

# SENATE BILL REPORT

## SB 5192

---

As of February 13, 1995

**Title:** An act relating to the rule-making process.

**Brief Description:** Changing the rule-making process.

**Sponsors:** Senators Sheldon, Winsley, Haugen, Snyder, Long, McAuliffe, Gaspard and Drew;  
by request of Governor Lowry.

**Brief History:**

**Committee Activity:** Government Operations: 2/15/95, 2/16/95.

---

### SENATE COMMITTEE ON GOVERNMENT OPERATIONS

**Staff:** Jonathan Seib (786-7427)

**Background:** The Governor's Task force on Regulatory Reform was created by Governor Lowry by Executive Order in August, 1993. It consisted of 23 members representing a variety of interests. The Task Force was charged with the development of recommendations for statutory and administrative changes leading to more reasonable, efficient, cost-effective, and coordinated regulatory actions. An interim report was submitted in December, 1993.

In 1994, the Legislature passed a measure that made changes to the state's administrative rule-making process, based on the recommendations of the Governor's Task Force. The Governor vetoed numerous sections of this bill. In June, the Governor issued an Executive Order reflecting some of the vetoed provisions. The Task Force continued to meet, and submitted its final report in December, 1994. This legislation was included in the final report.

Grants of Rule-making Authority. Many statutes contain intent sections articulating the general purpose and goals of the legislation. The enabling statutes of many state agencies also grant those agencies general authority to adopt rules. There is concern that agencies have used these intent sections and general grants of authority to regulate in ways that the Legislature did not authorize.

Rule-making Requirements. The state Administrative Procedure Act (APA) sets forth the process that agencies must follow when adopting all rules. It requires an agency to first prepare a "statement of intent" and solicit comments on a subject of possible rule-making. The agency must hold a hearing on a proposed rule, after notice of the hearing is given in the State Register. The agency is required to consider, summarize, and respond to the comments it receives. The agency may then withdraw the rule, modify it, or adopt it as proposed. At the time a rule is adopted, the agency must prepare a concise explanatory statement about the rule.

The APA encourages agencies to use new procedures for reaching agreement among interested parties before publishing a notice of a proposed rule adoption. This includes negotiated rule-making, a formal process allowing the agency to reach consensus on the rules with affected parties, and pilot rule-making, which tests the feasibility and impact of rules with a pilot group prior to their statewide adoption.

A legal action to contest the validity of a rule must be commenced within two years of the effective date of the rule. A court may invalidate a rule if it finds that the rule "could not conceivably have been the product of a rational decision-maker." This has been interpreted by our Supreme Court to require courts to examine whether an agency used correct factors in deciding a rule. What the factors are was not articulated.

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 in 1982 to promote agency consideration and mitigation of the impact of their rules on small business.

The act requires that in the adoption of certain rules, the agency must prepare a small business economic impact statement. If it is legal and feasible, the agency is required to reduce the economic impact of the rule in ways specified in the act.

**Summary of Bill:** Grants of Rule-making Authority. An agency is prohibited from relying solely on a statute's statement of intent or purpose, or on the agency's enabling statute, as legislative authority to adopt a rule. This only applies to rules implementing statutes enacted after this prohibition is in effect. The prohibition expires June 30, 2000.

Rule Adoption Factors. Before certain agencies may adopt a "significant legislative rule," the agency must make various determinations about the rule and its effects. This requirement is applied by law to five specified agencies, but may be applied to the significant legislative rules of any agency by a majority vote of the Joint Administrative Rules Review Committee (JARRC). The specified agencies include the Departments of Ecology, Labor and Industries, Revenue, Employment Security, and Fish and Wildlife for rules implementing statutes regarding construction projects in state waters. A "legislative rule" is defined. When a legislative rule is "significant" is defined. This includes when it is designated as such by JARRC.

Among others, the determinations that the agency must make include: that the rule is needed; that the probable benefits of the rule are greater than the probable costs; that the rule is the least burdensome alternative that will achieve the intended purpose, that the rule does not conflict with other state or federal laws; that the rule does not impose more stringent requirements on private entities than on public; and that the rule does not differ from applicable federal law unless justified by explicit statutory authority or substantial evidence that the difference is necessary to achieve statutory objectives.

Any legal action challenging a rule based on an agency's failure to comply with these requirements must be commenced within 90 days of the rule's effective date.

The Office of Financial Management is directed to report every two years to the Governor and the Legislature regarding the effects of these requirements on the regulatory system in this state. The requirements expire on June 30, 2000.

Expedited Rules Repeal. A process for the expedited repeal of outdated or unenforced rules is established. Each year, agencies publish in the Washington Register a list of those outdated and unenforced rules that the agency determines should be repealed. The list is also sent to those requesting it. If, within 30 days, no one objects to the repeal of the rule, the rule may be repealed without further action. If an objection is made, the rule can be repealed only through the regular repeal process.

Negotiated and Pilot Rule-making. The current statutes encouraging the use by agencies of negotiated and pilot rule-making are clarified and simplified. Under limited circumstances, an agency is authorized to use pilot rule-making in lieu of completing a Small Business Economic Impact Statement under the Regulatory Fairness Act.

Simplification of Rule Adoption Process. The existing requirements that an agency submit a concise explanatory statement of a rule and a summary and response to public comment are combined. Minor or technical rules are exempt from some requirements, including the requirement to prepare a Small Business Economic Impact Statement, and to prepare a concise explanatory statement upon adoption.

Rules Review. The existing process for petitioning for the repeal or amendment of a rule is changed to allow the petitioner, if their petition is denied by the agency, to appeal the denial to the Governor. Within 45 days, the Governor must either deny the petition in writing, specifically addressing the concerns raised by the petitioner, or direct or recommend that the agency initiate the rule-making process. The factors that a petitioner should address in making the appeal are listed.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.