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ENGROSSED SUBSTITUTE HOUSE BILL 1903

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State of Washington

54th Legislature

1995 Regular Session

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

Read first time 03/01/95.

1 AN ACT Relating to rule making by administrative agencies; amending  
2 RCW 34.05.360, 34.05.345, 34.05.350, 90.48.220, 90.48.230, 15.58.040,  
3 17.21.040, and 49.17.040; adding a new section to chapter 90.48 RCW;  
4 adding a new section to chapter 43.21A RCW; adding a new section to  
5 chapter 15.58 RCW; adding a new section to chapter 17.21 RCW; adding a  
6 new section to chapter 43.23 RCW; adding a new section to chapter 49.17  
7 RCW; adding a new section to chapter 43.22 RCW; adding a new section to  
8 chapter 34.05 RCW; and creating new sections.

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

10 NEW SECTION. **Sec. 1.** The legislature finds that its delegation of  
11 legislative authority to the executive branch of state government in  
12 the form of the authority to adopt rules requires closer scrutiny to  
13 ensure that the authority is exercised within the intention of the  
14 legislature. It is the intent of the legislature to condition its  
15 delegation of certain legislative authorities to the department of  
16 ecology, the department of agriculture, and the department of labor and  
17 industries in two ways: First, by requiring that the legislature be  
18 given an opportunity to review rules proposed by these departments  
19 before the rules become effective; and second, by ensuring that any

1 order, directive, or regulation of general applicability established by  
2 either of the departments has been subject to evaluation and comment by  
3 the public under the rule-making process provided by the administrative  
4 procedure act before such an order, directive, or regulation is applied  
5 to any member of the public.

6 **PART 1 - RULE MAKING**

7 NEW SECTION. **Sec. 101.** A new section is added to chapter 90.48  
8 RCW to read as follows:

9 (1) A rule adopted by the director or department under the  
10 authority of this chapter shall be adopted in accordance with the  
11 administrative procedure act, chapter 34.05 RCW, and this section.

12 Before publishing a proposal of such a rule under RCW 34.05.320,  
13 the director or department shall conduct negotiated rule making on the  
14 proposal under RCW 34.05.310. Once a proposal for the rule is  
15 published under RCW 34.05.320, at least one public hearing shall be  
16 conducted on the proposed rule before the rule's being considered by  
17 the legislature under this section. The proposed rule may be adopted  
18 only after the legislature has had an opportunity to consider the  
19 proposal during one full regular session, as such a session is  
20 described in Article II, section 12 of the state Constitution. To  
21 provide such an opportunity, the following apply:

22 (a) A proposal of a rule published on or by the first day of  
23 November of one calendar year is subject to consideration by the  
24 legislature during the regular session of the legislature convened in  
25 the following year; and

26 (b) A proposal of a rule published after the first day of November  
27 of one calendar year and before the end of the first regular session of  
28 the legislature convened following that first day of November, is  
29 subject to consideration by the legislature during the second regular  
30 session of the legislature convened after that first day of November.

31 A copy of the file for the rule, including the summary and  
32 responses required by RCW 34.05.325(6), shall be transmitted to the  
33 chief clerk of the house of representatives and the secretary of the  
34 senate not later than the fifteenth day of January following the  
35 convening of the regular session.

36 (2) Subsection (1) of this section does not apply to emergency  
37 rules adopted in accordance with RCW 34.05.350(5).

1        NEW SECTION.    **Sec. 102.**    A new section is added to chapter 43.21A  
2    RCW to read as follows:

3        The department shall not take an action to enforce or apply an  
4    order, directive, or regulation of general applicability that satisfies  
5    the definition of a rule provided by RCW 34.05.010 unless the order,  
6    directive, or regulation has been adopted as a rule.    If, during the  
7    judicial review of an action taken by the department, a court of  
8    competent jurisdiction finds that the department has by the action or  
9    some significant portion of the action violated this section, the court  
10   may, in addition to exercising any other authorities, award a party  
11   aggrieved by the violation reasonable attorneys' fees and court costs  
12   incurred by the aggrieved party with regard to the violation.

13        This section applies to any action taken by the department after  
14   the effective date of this section.

15        NEW SECTION.    **Sec. 103.**    A new section is added to chapter 15.58  
16    RCW to read as follows:

17        (1) A rule adopted by the director or department under the  
18    authority of this chapter shall be adopted in accordance with the  
19    administrative procedure act, chapter 34.05 RCW, and this section.

20        Before publishing a proposal of such a rule under RCW 34.05.320,  
21    the director or department shall conduct negotiated rule making on the  
22    proposal under RCW 34.05.310.    Once a proposal for the rule is  
23    published under RCW 34.05.320, at least one public hearing shall be  
24    conducted on the proposed rule before the rule's being considered by  
25    the legislature under this section.    The proposed rule may be adopted  
26    only after the legislature has had an opportunity to consider the  
27    proposal during one full regular session, as such a session is  
28    described in Article II, section 12 of the state Constitution.    To  
29    provide such an opportunity, the following apply:

30        (a) A proposal of a rule published on or by the first day of  
31    November of one calendar year is subject to consideration by the  
32    legislature during the regular session of the legislature convened in  
33    the following year; and

34        (b) A proposal of a rule published after the first day of November  
35    of one calendar year and before the end of the first regular session of  
36    the legislature convened following that first day of November, is  
37    subject to consideration by the legislature during the second regular  
38    session of the legislature convened after that first day of November.

1 A copy of the file for the rule, including the summary and  
2 responses required by RCW 34.05.325(6), shall be transmitted to the  
3 chief clerk of the house of representatives and the secretary of the  
4 senate not later than the fifteenth day of January following the  
5 convening of the regular session.

6 (2) Subsection (1) of this section does not apply to emergency  
7 rules adopted in accordance with RCW 34.05.350(5).

8 NEW SECTION. **Sec. 104.** A new section is added to chapter 17.21  
9 RCW to read as follows:

10 (1) A rule adopted by the director or department under the  
11 authority of this chapter shall be adopted in accordance with the  
12 administrative procedure act, chapter 34.05 RCW, and this section.

13 Before publishing a proposal of such a rule under RCW 34.05.320,  
14 the director or department shall conduct negotiated rule making on the  
15 proposal under RCW 34.05.310. Once a proposal for the rule is  
16 published under RCW 34.05.320, at least one public hearing shall be  
17 conducted on the proposed rule before the rule's being considered by  
18 the legislature under this section. The proposed rule may be adopted  
19 only after the legislature has had an opportunity to consider the  
20 proposal during one full regular session, as such a session is  
21 described in Article II, section 12 of the state Constitution. To  
22 provide such an opportunity, the following apply:

23 (a) A proposal of a rule published on or by the first day of  
24 November of one calendar year is subject to consideration by the  
25 legislature during the regular session of the legislature convened in  
26 the following year; and

27 (b) A proposal of a rule published after the first day of November  
28 of one calendar year and before the end of the first regular session of  
29 the legislature convened following that first day of November, is  
30 subject to consideration by the legislature during the second regular  
31 session of the legislature convened after that first day of November.

32 A copy of the file for the rule, including the summary and  
33 responses required by RCW 34.05.325(6), shall be transmitted to the  
34 chief clerk of the house of representatives and the secretary of the  
35 senate not later than the fifteenth day of January following the  
36 convening of the regular session.

37 (2) Subsection (1) of this section does not apply to emergency  
38 rules adopted in accordance with RCW 34.05.350(5) or to rules the

1 director of agriculture is required to adopt under chapter . . . , Laws  
2 of 1995 (Substitute House Bill No. 1065).

3 NEW SECTION. **Sec. 105.** A new section is added to chapter 43.23  
4 RCW to read as follows:

5 The department of agriculture shall not take an action to enforce  
6 or apply an order, directive, or regulation of general applicability  
7 that satisfies the definition of a rule provided by RCW 34.05.010  
8 unless the order, directive, or regulation has been adopted as a rule.  
9 If, during the judicial review of an action taken by the department, a  
10 court of competent jurisdiction finds that the department has by the  
11 action or some significant portion of the action violated this section,  
12 the court may, in addition to exercising any other authorities, award  
13 a party aggrieved by the violation reasonable attorneys' fees and court  
14 costs incurred by the aggrieved party with regard to the violation.

15 This section applies to any action taken by the department after  
16 the effective date of this section.

17 NEW SECTION. **Sec. 106.** A new section is added to chapter 49.17  
18 RCW to read as follows:

19 (1) A rule adopted by the director or department of labor and  
20 industries under the authority of this chapter shall be adopted in  
21 accordance with the administrative procedure act, chapter 34.05 RCW,  
22 and this section.

23 Before publishing a proposal of such a rule under RCW 34.05.320,  
24 the director or department shall conduct negotiated rule making on the  
25 proposal under RCW 34.05.310. Once a proposal for the rule is  
26 published under RCW 34.05.320, at least one public hearing shall be  
27 conducted on the proposed rule before the rule's being considered by  
28 the legislature under this section. The proposed rule may be adopted  
29 only after the legislature has had an opportunity to consider the  
30 proposal during one full regular session, as such a session is  
31 described in Article II, section 12 of the state Constitution. To  
32 provide such an opportunity, the following apply:

33 (a) A proposal of a rule published on or by the first day of  
34 November of one calendar year is subject to consideration by the  
35 legislature during the regular session of the legislature convened in  
36 the following year; and

1 (b) A proposal of a rule published after the first day of November  
2 of one calendar year and before the end of the first regular session of  
3 the legislature convened following that first day of November, is  
4 subject to consideration by the legislature during the second regular  
5 session of the legislature convened after that first day of November.

6 A copy of the file for the rule, including the summary and  
7 responses required by RCW 34.05.325(6), shall be transmitted to the  
8 chief clerk of the house of representatives and the secretary of the  
9 senate not later than the fifteenth day of January following the  
10 convening of the regular session.

11 (2) Subsection (1) of this section does not apply to emergency  
12 rules adopted in accordance with RCW 34.05.350(5).

13 NEW SECTION. **Sec. 107.** A new section is added to chapter 43.22  
14 RCW to read as follows:

15 The department of labor and industries shall not take an action to  
16 enforce or apply an order, directive, or regulation of general  
17 applicability that satisfies the definition of a rule provided by RCW  
18 34.05.010 unless the order, directive, or regulation has been adopted  
19 as a rule. If, during the judicial review of an action taken by the  
20 department, a court of competent jurisdiction finds that the department  
21 has by the action or some significant portion of the action violated  
22 this section, the court may, in addition to exercising any other  
23 authorities, award a party aggrieved by the violation reasonable  
24 attorneys' fees and court costs incurred by the aggrieved party with  
25 regard to the violation.

26 This section applies to any action taken by the department after  
27 the effective date of this section.

28 **Sec. 108.** RCW 34.05.360 and 1988 c 288 s 311 are each amended to  
29 read as follows:

30 The order of adoption by which each rule is adopted by an agency  
31 shall contain all of the following:

- 32 (1) The date the agency adopted the rule;  
33 (2) A concise statement of the purpose of the rule;  
34 (3) A reference to all rules repealed, amended, or suspended by the  
35 rule;  
36 (4) A reference to the specific statutory or other authority  
37 authorizing adoption of the rule;

1 (5) Any findings required by any provision of law as a precondition  
2 to adoption or effectiveness of the rule; and

3 (6) The effective date of the rule if other than that specified in  
4 RCW 34.05.380(2).

5 Except as provided in section 101(2) of this act, a rule may not be  
6 adopted by the department of ecology or by the director of the  
7 department under chapter 90.48 RCW unless the legislature and the  
8 public have had an opportunity to consider the proposed rule during one  
9 full regular session as provided in section 101 of this act.

10 Except as provided in section 103(2) or 104(2) of this act, a rule  
11 may not be adopted by the department of agriculture or by the director  
12 of the department under chapter 15.58 or 17.21 RCW unless the  
13 legislature and the public have had an opportunity to consider the  
14 proposed rule during one full regular session as provided in section  
15 103 or 104 of this act.

16 Except as provided in section 106(2) of this act, a rule may not be  
17 adopted by the department of labor and industries or by the director of  
18 the department under chapter 49.17 RCW unless the legislature and the  
19 public have had an opportunity to consider the proposed rule during one  
20 full regular session as provided in section 106 of this act.

21 **Sec. 109.** RCW 34.05.345 and 1988 c 288 s 308 are each amended to  
22 read as follows:

23 (1) Except for emergency rules adopted under RCW 34.05.350, when  
24 twenty days notice of intended action to adopt, amend, or repeal a rule  
25 has not been published in the state register, as required by RCW  
26 34.05.320, the code reviser shall not publish such rule and such rule  
27 shall not be effective for any purpose.

28 (2) If the legislature and the public have not been given an  
29 opportunity to consider a proposal of a rule by the department of  
30 ecology as required by RCW 34.05.360 and section 101 of this act, the  
31 code reviser shall not publish the rule and the rule shall not be  
32 effective for any purpose.

33 (3) If the legislature and the public have not been given an  
34 opportunity to consider a proposal of a rule by the department of  
35 agriculture as required by RCW 34.05.360 and section 103 or 104 of this  
36 act, the code reviser shall not publish the rule and the rule shall not  
37 be effective for any purpose.

1       (4) If the legislature and the public have not been given an  
2 opportunity to consider a proposal of a rule by the department of labor  
3 and industries as required by RCW 34.05.360 and section 106 of this  
4 act, the code reviser shall not publish the rule and the rule shall not  
5 be effective for any purpose.

6       **Sec. 110.** RCW 34.05.350 and 1994 c 249 s 3 are each amended to  
7 read as follows:

8       (1) If an agency for good cause finds:

9       (a) That immediate adoption, amendment, or repeal of a rule is  
10 necessary for the preservation of the public health, safety, or general  
11 welfare, and that observing the time requirements of notice and  
12 opportunity to comment upon adoption of a permanent rule would be  
13 contrary to the public interest; or

14       (b) That state or federal law or federal rule or a federal deadline  
15 for state receipt of federal funds requires immediate adoption of a  
16 rule, the agency may dispense with those requirements and adopt, amend,  
17 or repeal the rule on an emergency basis. The agency's finding and a  
18 concise statement of the reasons for its finding shall be incorporated  
19 in the order for adoption of the emergency rule or amendment filed with  
20 the office of the code reviser under RCW 34.05.380 and with the rules  
21 review committee.

22       (2)(a) An emergency rule adopted under this section takes effect  
23 upon filing with the code reviser, unless a later date is specified in  
24 the order of adoption, and, except as provided in (b) of this  
25 subsection, may not remain in effect for longer than one hundred twenty  
26 days after filing. Identical or substantially similar emergency rules  
27 may not be adopted in sequence unless conditions have changed or the  
28 agency has filed notice of its intent to adopt the rule as a permanent  
29 rule, and is actively undertaking the appropriate procedures to adopt  
30 the rule as a permanent rule. This section does not relieve any agency  
31 from compliance with any law requiring that its permanent rules be  
32 approved by designated persons or bodies before they become effective.

33       (b) An emergency rule that is subject to and is filed in accordance  
34 with subsection (5) of this section may remain in effect until the  
35 first date upon which a permanent version of the rule could become  
36 effective under section 101, 103, 104, or 106 of this act.

37       (3) Within seven days after the rule is adopted, any person may  
38 petition the governor requesting the immediate repeal of a rule adopted

1 on an emergency basis by any department listed in RCW 43.17.010.  
2 Within seven days after submission of the petition, the governor shall  
3 either deny the petition in writing, stating his or her reasons for the  
4 denial, or order the immediate repeal of the rule. In ruling on the  
5 petition, the governor shall consider only whether the conditions in  
6 subsection (1) of this section were met such that adoption of the rule  
7 on an emergency basis was necessary. If the governor orders the repeal  
8 of the emergency rule, any sanction imposed based on that rule is void.  
9 This subsection shall not be construed to prohibit adoption of any rule  
10 as a permanent rule.

11 (4) In adopting an emergency rule, the agency shall comply with  
12 section 4 of this act or provide a written explanation for its failure  
13 to do so.

14 (5) An emergency rule may be adopted and filed with the code  
15 reviser by the director or department of ecology under chapter 90.48  
16 RCW, by the director or department of agriculture under chapter 15.58  
17 or 17.21 RCW, or by the director or department of labor industries  
18 under chapter 49.17 RCW only if the filing is accompanied by a written  
19 declaration by the governor that an emergency exists that justifies the  
20 adoption of the rule on an emergency basis under this section.

21 **PART 2 - DEPARTMENT OF ECOLOGY**  
22 **CONFORMING AMENDMENTS**

23 **Sec. 201.** RCW 90.48.220 and 1993 c 296 s 1 are each amended to  
24 read as follows:

25 (1) For the purposes of this section "marine finfish rearing  
26 facilities" means those private and public facilities located within  
27 the salt water of the state where finfish are fed, nurtured, held,  
28 maintained, or reared to reach the size of release or for market sale.

29 (2) Not later than October 31, 1994, the department shall adopt  
30 criteria under chapter 34.05 RCW for allowable sediment impacts from  
31 organic enrichment due to marine finfish rearing facilities.

32 (3) Not later than June 30, 1995, the department shall adopt  
33 standards ~~((under))~~ in accordance with section 101 of this act and  
34 chapter 34.05 RCW for waste discharges from marine finfish rearing  
35 facilities. In establishing these standards, the department shall  
36 review and incorporate, to the extent possible, studies conducted by  
37 state and federal agencies on waste discharges from marine finfish

1 rearing facilities, and any reports and other materials prepared by  
2 technical committees on waste discharges from marine finfish rearing  
3 facilities. The department shall approve or deny discharge permit  
4 applications for marine finfish rearing facilities within one hundred  
5 eighty days from the date of application, unless a longer time is  
6 required to satisfy public participation requirements in the permit  
7 process in accordance with applicable rules, or compliance with the  
8 requirements of the state environmental policy act under chapter 43.21C  
9 RCW. The department shall notify applicants as soon as it determines  
10 that a proposed discharge meets or fails to comply with the standards  
11 adopted pursuant to this section, or if a time period longer than one  
12 hundred eighty days is necessary to satisfy public participation  
13 requirements of the state environmental policy act.

14 (4) The department may adopt rules to exempt marine finfish rearing  
15 facilities not requiring national pollutant discharge elimination  
16 system permits under the federal water pollution control act from the  
17 discharge permit requirement.

18 **Sec. 202.** RCW 90.48.230 and 1989 c 175 s 181 are each amended to  
19 read as follows:

20 The provisions of chapter 34.05 RCW, the administrative procedure  
21 act, and section 101 of this act apply to all rule making (~~and~~  
22 ~~adjudicative proceedings~~) authorized by or arising under the  
23 provisions of this chapter.

24 **PART 3 - DEPARTMENT OF AGRICULTURE**  
25 **CONFORMING AMENDMENTS**

26 **Sec. 301.** RCW 15.58.040 and 1991 c 264 s 2 are each amended to  
27 read as follows:

28 (1) The director shall administer and enforce the provisions of  
29 this chapter and rules adopted under this chapter. All the authority  
30 and requirements provided for in chapter 34.05 RCW (administrative  
31 procedure act) and (~~chapter 42.30 RCW shall~~) section 103 of this act  
32 apply to this chapter in the adoption of rules including those  
33 requiring due notice and a hearing for the adoption of permanent rules.

34 (2) The director is authorized to adopt appropriate rules for  
35 carrying out the purpose and provisions of this chapter, including but  
36 not limited to rules providing for:

1 (a) Declaring as a pest any form of plant or animal life or virus  
2 which is injurious to plants, people, animals (domestic or otherwise),  
3 land, articles, or substances;

4 (b) Determining that certain pesticides are highly toxic to people.  
5 For the purpose of this chapter, highly toxic pesticide means any  
6 pesticide that conforms to the criteria in 40 C.F.R. Sec. 162.10 for  
7 toxicity category I due to oral inhalation or dermal toxicity. The  
8 director shall publish a list of all pesticides, determined to be  
9 highly toxic, by their common or generic name and their trade or brand  
10 name if practical. Such list shall be kept current and shall, upon  
11 request, be made available to any interested party;

12 (c) Determining standards for denaturing pesticides by color,  
13 taste, odor, or form;

14 (d) The collection and examination of samples of pesticides or  
15 devices;

16 (e) The safe handling, transportation, storage, display,  
17 distribution, and disposal of pesticides and their containers;

18 (f) Restricting or prohibiting the use of certain types of  
19 containers or packages for specific pesticides. These restrictions may  
20 apply to type of construction, strength, and/or size to alleviate  
21 danger of spillage, breakage, misuse, or any other hazard to the  
22 public. The director shall be guided by federal regulations concerning  
23 pesticide containers;

24 (g) Procedures in making of pesticide recommendations;

25 (h) Adopting a list of restricted use pesticides for the state or  
26 for designated areas within the state if the director determines that  
27 such pesticides may require rules restricting or prohibiting their  
28 distribution or use. The director may include in the rule the time and  
29 conditions of distribution or use of such restricted use pesticides and  
30 may, if it is found necessary to carry out the purpose and provisions  
31 of this chapter, require that any or all restricted use pesticides  
32 shall be purchased, possessed, or used only under permit of the  
33 director and under the director's direct supervision in certain areas  
34 and/or under certain conditions or in certain quantities or  
35 concentrations. The director may require all persons issued such  
36 permits to maintain records as to the use of all the restricted use  
37 pesticides;

38 (i) Label requirements of all pesticides required to be registered  
39 under provisions of this chapter;

1 (j) Regulating the labeling of devices; and  
2 (k) The establishment of criteria governing the conduct of a  
3 structural pest control inspection.

4 (3) For the purpose of uniformity and to avoid confusion  
5 endangering the public health and welfare the director may adopt rules  
6 in conformity with the primary pesticide standards, particularly as to  
7 labeling, established by the United States environmental protection  
8 agency or any other federal agency.

9 **Sec. 302.** RCW 17.21.040 and 1989 c 380 s 35 are each amended to  
10 read as follows:

11 All rules adopted under the provisions of this chapter shall be  
12 subject to the provisions of chapter 34.05 RCW (~~as enacted or~~  
13 ~~hereafter amended,~~) and section 104 of this act concerning the  
14 adoption of rules.

15 **PART 4 - DEPARTMENT OF LABOR AND INDUSTRIES**  
16 **CONFORMING AMENDMENTS**

17 **Sec. 401.** RCW 49.17.040 and 1973 c 80 s 4 are each amended to read  
18 as follows:

19 The director shall make, adopt, modify, and repeal rules (~~and~~  
20 ~~regulations~~) governing safety and health standards for conditions of  
21 employment as authorized by this chapter after a public hearing in  
22 conformance with the administrative procedure act and the provisions of  
23 this chapter. Rules shall be adopted in accordance with section 106 of  
24 this act. At least thirty days prior to such public hearing, the  
25 director shall cause public notice of such hearing to be made in  
26 newspapers of general circulation in this state, of the date, time, and  
27 place of such public hearing, along with a general description of the  
28 subject matter of the proposed rules and information as to where copies  
29 of any rules (~~and regulations~~) proposed for adoption may be obtained  
30 and with a solicitation for recommendations in writing or suggestions  
31 for inclusion or changes in such rules to be submitted not later than  
32 five days prior to such public hearing. Any preexisting rules adopted  
33 by the department of labor and industries relating to health and safety  
34 standards in work places subject to the jurisdiction of the department  
35 shall remain effective insofar as such rules are not inconsistent with  
36 the provisions of this chapter.

**PART 5 - MISCELLANEOUS**

1

2        NEW SECTION.    **Sec. 501.**    A new section is added to chapter 34.05  
3 RCW under the subchapter heading Part III to read as follows:

4        The provisions of sections 101, 103, 104, and 106 of this act  
5 establishing new procedural requirements for adopting rules apply only  
6 to rules adopted after the effective date of this section.

7        NEW SECTION.    **Sec. 502.**    Part headings used in this act do not  
8 constitute any part of the law.

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