

FINAL BILL REPORT

E2SHB 1032

PARTIAL VETO

C 409 L 97

Synopsis as Enacted

Brief Description: Implementing regulatory reform.

Sponsors: By House Committee on Appropriations (originally sponsored by Representatives Reams, Mulliken, Thompson, McMorris, Koster, DeBolt, D. Sommers, Boldt, Hickel, Sheahan, Buck, Schoesler, Honeyford, Mitchell, D. Schmidt, Sherstad, L. Thomas, Dunn, Dyer, Mielke, Cairnes, Robertson and Backlund).

House Committee on Government Reform & Land Use

House Committee on Appropriations

Senate Committee on Government Operations

Senate Committee on Ways & Means

Background: In 1994 and 1995, the Legislature made substantial changes to agency rule-making and the legislative review of rules. Additional changes to rule-making and rules review were considered by 1996 Legislature but did not pass.

Grants of Rule-Making Authority: ESHB 1010 as passed by the Legislature during the 1995 session prohibited the departments of Labor and Industries, Revenue, Ecology, Social and Health Services, Health, Licensing, Employment Security, and Agriculture, as well as the Fish and Wildlife Commission, the Forest Practices Board, the Commissioner of Public Lands, and the Insurance Commissioner from relying solely on intent statements or the agency's enabling provisions as statutory authority to adopt a rule. The Governor vetoed the sections pertaining to the Forest Practices Board, the Department of Labor and Industries, and the Insurance Commissioner. All agencies were prohibited from adopting rules based solely on intent statutes or enabling provisions when implementing future statutes, except to interpret ambiguities in a statute.

Rule-Making Requirements: *General requirements.* The state Administrative Procedure Act (APA) details procedures state agencies are required to follow when adopting rules. Generally, a rule— is any agency order, directive, or regulation of general applicability which (1) subjects a person to a sanction if violated; or (2) establishes or changes any procedure or qualification relating to:

- (a) agency hearings;
- (b) benefits or privileges conferred by law;

- (c) licenses to pursue any commercial activity, trade, or profession; or
- (d) standards for the sale or distribution of products or materials.

Before adopting a rule, an agency must follow specified procedures, including publishing notice in the state register and holding a hearing. Rules not adopted in accordance with law are invalid.

Emergency rules. An agency may adopt an emergency rule if it finds either (1) that the immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that it would be contrary to the public interest to observe the time requirements of public notice and opportunity to comment; or (2) that state law, or a federal law, rule, or deadline for receipt of funds requires immediate adoption of a rule. The agency must include a statement of the reasons for the emergency in the rule adoption order filed with the Code Reviser. An emergency rule takes effect upon filing. No additional notice or a hearing is required.

Significant legislative rules. Before adopting significant legislative rules, the departments of Labor and Industries, Revenue, Ecology, Health, Employment Security, and Natural Resources, as well as 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. These determinations include that probable benefits exceed probable costs, that the rule does not require persons to take an action which violates another federal or state law; and other determinations.

The identified agencies must also coordinate implementation and enforcement of the rule with other federal and state entities that are regulating the same activity or subject matter. Within 45 days of the notice of proposed rule-making, the Joint Administrative Rules Review Committee (JARRC) may require that any state agency rule be subject to these requirements.

Review of rules. Rules remain in effect until amended or repealed. The APA does not require state agencies to review their rules. In April 1997, the Governor signed an executive order requiring agencies headed by gubernatorial appointees to review their rules.

Other rule-making provisions. Agencies must send notice to interested persons of rule-making activity. No provision is made for agencies to use electronic mail or facsimile mail in lieu of regular mail. In addition, agencies are not able to make filings with the Code Reviser by electronic mail. An expedited repeal process allows agencies to repeal rules through a simplified process if no one objects. Agencies must annually identify rules for repeal by the expedited process.

Other Agency Documents. In addition to rules, agencies also issue other types of documents. These include interpretive and policy statements, consumer-related guides and brochures, and technical assistance documents.

Legislative Review: The JARRC has authority to selectively review rules and interpretive and policy statements. If the JARRC finds that a rule is not within the intent of the Legislature or has not been adopted in accordance with all provisions of law, or that an agency is using an interpretive or policy statement in place of a rule, the JARRC notifies the agency. A process is in place for the agency to respond to the JARRC's findings and for the JARRC to take further action. Ultimately, the JARRC may recommend that the Governor suspend a rule.

The procedures for legislative review of rules do not establish a presumption as to the legality or constitutionality of the rule in subsequent judicial proceedings. In the last two legislative sessions, the Governor has vetoed provisions which would have provided that a JARRC suspension recommendation on the ground that a rule does not conform with the intent of the Legislature establishes a rebuttable presumption that the rule is invalid.

Judicial Review: The burden of proof for demonstrating the invalidity of an agency action, including the invalidity of a rule, is generally on the person asserting the invalidity.

A court is required to award fees and other expenses, including reasonable attorneys' fees, to a qualified party who prevails against a state agency in a challenge of an agency action unless the court finds that the agency action was substantially justified or that circumstances would make an award unjust. Qualified parties are 1) an individual whose net worth does not exceed \$1 million and 2) a sole owner of an unincorporated business, or a partnership or other business organization whose net worth does not exceed \$5 million. The amount awarded may not exceed \$25,000.

Adjudicative Proceedings: With certain exceptions, when a state agency conducts a hearing which is not presided over by officials who are to render the final decision, the hearing must be conducted by an administrative law judge.

Summary: Grants of Rule-Making Authority: The Forest Practices Board, the Department of Labor and Industries, and the Insurance Commissioner are prohibited from relying solely on intent statements or the agency's enabling provisions as statutory authority to adopt a rule. The Insurance Commissioner may use enabling/intent provisions to adopt procedural or interpretive rules. The prohibition relating to the Department of Labor and Industries does not apply to prevailing wage rules.

The authority for the Insurance Commissioner to define unfair methods of competition and unfair or deceptive acts or practices is modified. The commissioner must review all comments and documents received during rule-making, identify the reasons for defining the unfair methods or unfair or deceptive acts or practices, and include a description of facts upon which the commissioner relied and failed to rely in making the definition.

Upon appeal, the superior court must review the findings of fact upon which the regulation is based de novo on the record.

Rule-Making Requirements: *General requirements.* The Department of Revenue must index tax determinations which are precedential and publish the determinations and indexes.

Emergency rules. The Governor must sign emergency rules if immediate adoption is based on the preservation of the general welfare and must state why the rules are necessary for the preservation of general welfare.

Significant legislative rules. The Department of Social and Health Services (DSHS) is added to the list of agencies required to follow the procedures for significant legislative rules. Rules of the DSHS relating only to client medical or financial eligibility and rules concerning liability for care of dependents are exempted from the significant legislative rules requirements. The 45-day period for JARRC to require any agency to follow the significant legislative rules requirements for any rule is extended to 90 days.

Review of rules. The Legislature acknowledges the Governor's Executive Order on regulatory reform and encourages all agencies to establish a formal and expeditious process for the review of existing rules.

All agencies must review new rules within seven years of adoption or the rules are ineffective. An agency must review rules to evaluate the achievement of the goals and objectives of the rule, technological changes that impact the rule, actual costs undergone by the regulated community, and other matters. Rules which the Governor certifies have undergone executive rules review by July 31, 2001, are subject to the review process beginning in 2001.

Other rule-making provisions. An expedited adoption process is established which is similar to the expedited repeal process. Agencies may use the procedure to adopt rules correcting minor errors or clarifying language, rules which have been the subject of negotiated rule making or pilot rule making, rules that are being amended after a rules review, and other rules. Unless objection is made, the agency may adopt the rule without further notice, a significant legislative rule analysis, or a public hearing. The expedited adoption provisions expire on December 31, 2000. The

expedited repeal procedure is modified to require agencies to identify rules twice a year for expedited repeal.

Each agency must prepare a semiannual agenda for rules under development. The agency must send a copy to interested persons and publish it in the register.

In lieu of regular mail, an agency may send notices relating to rule making by electronic or facsimile mail when requested in writing by the person receiving the notice. If an agency is capable of receiving comments by electronic mail, facsimile transmissions, or recorded telephonic communications, the agency must state in its notice of hearing that persons may comment by these means and how they may do so. Comments must be placed in the rule-making file.

By November 30, 1997, the Governor must submit a plan to the Legislature for a pilot project consolidating all rules adopted by any agency that regulate the same activity or subject matter.

The code reviser must report to the Legislature and the Governor by July 1, 1998, on the feasibility of accepting agency rule filings in an electronic format.

Other Agency Documents: New definitions are created under the APA. An "issuance" is a document of general applicability issued by an agency. The term includes rules, policy and interpretive statements, and other documents, but does not include adjudicative orders, tax determinations of precedential value, medical coverage decisions, technical assistance documents, tariffs, or permits. "Rules" are redefined as issuances which have been adopted under the APA rule-making process. Issuances which have not been adopted as rules are advisory only. A "de facto" rule is an issuance not adopted under the APA rule-making process but which an agency uses as a rule.

A person may petition an agency to adopt an issuance as a rule and to repeal or withdraw an interpretive or policy statement.

Legislative Review of Rules: The JARRC may review an agency issuance to determine if it constitutes a de facto rule and may recommend suspension of an issuance it finds is a de facto rule. A person may petition the JARRC to review any issuance, in addition to rules and policy and interpretive statements.

A JARRC suspension recommendation to the Governor that a rule be suspended because it does not conform with legislative intent or was not adopted in accordance with law establishes a rebuttable presumption in any proceeding challenging the rule that the rule is invalid. In these cases, the agency has the burden of demonstrating the validity of the rule.

Judicial Review: In a declaratory judgment action challenging the validity of a rule, after the petitioner has identified the defects in the rule, the burden of going forward with the evidence is on the agency. A person does not need to first petition the JARRC before seeking judicial review of a rule.

The provisions for payment of attorneys' fees in agency actions are modified. The net worth limits to be a qualified party are raised. An individual whose net worth does not exceed \$2 million and who is the sole owner of an unincorporated business, or a partnership or other business organization whose net worth does not exceed \$7 million are eligible for awards. The standard for awards is changed so that an award must be made unless the court finds that circumstances make an award grossly unjust. The limits on awards are raised. A qualified party is entitled to \$50,000 for fees and other expenses incurred in superior court, and \$50,000 for fees and other expenses incurred in each court of appeal to a maximum of \$75,000. The agency must pay any fees awarded within 30 days, from moneys appropriated for administration and support services if these moneys are separately designated in the budget.

Adjudicative Proceedings: A hearing held by the Insurance Commissioner must be conducted by an administrative law judge unless the person demanding the hearing agrees in writing to have an employee of the commissioner conduct the hearing.

Other Provisions: An exception is created to the general requirement that a governmental agency seeking access to confidential information of the Department of Employment Security serve a copy of the request on the individual or employing unit whose records are sought. The requirement does not apply to the release of specified data for the purpose of preparing a small business economic impact statement or a cost-benefit analysis in connection with rule-making.

Prior to releasing a final report or study regarding management by a unit of local government, an agency must give a draft copy to the local legislative body and meet with the legislative body if so requested.

When issuing a citation or other written finding that a person has violated a statute, rule, or order, the agency must include the text of the statute granting the agency the authority to regulate the subject matter.

Votes on Final Passage:

House	65	33
Senate	30	19 (Senate amended)
House	68	29 (House concurred)

Effective: July 27, 1997
May 19, 1997 (Sections 605)

Partial Veto Summary: The governor vetoed some of the limits on rule-making, the signature requirement on emergency rules, the mandate to review new rules, the new definitions of issuance and de facto rule, the modifications to attorneys' fees, the establishment of a rebuttable presumption by a Joint Administrative Rules Review Committee suspension recommendation, and several other provisions.