly means to achieve the
3 purpose of the rule, including any that were proposed in the rule-
4 making hearing, but had reasonable justification for rejecting them in
5 favor of the adopted rule; and (iv) any fee imposed by the rule will
6 generate no more revenue than is necessary to fulfill the intent of the
7 specific statute authorizing the fee;

8 (b) The rule is clearly and simply stated, so that it will be
9 understood by any person required to comply;

10 (c) The agency has a written plan to: (i) Inform and educate
11 affected persons about the rule; (ii) promote voluntary compliance;
12 (iii) evaluate whether the rule achieves the purpose for which it was
13 adopted; and (iv) where necessary, meet the requirements of subsection
14 (2) or (3) of this section;

15 (d) The rule does not, without clear and specific statutory
16 authorization to do so, exceed any provision of federal law regulating
17 the same activity or subject matter; and

18 (e) The rule does not, without clear and specific statutory
19 authorization to do so, conflict with, overlap, or duplicate, any other
20 provision of federal, state, or local law regulating the same activity
21 or subject matter. The agency shall survey other federal, state, and
22 local entities that have jurisdiction over the same or similar subject
23 matter to determine whether such conflict, overlap, or duplication
24 exists.

25 (2) Upon the adoption of a rule that conflicts with, overlaps, or
26 duplicates any other provision of federal, state, or local law
27 regulating the same activity or subject matter, an agency shall: (a)
28 File with the code reviser for publication in the Washington State
29 Register a list citing by reference the other laws that the rule
30 conflicts with, overlaps, or duplicates; (b) mitigate the adverse
31 impact of the conflict, overlap, or duplication through coordination
32 with the appropriate federal, state, or local entities; and (c) report
33 to the chief clerk of the house of representatives and the secretary of
34 the senate regarding legislation that may be necessary to mitigate the
35 conflict, overlap, or duplication, and to facilitate coordination with
36 appropriate federal, state, and local entities.

37 (3) Upon the adoption of a rule that exceeds any provision of
38 federal law regulating the same activity or subject matter, the agency

1 shall, to the extent practicable, coordinate implementation and
2 enforcement with the appropriate federal entities.

3 **Sec. 6.** RCW 34.05.620 and 1988 c 288 s 602 are each amended to
4 read as follows:

5 Whenever a majority of the members of the rules review committee
6 determines that a proposed rule is not within the intent of the
7 legislature as expressed in the statute which the rule implements, or
8 that an agency may not be adopting a proposed rule in accordance with
9 all applicable provisions of law, including section 5 of this act, the
10 committee shall give the affected agency written notice of its
11 decision. The notice shall be given at least seven days prior to any
12 hearing scheduled for consideration of or adoption of the proposed rule
13 pursuant to RCW 34.05.320. The notice shall include a statement of the
14 review committee's findings and the reasons therefor. When the agency
15 holds a hearing on the proposed rule, the agency shall consider the
16 review committee's decision.

17 **Sec. 7.** RCW 34.05.630 and 1993 c 277 s 1 are each amended to read
18 as follows:

19 (1) All rules required to be filed pursuant to RCW 34.05.380, and
20 emergency rules adopted pursuant to RCW 34.05.350, are subject to
21 selective review by the legislature.

22 (2) The rules review committee may review an agency's use of policy
23 statements, guidelines, and issuances that are of general
24 applicability, or their equivalents to determine whether or not an
25 agency has failed to adopt a rule or whether they are within the intent
26 of the legislature as expressed by the governing statute.

27 (3) If the rules review committee finds by a majority vote of its
28 members: (a) That an existing rule is not within the intent of the
29 legislature as expressed by the statute which the rule implements, (b)
30 that the rule has not been adopted in accordance with all applicable
31 provisions of law, including section 5 of this act, (c) that an agency
32 is using a policy statement, guideline, or issuance in place of a rule,
33 or (d) that the policy statement, guideline, or issuance is outside of
34 legislative intent, the agency affected shall be notified of such
35 finding and the reasons therefor. Within thirty days of the receipt of
36 the rules review committee's notice, the agency shall file notice of a
37 hearing on the rules review committee's finding with the code reviser

1 and mail notice to all persons who have made timely request of the
2 agency for advance notice of its rule-making proceedings as provided in
3 RCW 34.05.320. The agency's notice shall include the rules review
4 committee's findings and reasons therefor, and shall be published in
5 the Washington state register in accordance with the provisions of
6 chapter 34.08 RCW.

7 (4) The agency shall consider fully all written and oral
8 submissions regarding (a) whether the rule in question is within the
9 intent of the legislature as expressed by the statute which the rule
10 implements, (b) whether the rule was adopted in accordance with all
11 applicable provisions of law, including section 5 of this act, (c)
12 whether the agency is using a policy statement, guideline, or issuance
13 in place of a rule, or (d) whether the policy statement, guideline, or
14 issuance is within the legislative intent.

15 **Sec. 8.** RCW 34.05.640 and 1993 c 277 s 2 are each amended to read
16 as follows:

17 (1) Within seven days of an agency hearing held after notification
18 of the agency by the rules review committee pursuant to RCW 34.05.620
19 or 34.05.630, the affected agency shall notify the committee of its
20 action on a proposed or existing rule to which the committee objected
21 or on a committee finding of the agency's failure to adopt rules. If
22 the rules review committee determines, by a majority vote of its
23 members, that the agency has failed to provide for the required
24 hearings or notice of its action to the committee, the committee may
25 file notice of its objections, together with a concise statement of the
26 reasons therefor, with the code reviser within thirty days of such
27 determination.

28 (2) If the rules review committee finds, by a majority vote of its
29 members: (a) That the proposed or existing rule in question has not
30 been modified, amended, withdrawn, or repealed by the agency so as to
31 conform with the intent of the legislature, or (b) that an existing
32 rule was not adopted in accordance with all applicable provisions of
33 law, including section 5 of this act, or (c) that the agency is using
34 a policy statement, guideline, or issuance in place of a rule, or that
35 the policy statement, guideline, or issuance is outside of the
36 legislative intent, the rules review committee may, within thirty days
37 from notification by the agency of its action, file with the code
38 reviser notice of its objections together with a concise statement of

1 the reasons therefor. Such notice and statement shall also be provided
2 to the agency by the rules review committee.

3 (3) If the rules review committee makes an adverse finding under
4 subsection (2) of this section, the committee may, by a two-thirds vote
5 of its members, recommend suspension of an existing rule. Within seven
6 days of such vote the committee shall transmit to the governor, the
7 code reviser, and the agency written notice of its objection and
8 recommended suspension and the concise reasons therefor. Within thirty
9 days of receipt of the notice, the governor shall transmit to the
10 committee, the code reviser, and the agency written approval or
11 disapproval of the recommended suspension. If the suspension is
12 approved by the governor, it is effective from the date of that
13 approval and continues until ninety days after the expiration of the
14 next regular legislative session.

15 (4) The code reviser shall publish transmittals from the rules
16 review committee or the governor issued pursuant to subsection (1),
17 (2), or (3) of this section in the Washington state register and shall
18 publish in the next supplement and compilation of the Washington
19 Administrative Code a reference to the committee's objection or
20 recommended suspension and the governor's action on it and to the issue
21 of the Washington state register in which the full text thereof
22 appears.

23 (5) The reference shall be removed from a rule published in the
24 Washington Administrative Code if a subsequent adjudicatory proceeding
25 determines that the rule is within the intent of the legislature or was
26 adopted in accordance with all applicable laws, whichever was the
27 objection of the rules review committee.

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