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**SUBSTITUTE SENATE BILL 6266**

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**State of Washington**

**59th Legislature**

**2006 Regular Session**

**By** Senate Committee on Government Operations & Elections (originally sponsored by Senator Kastama)

READ FIRST TIME 01/30/06.

1       AN ACT Relating to county and city participation in the rule-making  
2 process; amending RCW 34.05.010 and 34.05.313; and reenacting and  
3 amending RCW 34.05.328.

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

5       **Sec. 1.** RCW 34.05.010 and 1997 c 126 s 2 are each amended to read  
6 as follows:

7       The definitions set forth in this section shall apply throughout  
8 this chapter, unless the context clearly requires otherwise.

9       (1) "Adjudicative proceeding" means a proceeding before an agency  
10 in which an opportunity for hearing before that agency is required by  
11 statute or constitutional right before or after the entry of an order  
12 by the agency. Adjudicative proceedings also include all cases of  
13 licensing and rate making in which an application for a license or rate  
14 change is denied except as limited by RCW 66.08.150, or a license is  
15 revoked, suspended, or modified, or in which the granting of an  
16 application is contested by a person having standing to contest under  
17 the law.

18       (2) "Agency" means any state board, commission, department,  
19 institution of higher education, or officer, authorized by law to make

1 rules or to conduct adjudicative proceedings, except those in the  
2 legislative or judicial branches, the governor, or the attorney general  
3 except to the extent otherwise required by law and any local  
4 governmental entity that may request the appointment of an  
5 administrative law judge under chapter 42.41 RCW.

6 (3) "Agency action" means licensing, the implementation or  
7 enforcement of a statute, the adoption or application of an agency rule  
8 or order, the imposition of sanctions, or the granting or withholding  
9 of benefits.

10 Agency action does not include an agency decision regarding (a)  
11 contracting or procurement of goods, services, public works, and the  
12 purchase, lease, or acquisition by any other means, including eminent  
13 domain, of real estate, as well as all activities necessarily related  
14 to those functions, or (b) determinations as to the sufficiency of a  
15 showing of interest filed in support of a representation petition, or  
16 mediation or conciliation of labor disputes or arbitration of labor  
17 disputes under a collective bargaining law or similar statute, or (c)  
18 any sale, lease, contract, or other proprietary decision in the  
19 management of public lands or real property interests, or (d) the  
20 granting of a license, franchise, or permission for the use of  
21 trademarks, symbols, and similar property owned or controlled by the  
22 agency.

23 (4) "Agency head" means the individual or body of individuals in  
24 whom the ultimate legal authority of the agency is vested by any  
25 provision of law. If the agency head is a body of individuals, a  
26 majority of those individuals constitutes the agency head.

27 (5) "Entry" of an order means the signing of the order by all  
28 persons who are to sign the order, as an official act indicating that  
29 the order is to be effective.

30 (6) "Filing" of a document that is required to be filed with an  
31 agency means delivery of the document to a place designated by the  
32 agency by rule for receipt of official documents, or in the absence of  
33 such designation, at the office of the agency head.

34 (7) "Institutions of higher education" are the University of  
35 Washington, Washington State University, Central Washington University,  
36 Eastern Washington University, Western Washington University, The  
37 Evergreen State College, the various community colleges, and the  
38 governing boards of each of the above, and the various colleges,

1 divisions, departments, or offices authorized by the governing board of  
2 the institution involved to act for the institution, all of which are  
3 sometimes referred to in this chapter as "institutions."

4 (8) "Interpretive statement" means a written expression of the  
5 opinion of an agency, entitled an interpretive statement by the agency  
6 head or its designee, as to the meaning of a statute or other provision  
7 of law, of a court decision, or of an agency order.

8 (9)(a) "License" means a franchise, permit, certification,  
9 approval, registration, charter, or similar form of authorization  
10 required by law, but does not include (i) a license required solely for  
11 revenue purposes, or (ii) a certification of an exclusive bargaining  
12 representative, or similar status, under a collective bargaining law or  
13 similar statute, or (iii) a license, franchise, or permission for use  
14 of trademarks, symbols, and similar property owned or controlled by the  
15 agency.

16 (b) "Licensing" includes the agency process respecting the  
17 issuance, denial, revocation, suspension, or modification of a license.

18 (10) "Mail" or "send," for purposes of any notice relating to rule  
19 making or policy or interpretive statements, means regular mail or  
20 electronic distribution, as provided in RCW 34.05.260. "Electronic  
21 distribution" or "electronically" means distribution by electronic mail  
22 or facsimile mail.

23 (11)(a) "Order," without further qualification, means a written  
24 statement of particular applicability that finally determines the legal  
25 rights, duties, privileges, immunities, or other legal interests of a  
26 specific person or persons.

27 (b) "Order of adoption" means the official written statement by  
28 which an agency adopts, amends, or repeals a rule.

29 (12) "Party to agency proceedings," or "party" in a context so  
30 indicating, means:

31 (a) A person to whom the agency action is specifically directed; or

32 (b) A person named as a party to the agency proceeding or allowed  
33 to intervene or participate as a party in the agency proceeding.

34 (13) "Party to judicial review or civil enforcement proceedings,"  
35 or "party" in a context so indicating, means:

36 (a) A person who files a petition for a judicial review or civil  
37 enforcement proceeding; or

1 (b) A person named as a party in a judicial review or civil  
2 enforcement proceeding, or allowed to participate as a party in a  
3 judicial review or civil enforcement proceeding.

4 (14) "Person" means any individual, partnership, corporation,  
5 association, governmental subdivision or unit thereof, or public or  
6 private organization or entity of any character, and includes another  
7 agency.

8 (15) "Policy statement" means a written description of the current  
9 approach of an agency, entitled a policy statement by the agency head  
10 or its designee, to implementation of a statute or other provision of  
11 law, of a court decision, or of an agency order, including where  
12 appropriate the agency's current practice, procedure, or method of  
13 action based upon that approach.

14 (16) "Public" includes county and city governments.

15 (17) "Rule" means any agency order, directive, or regulation of  
16 general applicability (a) the violation of which subjects a person to  
17 a penalty or administrative sanction; (b) which establishes, alters, or  
18 revokes any procedure, practice, or requirement relating to agency  
19 hearings; (c) which establishes, alters, or revokes any qualification  
20 or requirement relating to the enjoyment of benefits or privileges  
21 conferred by law; (d) which establishes, alters, or revokes any  
22 qualifications or standards for the issuance, suspension, or revocation  
23 of licenses to pursue any commercial activity, trade, or profession; or  
24 (e) which establishes, alters, or revokes any mandatory standards for  
25 any product or material which must be met before distribution or sale.  
26 The term includes the amendment or repeal of a prior rule, but does not  
27 include (i) statements concerning only the internal management of an  
28 agency and not affecting private rights or procedures available to the  
29 public, (ii) declaratory rulings issued pursuant to RCW 34.05.240,  
30 (iii) traffic restrictions for motor vehicles, bicyclists, and  
31 pedestrians established by the secretary of transportation or his  
32 designee where notice of such restrictions is given by official traffic  
33 control devices, or (iv) rules of institutions of higher education  
34 involving standards of admission, academic advancement, academic  
35 credit, graduation and the granting of degrees, employment  
36 relationships, or fiscal processes.

37 ((+17)) (18) "Rules review committee" or "committee" means the

1 joint administrative rules review committee created pursuant to RCW  
2 34.05.610 for the purpose of selectively reviewing existing and  
3 proposed rules of state agencies.

4 ~~((18))~~ (19) "Rule making" means the process for formulation and  
5 adoption of a rule.

6 ~~((19))~~ (20) "Service," except as otherwise provided in this  
7 chapter, means posting in the United States mail, properly addressed,  
8 postage prepaid, or personal service. Service by mail is complete upon  
9 deposit in the United States mail. Agencies may, by rule, authorize  
10 service by electronic telefacsimile transmission, where copies are  
11 mailed simultaneously, or by commercial parcel delivery company.

12 **Sec. 2.** RCW 34.05.313 and 1995 c 403 s 303 are each amended to  
13 read as follows:

14 (1)(a) During the development of a rule or after its adoption, an  
15 agency may develop methods for measuring or testing the feasibility of  
16 complying with or administering the rule and for identifying simple,  
17 efficient, and economical alternatives for achieving the goal of the  
18 rule. When the interests of a county or city are or could reasonably  
19 be affected by a subject of rule making, and the agency determines that  
20 pilot rule making is appropriate, the agency shall invite all affected  
21 counties and cities to participate in a pilot rule project. If any  
22 affected county or city accepts the invitation to participate, then the  
23 agency and the participating counties and cities shall jointly develop  
24 a pilot rule project.

25 (b) A pilot project shall include public notice, participation by  
26 volunteers who are or will be subject to the rule, a high level of  
27 involvement from agency management, reasonable completion dates, and a  
28 process by which one or more parties may withdraw from the process or  
29 the process may be terminated. Volunteers who agree to test a rule and  
30 attempt to meet the requirements of the draft rule, to report  
31 periodically to the proposing agency on the extent of their ability to  
32 meet the requirements of the draft rule, and to make recommendations  
33 for improving the draft rule shall not be obligated to comply fully  
34 with the rule being tested nor be subject to any enforcement action or  
35 other sanction for failing to comply with the requirements of the draft  
36 rule.

1 (2) An agency conducting a pilot rule project authorized under  
2 subsection (1) of this section may waive one or more provisions of  
3 agency rules otherwise applicable to participants in such a pilot  
4 project if the agency first determines that such a waiver is in the  
5 public interest and necessary to conduct the project. Such a waiver  
6 may be only for a stated period of time, not to exceed the duration of  
7 the project.

8 (3) The findings of the pilot project should be widely shared and,  
9 where appropriate, adopted as amendments to the rule.

10 (4) If an agency conducts a pilot rule project in lieu of meeting  
11 the requirements of the regulatory fairness act, chapter 19.85 RCW, the  
12 agency shall ensure the following conditions are met:

13 (a) If over ten small businesses are affected, there shall be at  
14 least ten small businesses in the test group and at least one-half of  
15 the volunteers participating in the pilot test group shall be small  
16 businesses.

17 (b)(i) If there are at least one hundred businesses affected, the  
18 participation by small businesses in the test group shall be as  
19 follows:

20 (A) Not less than twenty percent of the small businesses must  
21 employ twenty-six to fifty employees;

22 (B) Not less than twenty percent of the small businesses must  
23 employ eleven to twenty-six employees; and

24 (C) Not less than twenty percent of the small businesses must  
25 employ zero to ten employees.

26 (ii) If there do not exist a sufficient number of small businesses  
27 in each size category set forth in (b)(i) of this subsection willing to  
28 participate in the pilot project to meet the minimum requirements of  
29 that subsection, then the agency must comply with this section to the  
30 maximum extent practicable.

31 (c) The agency may not terminate the pilot project before  
32 completion.

33 (d) Before filing the notice of proposed rule making pursuant to  
34 RCW 34.05.320, the agency must prepare a report of the pilot rule  
35 project that includes:

36 (i) A description of the difficulties small businesses had in  
37 complying with the pilot rule;

1 (ii) A list of the recommended revisions to the rule to make  
2 compliance with the rule easier or to reduce the cost of compliance  
3 with the rule by the small businesses participating in the pilot rule  
4 project;

5 (iii) A written statement explaining the options it considered to  
6 resolve each of the difficulties described and a statement explaining  
7 its reasons for not including a recommendation by the pilot test group  
8 to revise the rule; and

9 (iv) If the agency was unable to meet the requirements set forth in  
10 (b)(i) of this subsection, a written explanation of why it was unable  
11 to do so and the steps the agency took to include small businesses in  
12 the pilot project.

13 **Sec. 3.** RCW 34.05.328 and 2003 c 165 s 2 and 2003 c 39 s 13 are  
14 each reenacted and amended to read as follows:

15 (1) Before adopting a rule described in subsection (5) of this  
16 section, an agency shall:

17 (a) Clearly state in detail the general goals and specific  
18 objectives of the statute that the rule implements;

19 (b) Determine that the rule is needed to achieve the general goals  
20 and specific objectives stated under (a) of this subsection, and  
21 analyze alternatives to rule making and the consequences of not  
22 adopting the rule;

23 (c) Provide notification in the notice of proposed rule making  
24 under RCW 34.05.320 that a preliminary cost-benefit analysis is  
25 available. The preliminary cost-benefit analysis must fulfill the  
26 requirements of the cost-benefit analysis under (d) of this subsection.  
27 If the agency files a supplemental notice under RCW 34.05.340, the  
28 supplemental notice shall include notification that a revised  
29 preliminary cost-benefit analysis is available. A final cost-benefit  
30 analysis shall be available when the rule is adopted under RCW  
31 34.05.360;

32 (d)(i) Determine that the probable benefits of the rule are greater  
33 than its probable costs, taking into account both the qualitative and  
34 quantitative benefits and costs and the specific directives of the  
35 statute being implemented;

36 (ii) In the case of costs and benefits to counties and cities when  
37 counties and cities are required to comply with the rule, the analysis

1 shall be tailored to reflect that the cost of compliance is more or  
2 less affordable by counties and cities dependant on various factors.  
3 For purposes of this subsection, counties and cities able to afford the  
4 costs of regulation shall be determined in descending order, either  
5 individually or by groupings not to be less than five groups,  
6 biennially by the office of financial management by taking into  
7 consideration population, population growth, population density on  
8 taxable land, median income, property tax revenues, sales tax revenues,  
9 and general fund budget of the county or city. The ranking of the  
10 county or city required to comply with the rule shall be considered by  
11 the agency in determination of the ability of the county or city to  
12 comply with the rule. The less able a county or city is to afford  
13 compliance, the greater the cost to the county or city of compliance.  
14 Nothing in this subsection shall be construed to diminish the agency's  
15 decision-making authority in determining whether the probable benefits  
16 of the rule exceed the probable costs;

17 (e) Determine, after considering alternative versions of the rule  
18 and the analysis required under (b), (c), and (d) of this subsection,  
19 that the rule being adopted is the least burdensome alternative for  
20 those required to comply with it that will achieve the general goals  
21 and specific objectives stated under (a) of this subsection;

22 (f) Determine that the rule does not require those to whom it  
23 applies to take an action that violates requirements of another federal  
24 or state law;

25 (g) Determine that the rule does not impose more stringent  
26 performance requirements on private entities than on public entities  
27 unless required to do so by federal or state law;

28 (h) Determine if the rule differs from any federal regulation or  
29 statute applicable to the same activity or subject matter and, if so,  
30 determine that the difference is justified by the following:

31 (i) A state statute that explicitly allows the agency to differ  
32 from federal standards; or

33 (ii) Substantial evidence that the difference is necessary to  
34 achieve the general goals and specific objectives stated under (a) of  
35 this subsection; and

36 (i) Coordinate the rule, to the maximum extent practicable, with  
37 other federal, state, and local laws applicable to the same activity or  
38 subject matter.

1 (2) In making its determinations pursuant to subsection (1)(b)  
2 through (h) of this section, the agency shall place in the rule-making  
3 file documentation of sufficient quantity and quality so as to persuade  
4 a reasonable person that the determinations are justified.

5 (3) Before adopting rules described in subsection (5) of this  
6 section, an agency shall place in the rule-making file a rule  
7 implementation plan for rules filed under each adopting order. The  
8 rule implementation plan shall describe all counties and cities  
9 included within the purview of the proposed rule. For the rules that  
10 impact the included counties and cities, the rule implementation plan  
11 shall be prepared by the agency in consultation with the included  
12 cities and counties. The plan shall describe how the agency intends  
13 to:

14 (a) Implement and enforce the rule, including a description of the  
15 resources the agency intends to use;

16 (b) Inform and educate affected persons about the rule;

17 (c) Promote and assist voluntary compliance; and

18 (d) Evaluate whether the rule achieves the purpose for which it was  
19 adopted, including, to the maximum extent practicable, the use of  
20 interim milestones to assess progress and the use of objectively  
21 measurable outcomes.

22 (4) After adopting a rule described in subsection (5) of this  
23 section regulating the same activity or subject matter as another  
24 provision of federal or state law, an agency shall do all of the  
25 following:

26 (a) Provide to the business assistance center a list citing by  
27 reference the other federal and state laws that regulate the same  
28 activity or subject matter;

29 (b) Coordinate implementation and enforcement of the rule with the  
30 other federal (~~and~~), state, and local entities regulating the same  
31 activity (~~or~~), subject matter, or geographic location by making every  
32 effort to do one or more of the following:

33 (i) Deferring to the other entity;

34 (ii) Designating a lead agency; or

35 (iii) Entering into an agreement with the other entities specifying  
36 how the agency and entities will coordinate implementation and  
37 enforcement.

1 If the agency is unable to comply with this subsection (4)(b), the  
2 agency shall report to the legislature pursuant to (c) of this  
3 subsection;

4 (c) Report to the joint administrative rules review committee:

5 (i) The existence of any overlap or duplication of other federal or  
6 state laws, any differences from federal law, and any known overlap,  
7 duplication, or conflict with local laws; and

8 (ii) Make recommendations for any legislation that may be necessary  
9 to eliminate or mitigate any adverse effects of such overlap,  
10 duplication, or difference.

11 For purposes of this subsection, "local entities" means counties  
12 and cities.

13 (5)(a) Except as provided in (b) of this subsection, this section  
14 applies to:

15 (i) Significant legislative rules of the departments of ecology,  
16 labor and industries, health, revenue, social and health services, and  
17 natural resources, the employment security department, the forest  
18 practices board, the office of the insurance commissioner, and to the  
19 legislative rules of the department of fish and wildlife implementing  
20 chapter 77.55 RCW; and

21 (ii) Any rule of any agency, if this section is voluntarily made  
22 applicable to the rule by the agency, or is made applicable to the rule  
23 by a majority vote of the joint administrative rules review committee  
24 within forty-five days of receiving the notice of proposed rule making  
25 under RCW 34.05.320.

26 (b) This section does not apply to:

27 (i) Emergency rules adopted under RCW 34.05.350;

28 (ii) Rules relating only to internal governmental operations that  
29 are not subject to violation by a nongovernment party;

30 (iii) Rules adopting or incorporating by reference without material  
31 change federal statutes or regulations, Washington state statutes,  
32 rules of other Washington state agencies, shoreline master programs  
33 other than those programs governing shorelines of statewide  
34 significance, or, as referenced by Washington state law, national  
35 consensus codes that generally establish industry standards, if the  
36 material adopted or incorporated regulates the same subject matter and  
37 conduct as the adopting or incorporating rule;

1 (iv) Rules that only correct typographical errors, make address or  
2 name changes, or clarify language of a rule without changing its  
3 effect;

4 (v) Rules the content of which is explicitly and specifically  
5 dictated by statute;

6 (vi) Rules that set or adjust fees or rates pursuant to legislative  
7 standards; or

8 (vii) Rules of the department of social and health services  
9 relating only to client medical or financial eligibility and rules  
10 concerning liability for care of dependents.

11 (c) For purposes of this subsection:

12 (i) A "procedural rule" is a rule that adopts, amends, or repeals  
13 (A) any procedure, practice, or requirement relating to any agency  
14 hearings; (B) any filing or related process requirement for making  
15 application to an agency for a license or permit; or (C) any policy  
16 statement pertaining to the consistent internal operations of an  
17 agency.

18 (ii) An "interpretive rule" is a rule, the violation of which does  
19 not subject a person to a penalty or sanction, that sets forth the  
20 agency's interpretation of statutory provisions it administers.

21 (iii) A "significant legislative rule" is a rule other than a  
22 procedural or interpretive rule that (A) adopts substantive provisions  
23 of law pursuant to delegated legislative authority, the violation of  
24 which subjects a violator of such rule to a penalty or sanction; (B)  
25 establishes, alters, or revokes any qualification or standard for the  
26 issuance, suspension, or revocation of a license or permit; or (C)  
27 adopts a new, or makes significant amendments to, a policy or  
28 regulatory program.

29 (d) In the notice of proposed rule making under RCW 34.05.320, an  
30 agency shall state whether this section applies to the proposed rule  
31 pursuant to (a)(i) of this subsection, or if the agency will apply this  
32 section voluntarily.

33 (6) By January 31, 1996, and by January 31st of each even-numbered  
34 year thereafter, the office of financial management, after consulting  
35 with state agencies, counties, and cities, and business, labor, and  
36 environmental organizations, shall report to the governor and the  
37 legislature regarding the effects of this section on the regulatory  
38 system in this state. The report shall document:

- 1           (a) The rules proposed to which this section applied and to the  
2 extent possible, how compliance with this section affected the  
3 substance of the rule, if any, that the agency ultimately adopted;
- 4           (b) The costs incurred by state agencies in complying with this  
5 section;
- 6           (c) Any legal action maintained based upon the alleged failure of  
7 any agency to comply with this section, the costs to the state of such  
8 action, and the result;
- 9           (d) The extent to which this section has adversely affected the  
10 capacity of agencies to fulfill their legislatively prescribed mission;
- 11           (e) The extent to which this section has improved the acceptability  
12 of state rules to those regulated; and
- 13           (f) Any other information considered by the office of financial  
14 management to be useful in evaluating the effect of this section.

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