

# HOUSE BILL REPORT

## ESHB 1903

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### **As Passed House:**

March 9, 1995

**Title:** An act relating to rule making by administrative agencies.

**Brief Description:** Establishing new procedures for rule adoption by administrative agencies.

**Sponsors:** By House Committee on Agriculture & Ecology (originally sponsored by Representatives Clements, Casada, Chandler and Schoesler).

### **Brief History:**

#### **Committee Activity:**

Agriculture & Ecology: 2/27/95 [DPS].

#### **Floor Activity:**

Passed House: 3/9/95, 74-22.

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## HOUSE COMMITTEE ON AGRICULTURE & ECOLOGY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 13 members: Representatives Chandler, Chairman; Koster, Vice Chairman; McMorris, Vice Chairman; Mastin, Ranking Minority Member; Chappell, Assistant Ranking Minority Member; Boldt; Clements; Delvin; Honeyford; Johnson; Kremen; Robertson and Schoesler.

**Minority Report:** Without recommendation. Signed by 4 members: Representatives R. Fisher; Poulsen; Regala and Rust.

**Staff:** Kenneth Hirst (786-7105).

### **Background:**

Rules. The procedures to be used by state agencies in adopting rules are established in the Administrative Procedure Act (APA). A "rule" that must be adopted in conformity with these procedures is an agency's order, directive, or regulation of general applicability which: (1) subjects a person to a penalty or sanction if violated; or (2) establishes, alters, or revokes: a procedure or requirement relating to agency hearings; a requirement relating to the enjoyment of benefits conferred by law; a qualification or standard for a commercial, trade, or professional license; or a mandatory standard for a material or product which is to be sold.

Some agency actions are not considered to be rules, such as: traffic restrictions identified in highway signs or other traffic control devices; college admissions, advancement, credit, graduation requirements and employment relationships; and agency internal management statements that do not affect private rights or procedures available to the public. The rule-making provisions of the APA do not apply to certain other actions of agencies.

Rule Adopting Procedures. The procedures set by the APA for adopting rules apply equally to amending and repealing rules. At least 20 days before a hearing at which a state agency is to receive public comment regarding the adoption of a rule, the agency must publish notice of the hearing in the State Register. The publication constitutes the agency's proposal to adopt a rule.

The agency must provide an opportunity for oral comment to be received in the hearing and must accept written comments regarding the proposed rule if they are received by an announced deadline. Before adopting a rule, the agency must prepare a written summary of all comments received and a substantive response to the comments by category or subject matter. Except as provided for emergency rules, if the 20 day notice of a proposal to adopt a rule has not been published in the State Register, the Code Reviser is prohibited from publishing the rule and the rule has no effect.

Emergency Rules. An agency may adopt a rule on an emergency basis if, for good cause, it finds that: immediate adoption of the rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest; or state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule. In such a case, the standard rule adoption requirements are waived. Such an emergency rule takes effect upon being filed with the Code Reviser, unless a later date is specified in the adopting order. The emergency rule may not remain in effect for more than 120 days. Within seven days of the adoption of an emergency rule, any person may petition the Governor to repeal the emergency rule. In response to the request, the Governor may only consider whether the statutory conditions which authorize the adoption of an emergency rule were or were not met.

Other. The APA provides special procedures for receiving pre-notice comments, facilitating negotiated rule-making, and establishing voluntary, pilot studies for testing proposed rules. Rules and emergency rules are subject to review by the Joint Administrative Rules Review Committee.

### **Summary of Bill:**

Adoption of Rules. New procedures are established for the adoption of rules for certain programs administered by the Department of Ecology, by the Department of Agriculture, and the Department of Labor and Industries. The procedures apply to any rule proposed for adoption under the state's water quality laws, pesticide registration and use laws, or industrial safety and health laws.

Negotiated rulemaking and at least one public hearing must be conducted on the proposed rule before it is reviewed by the Legislature. The rule may be adopted only after the Legislature has had an opportunity to consider the proposal during one full Regular Session. A rule proposed by November 1st of one calendar year is subject to consideration by the Legislature during the Regular Session convened in the following year. The rule must be proposed by the publication of a hearing notice for the rule by that date. A rule proposed after November 1st and before the end of the following Regular Session is subject to consideration during the second Regular Session following that November 1st. The agency's rule file for the rule must be submitted to the Legislature by January 15th of the session.

This requirement does not apply to the adoption of emergency rules. Nor does it apply to a specified set of federal worker protection rules the Director of Agriculture is required to adopt under separate legislation. An emergency rule may be adopted for any of these three programs only if it is accompanied, when filed with the Code Reviser, by a written declaration by the Governor that an emergency exists that justifies its adoption on an emergency basis. These emergency rules may remain in effect until the first date a permanent version of the rule could become effective.

Regulation Other Than By Rule. The Department of Ecology, the Department of Agriculture, or the Department of Labor and Industries may not take an action to enforce or apply an order or regulation under any of the laws it administers which satisfies the APA's definition of a rule unless the order or regulation has been adopted as a rule. If, during the judicial review of an action taken by any of these departments, a court finds that the department has violated this prohibition, the court may award a party aggrieved by the violation reasonable attorneys' fees and court costs incurred by the aggrieved party with regard to the violation.

**Appropriation:** None.

**Fiscal Note:** Requested on February 23, 1995.

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

**Testimony For:** (1) The rule review program established by the substitute bill applies only to the programs of the three agencies that cause the most consternation and that need the most review. It permits all sides of an issue to be examined before an administrative law can take effect. (2) The limited scope of the substitute bill

establishes a reasonable, trial program. (3) The fact that the Legislature is looking over the shoulders of the state agencies has a sobering effect on their rulemaking.

**Testimony Against:** The rule adoption process should not take longer than it already does.

**Testified:** Representative Clements (prime sponsor); Enid Layes, Washington State Horticultural Association and Washington AgriBusiness Coalition (pro); Chris Cheney, Washington Growers League and Hop Growers of Washington (pro); Bill Alkire, Department of Ecology (con); and Llewellyn Matthews, Northwest Pulp & Paper Association (commented).