HOUSE BILL REPORT
ESHB 1010

As Amended by Senate

Title: An act relating to regulatory reform.

Brief Description: Implementing regulatory reform.

Sponsors: By House Committee on Government Operations (originally sponsored by Representatives Reams, Horn, Lisk, Cairnes, Dyer, Van Luven, Ballasiotes, Buck, Casada, D. Schmidt, B. Thomas, Chandler, L. Thomas, Brumsickle, Sehlin, Sherstad, Carlson, Benton, Skinner, Kremen, Hargrove, Cooke, Delvin, Schoesler, Johnson, Thompson, Beeksma, Goldsmith, Radcliff, Hickel, Backlund, Crouse, Elliot, Pennington, Mastin, Carrell, Mitchell, K. Schmidt, Chappell, Basich, Grant, Smith, Robertson, Foreman, Honeyford, Pelesky, Blanton, Koster, Lambert, Mulliken, Boldt, McMorris, Clements, Fuhrman, Campbell, Sheldon, Huff, Mielke, Talcott, Silver, McMahan, Stevens, Morris and Hymes).

Brief History:
Committee Activity:
Government Operations: 1/11/95, 1/17/95 [DPS].
Floor Activity:
Passed House: 2/1/95, 64-32.
Senate Amended.

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Reams, Chair; Goldsmith, Vice Chair; L. Thomas, Vice Chair; Hargrove; Honeyford; Hymes; Mulliken; D. Schmidt and Van Luven.

Minority Report: Do not pass. Signed by 6 members: Representatives Rust, Ranking Minority Member; Scott, Assistant Ranking Minority Member; Chopp; R. Fisher; Sommers and Wolfe.

Staff: Bonnie Austin (786-7135).

Background: During the 1994 legislative session, the Legislature passed E2SHB 2510. The bill made substantial changes to the state agency rule-making process, the legislative review of rules, the regulatory fairness act, and state agency technical

assistance. The Governor, who was conducting an executive branch task force on regulatory reform, vetoed numerous sections of the bill. In June, the Governor issued an executive order incorporating some of the vetoed elements into executive policy. The Governor's task force completed its process in December and made final recommendations.

GRANTS OF RULE-MAKING AUTHORITY: The enabling statutes of many state agencies grant those agencies general authority to adopt rules. Typically, the language used will authorize rules "necessary or appropriate to carry out the provisions of this act," or "necessary or desirable to carry out the powers and duties imposed by the legislature." There is concern that some agencies have used these general grants of authority, without further legislative guidance or authorization, to regulate matters that the Legislature did not intend to regulate.

RULE-MAKING REQUIREMENTS: The state Administrative Procedure Act (APA) details procedures that state agencies are required to follow when adopting rules. First, an agency is required to prepare a "statement of intent" and solicit comments from the public on a subject of possible rule-making. When the agency is ready to hold a hearing on a proposed rule, it publishes a notice in the state register. A hearing is held and comments are received. An agency is required to consider, summarize, and respond to the oral and written comments it receives. The agency may then withdraw the rule, modify it, or adopt the rule as proposed.

The APA encourages agencies to use new procedures for reaching agreement among interested parties before publishing a notice of a proposed rule adoption. One of these new methods is measuring or testing the feasibility of compliance with a rule with a pilot study group or pilot project.

Agencies are required to maintain a rule-making file for each rule that it proposes or adopts. This file and the materials it incorporates must be available for public inspection. Among other items, the file must contain: all written comments received by the agency on the proposed rule adoption; a written summary of those comments and a substantive response by category or subject matter; a transcript or recording of presentations made during rule-making proceedings and any memorandum prepared summarizing the presentations; petitions for exceptions to, amendment of, or repeal or suspension of the rule; a concise explanatory statement identifying the agency's reasons for adopting a rule and a description of any differences between the proposed and adopted rule; documents publicly cited by the agency in connection with its decision; and citations to data and factual information relied on in rule adoption. Unless otherwise required by law, the rule-making file need not be the exclusive basis for agency action on a rule.

A court may invalidate an agency rule if it determines that the rule "could not conceivably have been the product of a rational decision maker." The state Supreme

Court has interpreted this language to be the equivalent of the familiar "arbitrary and capricious" standard.

Any person may petition a state agency to adopt, amend, or repeal a rule. Within 60 days, the agency is required to either deny the petition and state the reasons for the denial, or initiate rule-making proceedings.

REGULATORY FAIRNESS: The Regulatory Fairness Act was adopted to minimize the proportionally higher impact of state agency rules on small businesses. When a proposed rule will impose more than minor costs on more than 20 percent of all industries, or more than 10 percent of any one industry, the agency is required to: (1) reduce the economic impact of the rule on small businesses; and (2) prepare a small business economic impact statement (SBEIS). As part of the notice of a proposed rule adoption, an agency must file notice of how a copy of the SBEIS can be obtained.

Agencies may reduce the impact of rules by exempting small businesses from some or all of the requirements of the rule, simplifying compliance or reporting requirements for small businesses, establishing different timetables for small businesses, reducing or modifying fine schedules for noncompliance, or establishing performance rather than design standards.

LEGISLATIVE REVIEW OF RULES: The Joint Administrative Rules Review Committee (JARRC) is an eight-member bipartisan legislative committee established to selectively review proposed and existing state agency rules. JARRC is authorized to recommend the suspension of an agency rule when it finds that the rule does not conform with the intent of the Legislature or was not adopted in compliance with applicable provisions of law. The Governor is required to approve or disapprove the recommended suspension within 30 days. If the Governor approves the suspension, the suspension is effective until 90 days after the expiration of the next regular legislative session. A JARRC suspension recommendation does not establish a presumption as to the legality or constitutionality of the rule in subsequent judicial proceedings.

TECHNICAL ASSISTANCE: The Department of Labor and Industries operates a voluntary compliance program that provides on-site or other types of consultations to employers regarding their compliance with health and safety standards. These visits are not regarded as inspections, nor is any enforcement action taken unless a serious violation is found and the violation is not or cannot be satisfactorily abated by the employer.

The Department of Ecology operates a similar program that provides on-site consultation to businesses to help them comply with environmental regulations. The technical assistance officer may report violations to enforcement personnel within the

department, but may not take enforcement action unless persons or property are at risk of substantial harm.

FEES AND EXPENSES: Under federal law, the prevailing party in any civil action brought by or against the United States may be awarded costs and attorneys' fees. However, if the court finds that the position of the United States was substantially justified, or that special circumstances make an award unjust, fees and costs may not be awarded. Additionally, the court is directed to reduce the amount to be awarded to the extent that the prevailing party engaged in conduct which unduly and unreasonably protracted resolution of the case.

REFERENDUM: Under Article II, section 1 of the Washington State Constitution, the Legislature may order a referendum on a bill passed by the Legislature. Referendum bills are filed with the Secretary of State and submitted to the people at the next succeeding regular general election. The veto power of the Governor does not extend to acts referred to the people.

Summary of Bill: GRANTS OF RULE-MAKING AUTHORITY: The general grants of rule-making authority to the following state agencies are repealed: the Department of Health, the Department of Revenue, the Department of Ecology, the Department of Labor and Industries, the Department of Licensing, the Department of Employment Security, the Department of Social and Health Services, the Department of Agriculture, the Forest Practices Board, the Commissioner of Public Lands, the Wildlife Commission, and the Office of Insurance Commissioner. These agencies may only adopt rules as specifically required by federal law or as specifically authorized by the Legislature. These limitations do not apply to emergency rules. Courts are directed to narrowly construe grants of rule-making authority to all state agencies.

RULE-MAKING REQUIREMENTS: An agency "statement of intent" must identify other agencies that have rule-making authority over the subject matter or activity of a new rule and describe the process for coordination with those agencies.

Current law related to pilot projects is clarified. Volunteers who agree to test a rule cannot be issued a penalty or any other sanction for failure to comply with the draft rule. Agencies are authorized to use the pilot rule process in lieu of preparing a small business economic impact statement. If an agency chooses to do this, requirements for small business participation in the pilot process must be met. Prior to filing notice of a proposed rule-making, agencies are required to produce a report of the pilot project.

The rule-making file must contain evidence that a rule is: authorized; necessary; cost-effective; consistent with and not duplicated by other federal, state, or local laws; enforceable; targeted; measurable; the least burdensome alternative; and not in excess

of federal law as it existed on January 1, 1995, unless authorized by state statute. Courts are directed to review compliance with this requirement under a new "substantial evidence" standard. Agencies are not required to place the evidence in the rule-making file when adopting emergency rules if they provide a reasonable justification in writing for failing to do so.

The rule-making file is the exclusive basis for agency action on a rule. The current "conceivably the product of a rational decision maker" language is changed to "arbitrary and capricious" to conform with judicial interpretation.

Upon the adoption of a rule, agencies are required to inform and educate affected persons about the rule and promote voluntary compliance. If the rule regulates the same subject matter or activity as another provision of federal, state, or local law, agencies are required to: (1) provide the Business Assistance Center with a listing of those other laws; (2) coordinate implementation with the other federal, state and local entities by either deferring to the other entity, designating a lead agency, or entering into an agreement to coordinate implementation and enforcement; and (3) report to the Legislature regarding statutory changes that may be necessary.

Rules adopted by the following agencies are given a maximum life span of seven years: the Department of Health, the Department of Revenue, the Department of Ecology, the Department of Labor and Industries, the Department of Licensing, the Department of Employment Security, the Department of Social and Health Services, the Department of Fish and Wildlife, the Forest Practices Board, the Commissioner of Public Lands, and the Office of Insurance Commissioner. These agencies and the Department of Agriculture are required to review their existing rules on a schedule over the next seven years.

If an agency under the Governor's authority denies a petition to repeal or amend a rule, the petitioner may appeal to the Governor. The Governor is required to respond to the appeal within 60 days, and file the response with the Regulatory Oversight Committee and the code reviser for publication in the state register. Criteria for the Governor to consider when ruling on the appeal are included.

REGULATORY FAIRNESS: The qualification that a Small Business Economic Impact Statement (SBEIS) need only be prepared when a rule impacts more than 20 percent of all industries or 10 percent of any one industry is repealed. A SBEIS must be prepared whenever a rule will impose more than minor costs on businesses in an industry. "More than minor costs" is defined as equal to or exceeding 0.1 percent of the average yearly profit for businesses in the industry.

The SBEIS must be filed with the code reviser along with the notice of a proposed rule. A SBEIS prepared at the request of the Regulatory Oversight Committee must be filed with the code reviser before the adoption of a rule.

Based on the extent of disproportionate impact identified in the SBEIS, agencies are required to reduce the costs imposed by rules on small businesses if legal and possible to do so. Current methods for reducing the impact are repealed and new methods for reducing the impact are authorized.

Unless a SBEIS is requested by the Regulatory Oversight Committee, an agency is not required to prepare a SBEIS when adopting a rule solely for the purpose of complying with federal law or regulations. Instead of the SBEIS, the agency must file with the code reviser a statement specifically citing the federal law or regulation, and describing the consequences to the state if the rule is not adopted.

LEGISLATIVE REVIEW OF RULES: The name of the Joint Administrative Rules Review Committee (JARRC) is changed to the Legislative Regulatory Oversight Committee (LROC). The sections of law establishing the committee are recodified as a separate chapter of law.

LROC may not render a decision on a rule unless a quorum of five members is present. Once a quorum is established, a majority of the quorum may render any decision except a suspension recommendation. A suspension recommendation requires a majority of LROC membership.

Upon filing notice of a proposed rule, agencies are required to send three copies of the proposed rule, as well as the evidence required by this act to be placed in the rule-making file, to LROC. LROC is required to send copies of all proposed rules, and all existing rules that it is reviewing, to the appropriate standing committee of the Legislature. Standing committees are required to make a recommendation on the rule within 60 days of the referral, and forward that recommendation to LROC.

Any person potentially impacted by a proposed rule or currently impacted by an existing rule may petition for LROC review. LROC is required to acknowledge receipt of the petition and describe the initial action taken, or the reasons for the rejection of the petition, within 30 days. LROC is required to make a final decision on the rule within 90 days of the receipt of the petition.

LROC may recommend to the Legislature the amendment or repeal of original enabling legislation serving as authority for the adoption of any rule it reviews. This recommendation may be submitted in the form of request legislation.

A LROC recommendation to suspend a rule establishes a presumption in any subsequent judicial review of the rule that the rule is invalid. In this case, the burden of demonstrating the rule's validity is on the adopting agency.

LROC is required to keep complete minutes of its meetings. It is authorized to establish ad hoc advisory boards and to hire staff as needed. LROC is granted the

authority to issue subpoenas and compel the attendance of witnesses and the production of documents. In the case of a refusal to comply with a LROC subpoena or request to testify, the superior court is directed to compel obedience by proceedings for contempt.

Any individual employed or holding office in any state agency may submit rules warranting review to LROC. State employees who identify rules warranting review or provide information to LROC are protected from retaliation under state employee whistle blower provisions.

TECHNICAL ASSISTANCE: The Department of Health, the Department of Revenue, the Department of Ecology, the Department of Labor and Industries, the Department of Licensing, the Department of Employment Security, the Department of Fish and Wildlife, the Department of Agriculture, and the Office of Insurance Commissioner are prohibited from immediately issuing a penalty for the violation of a rule unless the violation was willful. Instead, the agency will issue a "statement of deficiency" that will specify the rule violated, suggested actions, technical assistance personnel contacts, and a negotiated date when the entity will be revisited. At the revisit, the technical assistance personnel will assess compliance, make further recommendations for action, and set a date for compliance. Noncompliance by the date specified subjects the entity to the penalty otherwise provided by law.

The prohibition against immediately issuing penalties does not apply to any violation that: places a person in danger of death or substantial bodily harm; is causing or is likely to cause significant environmental harm; or has caused or is likely to cause property damage exceeding $1,000.

Agencies who are enforcing federally delegated laws or regulations are required to submit a written petition to the appropriate federal agency for authorization to comply with these requirements. If federal approval is not granted, the agency will only comply with these requirements once the minimum number of inspections necessary to retain federal enforcement delegation has been achieved.

Enforcement personnel in the Department of Health, the Department of Revenue, the Department of Ecology, the Department of Labor and Industries, the Department of Licensing, the Department of Employment Security, the Department of Social and Health Services, the Department of Fish and Wildlife, the Department of Natural Resources, and the Office of Insurance Commissioner are converted to technical assistance personnel. However, this requirement does not apply where enforcement personnel are required to maintain the state's authority to administer a federally delegated program.

FEES AND EXPENSES: Qualified parties who successfully challenge a rule will be awarded fees and expenses not exceeding $10,000. Qualified parties include:

individuals whose net worth does not exceed $1 million; a sole owner of an unincorporated business or organization whose net worth does not exceed $5 million, except that certain nonprofits and agricultural cooperatives are eligible regardless of net worth; or the sole owner of an unincorporated business or organization having not more than 100 employees. Fees and expenses to be awarded include reasonable attorneys' fees (generally limited to $150 per hour), expert witness expenses, and costs of studies or other projects or tests found by the court to be necessary for preparation of the party's case.

Awarded fees and expenses will be paid from the operating funds appropriated to the agency that adopted the invalid rule. Payments will be reported to the Office of Financial Management (OFM). Interest will accrue at the rate of 1 percent per month. OFM is required to report annually to the Legislature on the amount of fees and expenses awarded.

REFERENDUM: This act will be submitted to the people for their approval or rejection at the November 1995 general election.

EFFECT OF SENATE AMENDMENT(S):

GRANTS OF RULE-MAKING AUTHORITY: **The departments of Health, Revenue, Agriculture, Ecology, Licensing, Employment Security, Social and Health Services, Labor and Industries, the Fish and Wildlife Commission, the Forest Practices Board, the Commissioner of Public Lands, and the Insurance Commissioner are prohibited from relying solely on a statement of intent and/or on the agency's enabling provisions as authority to adopt a rule. All other agencies are prohibited from adopting rules based solely on enabling provisions and/or intent language when implementing future statutes.**

The Insurance Commissioner's authority to adopt rules defining unfair methods of competition or unfair or deceptive acts or practices is repealed. The Legislature will define these methods, acts, and practices by statute.

RULE-MAKING REQUIREMENTS**: When adopting significant legislative rules, the departments of Ecology, Labor and Industries, Revenue, Employment Security, Health, Natural Resources, the Forest Practices Board and the Insurance Commissioner must make certain determinations. The Department of Fish and Wildlife must also make these determinations when adopting certain hydraulics rules. Additionally, the Joint Administrative Rules Review Committee (JARRC) may require that any rule of any agency be subject to these determinations.**

For all of these rules, the agency must determine that the rule is needed to achieve statutory goals; probable benefits must outweigh probable costs; the rule

must be the least burdensome alternative; the rule most not conflict with federal or state law; the rule must not treat public and private entities differently; and any differences from federal law must be explicitly authorized, or justified by substantial evidence that the difference is necessary to meet statutory objectives. The agency is required to place documentation in the rule-making file of sufficient quantity and quality so as to persuade a reasonable person that these determinations are justified.

Until July 1, 1999, when adopting Clean Air Act rules, the Department of Ecology must consider additional factors when exceeding or preceding federal standards, unless those differences are explicitly authorized by the Legislature.

For all of the rules subject to the determinations, prior to adoption, a rule implementation plan must be developed and rules must be coordinated, to the maximum extent practicable, with other applicable federal, state and local laws. After adoption, the agency is required to make every effort to coordinate with federal and state entities by deferring, designating a lead agency, or entering into a coordination agreement. If an agency is unable to comply with the coordination requirement, it is required to report to JARRC.

Every two years, the Office of Financial Management (OFM) is required to report on the effects of the above new rule-making requirements.

The "statement of intent" is changed to the "statement of inquiry." The statement must include the process for coordination with other federal and state agencies. Specified rules are exempt from compliance with the statement of inquiry process. Processes are established for the expedited repeal of obsolete or redundant agency rules and for converting interpretive and policy statements into rules. The seven-year sunset and review of specified agency rules is deleted. The code reviser is required to issue a quarterly publication on state rule-making activity.

A petitioner whose request to adopt, repeal, or amend a rule has been denied by an agency may appeal to Governor within 30 days of the denial. The Governor is required to respond within 45 days. OFM is required to develop a standardized petition format. An agency denial of a petition must address the petitioner's concerns.

REGULATORY FAIRNESS ACT: **An agency is not required to prepare a small business economic impact statement for rules subject to expedited repeal or rules not subject to the "statement of inquiry" process. The Business Assistance Center will define minor impact. Where legal and feasible, agencies are required to reduce costs imposed on small businesses.**

JOINT ADMINISTRATIVE RULES REVIEW COMMITTEE: **The name of the committee will not be changed. Appropriate standing committees are directed to study alternatives to JARRC, rather than review proposed rules.**

TECHNICAL ASSISTANCE: **All agencies must develop programs to encourage voluntary compliance by providing technical assistance, including technical assistance visits. Agencies, however, are not obligated to conduct technical assistance visits.**

A technical assistant visit is defined and the terms of such a visit are established. Except for repeat, serious, or other listed violations, agencies are required to provide those being visited a reasonable period of time to correct violations identified during the visit. If identified violations are not corrected within the specified time, the penalty otherwise provided may be imposed.

Except in the case of repeat or serious violations, the Department of Ecology, in the course of a site inspection that is not a technical assistance visit, is allowed to issue a notice of correction instead of immediately imposing a civil penalty. The civil penalty may be imposed if compliance with the notice of correction is not achieved by the date provided.

The provisions applicable to the Department of Ecology are also made applicable to the departments of Agriculture, Fish and Wildlife, Health, Licensing, and Natural Resources. However, for these agencies they apply only with respect to inspections of individuals, and businesses employing 50 or less, and do not apply to fish and wildlife rules dealing with fish and wildlife seasons, catch limits, gear types, and geographical areas.

The Department of Labor and Industries, following a compliance inspection, may issue citations for violations of industrial safety and health standards but the citation cannot assess a penalty if the violations are determined not to be of a serious nature, are not previously cited, are not willful, and do not have a mandatory penalty under the Industrial Safety and Health Act.

The departments of Revenue, Labor and Industries, and Employment Security are required to undertake an educational program directed at those who have the most difficulty in determining their tax or premium liability. These agencies must also develop and administer a pilot voluntary audit program, and review the penalties they issue related to taxes or premiums to determine if they are consistent, and provide for waivers in appropriate circumstances.

Any of the technical assistance provisions that conflict with federal requirements are inoperative. The Governor and the Legislature are to be notified regarding any such conflict.

Every two years until the year 2000, OFM is required to study the effects of the technical assistance provisions on the regulatory system of the state.

Fees and Expenses: **Qualified parties who successfully challenge an agency action may be awarded fees and expenses not exceeding $25,000. Qualified parties include individuals whose net worth does not exceed $1 million, and a sole owner of an unincorporated business or organization whose net worth does not exceed $5 million. Certain nonprofits and agricultural cooperatives are eligible regardless of net worth. A court may reduce or deny an award if it finds the agency action was substantially justified or that the qualified party unduly protracted final resolution of the dispute.**

Business License Information: **By December 31, 1995, the Department of Licensing is to develop a plan for a statewide license information management system and for a combined licensing program.**

By December 31, 1996, the Department of Licensing is to expand the license information management system in order to provide on-line local, state, and federal business registration and licensing requirements.

By June 30, 1997, the Department of Licensing is to have a combined licensing project fully operational in at least two cities within the state.

A $5 fee currently charged to receive a license information packet from the Department of Licensing is removed.

Miscellaneous: **The provisions related to business license information and appealing a denial of a petition to the Governor are null and void unless funded in the budget. The referendum clause is deleted. The act will take effect 90 days after adjournment of the session in which the bill is passed.**

Appropriation: None.

Fiscal Note: Available.

Effective Date of Bill: Thirty days after the election at which the referendum bill is approved (December 7, 1995).

Testimony For: Agencies need to have more specific standards for rule-making. Agencies should not be allowed to adopt rules that are more stringent than federal rules unless the Legislature has authorized it. Enhanced judicial review must be paired with attorneys' fees or the new provisions are useless to small businesses. The seven-year review of existing rules is necessary.

Last year's bill was a weak first step, but even that was vetoed by the Governor. We need to send this issue to the people. Businesses will leave the state if they don't obtain some relief from oppressive regulations. The number of regulations has increased dramatically over the last two decades. The enhancement of LROC is needed to better oversee agency regulators.

Some agency enforcement personnel have been unfair and unreasonable. It is impossible for small business owners to be aware of all the rules affecting their businesses. Businesses should be given technical assistance prior to enforcement.

Testimony Against: The committee should consider the task force proposal. The attorney fee section is income security for lawyers. Don't abandon enforcement when providing technical assistance. The sunset of rules that aren't a problem wastes taxpayer dollars. The new criteria should only apply to legislative rules. Eliminating enforcement abdicates our responsibility as public servants.

It is critical for agencies to be able to adopt rules that go beyond the federal standards. The fall protection standards that apply to Kingdome workers is beyond the federal standards. This bill will undermine environmental and public health protections. The bill essentially tells agencies not to enforce the law. Limiting grants of authority to federal or legislative mandates subverts local control. The fiscal impact of this proposal should be considered.

Testified: Carolyn Logue, NFIB; Senator Ann Anderson; Karen Lane and Corey Knutsen, Governor's Task Force on Regulatory Reform; Mike Nykrem; Don Brunell, AWB; Steve Hulbert, Hulbert Cadillac; Jim Jesernig, Dept. of Agriculture; Ron Judd, King County Labor Council; Bruce Wishart, Sierra Club; Naki Stevens, People for Puget Sound; Ron Schultz, Audubon Society; Scott Merriman, Washington Environmental Council; and Krista Eichler; Greater Seattle Chamber of Commerce.

Votes on Final Passage:

Yeas 64; Nays 32; Excused 2

Nays: Appelwick, Basich, Brown, Chopp, Cody, Cole, Conway, Costa, Dellwo, Dickerson, Ebersole, G. Fisher, R. Fisher, Grant, Hatfield, Jacobsen, Kessler, Mason, Mastin, Morris, Patterson, Poulsen, Regala, Romero, Rust, Scott, Sommers, Thibaudeau, Tokuda, Valle, Veloria, Wolfe

Excused: Ogden, Silver