

SENATE BILL REPORT

ESHB 1010

As Reported By Senate Committee On:
Government Operations, March 30, 1995
Ways & Means, April 10, 1995

Title: An act relating to regulatory reform.

Brief Description: Implementing regulatory reform.

Sponsors: 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: 3/23/95, 3/30/95 [DPA, DNP].
Ways & Means: 4/10/95 [DPA (GO)].

SENATE COMMITTEE ON GOVERNMENT OPERATIONS

Majority Report: Do pass as amended.

Signed by Senators Haugen, Chair; Sheldon, Vice Chair; Drew, Hale, McCaslin and Winsley.

Minority Report: Do not pass.

Signed by Senator Heavey.

Staff: Jonathan Seib (786-7427)

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 Requirement. 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 Amended Bill: Grants of Rule-making Authority. For certain agencies, for other than interpretive rules, rules adopted after the effective date of the act may not rely solely on a statement of intent or on the agency's enabling provisions as authority to adopt a rule. These agencies include the Commissioner of Public Lands, the Department of Social and Health Services, the Department of Ecology, the Department of Agriculture, the Department of Health, the Department of Revenue, the Department of Labor and Industries, the Department of Licensing, the Employment Security Department, the Forest Practices Board, and the Fish and Wildlife Commission. For all other agencies except the Insurance

Commissioner, this limitation applies to all rules implementing statutes enacted after the effective date of this act.

The general grants of rule making authority to the Office of the Insurance Commissioner are repealed. After the effective date of this act, this agency may only adopt rules as specifically authorized by the Legislature.

After July 1, 1995, the Department of Ecology may adopt rules that exceed the requirement of the federal Clean Air Act only after compliance with certain procedures established in the bill.

The director of Ecology is also to allow the application of certain herbicides to Lake Steilacoom if those herbicides have federal approval.

Rule Adoption Factors. Before certain agencies may adopt a "legislative rule," the agency must make various determinations about the rule and its effects. This requirement is applied by law to nine specified agencies, but may be applied to the 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, Natural Resources, Health, the Forest Practices Board, the Insurance Commissioner, and Fish and Wildlife for rules implementing statutes regarding construction projects in state waters. A "legislative rule" is defined.

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.

These determinations must be supported by substantial evidence, which is defined as "evidence in sufficient quantity to persuade a fair-minded person of the truth of the declared premises."

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.

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.

Legislative Review of Rules. JARRC 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 JARRC membership.

Any person potentially impacted by a proposed rule or currently impacted by an existing rule may petition for JARRC review. JARRC 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. JARRC is required to make a final decision on the rule within 90 days of the receipt of the petition.

A JARRC 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.

JARRC is required to keep complete minutes of its meetings. It is authorized to establish ad hoc advisory boards and to hire staff as needed. JARRC 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 JARRC 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 JARRC. State employees who identify rules warranting review or provide information to JARRC are protected from retaliation under state employee whistle blower provisions.

JARRC is repealed effective December 1, 1996. Before the 1996 session, the appropriate standing committees of the Legislature are to study alternative means to provide oversight of agency rule-making and recommend whether JARRC should be continued or replaced.

Technical Assistance and Voluntary Compliance. All agencies must develop programs to encourage voluntary compliance by providing technical assistance consistent with statutory

requirements. The programs must include, but are not limited to, technical assistance visits. Agencies, however, are explicitly not obligated to conduct technical assistance visits.

A technical assistance visit is defined and the terms of such a visit are established. Except for repeat or serious 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 catch limits.

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 provisions of the bill in conflict with federal requirements are inoperative. The Governor and the Legislature are to be notified regarding any such conflict.

The Office of Financial Management is required to report every two years on the effects of this legislation on the regulatory system in the state.

Fees and Expenses. Qualified parties who successfully challenge an agency action may be awarded fees and expenses not exceeding \$35,000. 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. Fees and expenses 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. A court may reduce or deny an award if it finds the agency action was substantially justified or that a party unduly protracted final resolution of the dispute.

Awarded fees and expenses are paid from the operating funds appropriated to the agency that took the challenged action. Payments are reported to the Office of Financial Management (OFM). OFM is required to report annually to the Legislature on the amount of fees and expenses awarded.

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 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.

Amended Bill Compared to Substitute Bill: The amendment is a striking amendment. Most of the provisions of the original bill are completely replaced with new provisions addressing similar issues, but in a different manner. The amended bill is not subject to a referendum.

Appropriation: None.

Fiscal Note: Available.

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

Testimony: Testimony was received on a proposed striking amendment which was changed substantially prior to adoption of the current striking amendment. Generally, testimony favored strong regulatory reform, but warned against any reduction in protections to the environment or worker safety.

Testified: Carolyn Logue, NFIB (pro); Darlene Flowers, Foster Parents Assn. of Washington (con); Garry Fujita, David Wright Tremaine (pro); Charlie Brown, WNG; Earl Tower, AWB; Krista Eichler, Seattle Chamber of Commerce; Bruce Wishart, Sierra Club (con); Karen Lane, Task Force on Regulatory Reform (pro w/concerns); Kathy Gill, WSPPA; Robby Stern, Washington State Labor Council; Scott Merriman, Washington Environmental Council; Ron Judd, King County Labor Council; Diane Michalek, Aviation West Corp. (pro); Susan Hahn, Cascade Diesel & Truck Repair (pro); Stacy Stead, Clay Enterprises (pro); Basil Badley, AIA, ACLI, WIAA (con); Claire Hesselholt, Revenue (pro); Gary Smith, Ind. Business Assn. (pro); Howard Vietske, Firefighters (con); Bill Redman, Federation of Fly Fishers (con); Ron Shultz, National Audubon (con); Frank Urabeck, Trout Unlimited (con).

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended by Committee on Government Operations.

Signed by Senators Rinehart, Chair; Loveland, Vice Chair; Bauer, Drew, Finkbeiner, Hargrove, Hochstatter, Johnson, Long, McDonald, Roach, Sheldon, Snyder, Strannigan and West.

Staff: Randy Hodgins (786-7438)

Testimony: Several individuals testified against provisions in the striking amendment which repealed the broad rule-making authority of the Office of the Insurance Commissioner. They indicated that the changes would hamper the office's ability to protect consumers and would cost additional money. Testimony also expressed concerns about the impact of the measure on natural resource and human services agencies.

Testified: Mary Clogston, George Taylor, Office of the Insurance Commissioner (con); Peter Berliner, Children's Alliance, Healthcare Coalition (con); Bruce Wishart, Sierra Club (concerns); Margaret Casey, Catholic Conference; Tony Meinhardt, IBA (pro).