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HOUSE BILL 1156

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State of Washington

62nd Legislature

2011 Regular Session

By Representatives Orcutt, Rivers, Angel, Klippert, Smith, Johnson, Kretz, Kristiansen, Taylor, Haler, McCune, Short, Bailey, Pearson, Harris, and Condotta

Read first time 01/13/11. Referred to Committee on State Government & Tribal Affairs.

1 AN ACT Relating to suspension of rule making; amending RCW  
2 34.05.310, 34.05.313, 34.05.320, and 34.05.328; adding new sections to  
3 chapter 34.05 RCW; and declaring an emergency.

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

5 NEW SECTION. **Sec. 1.** A new section is added to chapter 34.05 RCW  
6 to read as follows:

7 The legislature finds that Washington families, workers, and  
8 employers continue to struggle to make ends meet as the recession  
9 starting in December 2007 continues into 2011. As families and  
10 employers have streamlined their budgets and services, so should state  
11 government. Government continues to increase the burden on citizens  
12 and employers through perpetual alteration and expansion of rules. The  
13 Washington Administrative Code has grown by 2,778 pages between 2001  
14 and 2009 (15,138 pages to 17,916 pages). In 2010, 1,354 new, permanent  
15 rules were adopted, 2,477 rules were amended, 459 emergency rule  
16 filings were made, and 1,125 rules were repealed.

17 The constant changing of rules provides uncertainty to citizens  
18 and employers and adds additional costs to taxpayers as agencies hold  
19 public meetings and telephone conferences, and employees spend untold

1 hours working on drafts for rules. Furthermore, continual proposal of  
2 new rules distracts employers from being productive in their respective  
3 businesses due to a need to comment against these proposed rules. Most  
4 agencies do not track the number of hours employees spend on rule  
5 making nor do they track the cost to the agency to do this task. One  
6 way to reduce millions of dollars in employee and administrative costs  
7 is to impose a moratorium on formal and informal rule making by state  
8 agencies except in certain specified instances. This moratorium is to  
9 last for three years or until the state is no longer facing financial  
10 deficits.

11 NEW SECTION. **Sec. 2.** A new section is added to chapter 34.05 RCW  
12 to read as follows:

13 (1) Agency rule making is suspended until the later of July 1,  
14 2014, or such time as the economic and revenue forecast council reports  
15 for three consecutive quarters that state revenue collections have  
16 increased above the official forecast adopted pursuant to RCW 82.33.010  
17 on or before February 20th in an even-numbered year or March 20th in an  
18 odd-numbered year, except in the following cases:

- 19 (a) A rule is needed to implement a federal law;
  - 20 (b) A rule is needed to implement the terms of a governor-declared  
21 state of emergency;
  - 22 (c) A rule is needed by the department of health to respond to a  
23 public health emergency;
  - 24 (d) A rule is needed to set the times for the taking of wildlife,  
25 fish, or shellfish pursuant to RCW 77.12.047(1)(a); or
  - 26 (e) Legislation specifically directs that rule making be  
27 undertaken. Rules adopted under this subsection (1)(e) must be  
28 approved by the legislature in the ensuing legislative session before  
29 the rule may take effect.
- 30 (2) This section does not prohibit an agency from repealing rules.

31 **Sec. 3.** RCW 34.05.310 and 2004 c 31 s 1 are each amended to read  
32 as follows:

- 33 (1) The provisions of this section are subject to section 2 of this  
34 act.
- 35 (2) To meet the intent of providing greater public access to  
36 administrative rule making and to promote consensus among interested

1 parties, agencies shall solicit comments from the public on a subject  
2 of possible rule making before filing with the code reviser a notice of  
3 proposed rule making under RCW 34.05.320. The agency shall prepare a  
4 statement of inquiry that:

5 (a) Identifies the specific statute or statutes authorizing the  
6 agency to adopt rules on this subject;

7 (b) Discusses why rules on this subject may be needed and what they  
8 might accomplish;

9 (c) Identifies other federal and state agencies that regulate this  
10 subject, and describes the process whereby the agency would coordinate  
11 the contemplated rule with these agencies;

12 (d) Discusses the process by which the rule might be developed,  
13 including, but not limited to, negotiated rule making, pilot rule  
14 making, or agency study;

15 (e) Specifies the process by which interested parties can  
16 effectively participate in the decision to adopt a new rule and  
17 formulation of a proposed rule before its publication.

18 The statement of inquiry shall be filed with the code reviser for  
19 publication in the state register at least thirty days before the date  
20 the agency files notice of proposed rule making under RCW 34.05.320 and  
21 the statement, or a summary of the information contained in that  
22 statement, shall be sent to any party that has requested receipt of the  
23 agency's statements of inquiry.

24 ((+2)) (3) Agencies are encouraged to develop and use new  
25 procedures for reaching agreement among interested parties before  
26 publication of notice and the adoption hearing on a proposed rule.  
27 Examples of new procedures include, but are not limited to:

28 (a) Negotiated rule making by which representatives of an agency  
29 and of the interests that are affected by a subject of rule making,  
30 including, where appropriate, county and city representatives, seek to  
31 reach consensus on the terms of the proposed rule and on the process by  
32 which it is negotiated; and

33 (b) Pilot rule making which includes testing the feasibility of  
34 complying with or administering draft new rules or draft amendments to  
35 existing rules through the use of volunteer pilot groups in various  
36 areas and circumstances, as provided in RCW 34.05.313 or as otherwise  
37 provided by the agency.

1       (~~(3)~~) (4)(a) An agency must make a determination whether  
2 negotiated rule making, pilot rule making, or another process for  
3 generating participation from interested parties prior to development  
4 of the rule is appropriate.

5       (b) An agency must include a written justification in the rule-  
6 making file if an opportunity for interested parties to participate in  
7 the rule-making process prior to publication of the proposed rule has  
8 not been provided.

9       (~~(4)~~) (5) This section does not apply to:

10      (a) Emergency rules adopted under RCW 34.05.350;

11      (b) Rules relating only to internal governmental operations that  
12 are not subject to violation by a nongovernment party;

13      (c) Rules adopting or incorporating by reference without material  
14 change federal statutes or regulations, Washington state statutes,  
15 rules of other Washington state agencies, shoreline master programs  
16 other than those programs governing shorelines of statewide  
17 significance, or, as referenced by Washington state law, national  
18 consensus codes that generally establish industry standards, if the  
19 material adopted or incorporated regulates the same subject matter and  
20 conduct as the adopting or incorporating rule;

21      (d) Rules that only correct typographical errors, make address or  
22 name changes, or clarify language of a rule without changing its  
23 effect;

24      (e) Rules the content of which is explicitly and specifically  
25 dictated by statute;

26      (f) Rules that set or adjust fees or rates pursuant to legislative  
27 standards; or

28      (g) Rules that adopt, amend, or repeal:

29      (i) A procedure, practice, or requirement relating to agency  
30 hearings; or

31      (ii) A filing or related process requirement for applying to an  
32 agency for a license or permit.

33       **Sec. 4.** RCW 34.05.313 and 1995 c 403 s 303 are each amended to  
34 read as follows:

35      (1) The provisions of this section are subject to section 2 of this  
36 act.

1        (2) During the development of a rule or after its adoption, an  
2 agency may develop methods for measuring or testing the feasibility of  
3 complying with or administering the rule and for identifying simple,  
4 efficient, and economical alternatives for achieving the goal of the  
5 rule. A pilot project shall include public notice, participation by  
6 volunteers who are or will be subject to the rule, a high level of  
7 involvement from agency management, reasonable completion dates, and a  
8 process by which one or more parties may withdraw from the process or  
9 the process may be terminated. Volunteers who agree to test a rule and  
10 attempt to meet the requirements of the draft rule, to report  
11 periodically to the proposing agency on the extent of their ability to  
12 meet the requirements of the draft rule, and to make recommendations  
13 for improving the draft rule shall not be obligated to comply fully  
14 with the rule being tested nor be subject to any enforcement action or  
15 other sanction for failing to comply with the requirements of the draft  
16 rule.

17        ~~((+2))~~ (3) An agency conducting a pilot rule project authorized  
18 under subsection ~~((+1))~~ (2) of this section may waive one or more  
19 provisions of agency rules otherwise applicable to participants in such  
20 a pilot project if the agency first determines that such a waiver is in  
21 the public interest and necessary to conduct the project. Such a  
22 waiver may be only for a stated period of time, not to exceed the  
23 duration of the project.

24        ~~((+3))~~ (4) The findings of the pilot project should be widely  
25 shared and, where appropriate, adopted as amendments to the rule.

26        ~~((+4))~~ (5) If an agency conducts a pilot rule project in lieu of  
27 meeting the requirements of the regulatory fairness act, chapter 19.85  
28 RCW, the agency shall ensure the following conditions are met:

29        (a) If over ten small businesses are affected, there shall be at  
30 least ten small businesses in the test group and at least one-half of  
31 the volunteers participating in the pilot test group shall be small  
32 businesses.

33        (b)(i) If there are at least one hundred businesses affected, the  
34 participation by small businesses in the test group shall be as  
35 follows:

36        (A) Not less than twenty percent of the small businesses must  
37 employ twenty-six to fifty employees;

1 (B) Not less than twenty percent of the small businesses must  
2 employ eleven to twenty-six employees; and

3 (C) Not less than twenty percent of the small businesses must  
4 employ zero to ten employees.

5 (ii) If there do not exist a sufficient number of small businesses  
6 in each size category set forth in (b)(i) of this subsection willing to  
7 participate in the pilot project to meet the minimum requirements of  
8 that subsection, then the agency must comply with this section to the  
9 maximum extent practicable.

10 (c) The agency may not terminate the pilot project before  
11 completion.

12 (d) Before filing the notice of proposed rule making pursuant to  
13 RCW 34.05.320, the agency must prepare a report of the pilot rule  
14 project that includes:

15 (i) A description of the difficulties small businesses had in  
16 complying with the pilot rule;

17 (ii) A list of the recommended revisions to the rule to make  
18 compliance with the rule easier or to reduce the cost of compliance  
19 with the rule by the small businesses participating in the pilot rule  
20 project;

21 (iii) A written statement explaining the options it considered to  
22 resolve each of the difficulties described and a statement explaining  
23 its reasons for not including a recommendation by the pilot test group  
24 to revise the rule; and

25 (iv) If the agency was unable to meet the requirements set forth in  
26 (b)(i) of this subsection, a written explanation of why it was unable  
27 to do so and the steps the agency took to include small businesses in  
28 the pilot project.

29 **Sec. 5.** RCW 34.05.320 and 2004 c 31 s 2 are each amended to read  
30 as follows:

31 (1) The provisions of this section are subject to section 2 of this  
32 act.

33 (2) At least twenty days before the rule-making hearing at which  
34 the agency receives public comment regarding adoption of a rule, the  
35 agency shall cause notice of the hearing to be published in the state  
36 register. The publication constitutes the proposal of a rule. The  
37 notice shall include all of the following:

1 (a) A title, a description of the rule's purpose, and any other  
2 information which may be of assistance in identifying the rule or its  
3 purpose;

4 (b) Citations of the statutory authority for adopting the rule and  
5 the specific statute the rule is intended to implement;

6 (c) A short explanation of the rule, its purpose, and anticipated  
7 effects, including in the case of a proposal that would modify existing  
8 rules, a short description of the changes the proposal would make, and  
9 a statement of the reasons supporting the proposed action;

10 (d) The agency personnel, with their office location and telephone  
11 number, who are responsible for the drafting, implementation, and  
12 enforcement of the rule;

13 (e) The name of the person or organization, whether private,  
14 public, or governmental, proposing the rule;

15 (f) Agency comments or recommendations, if any, regarding statutory  
16 language, implementation, enforcement, and fiscal matters pertaining to  
17 the rule;

18 (g) Whether the rule is necessary as the result of federal law or  
19 federal or state court action, and if so, a citation to such law or  
20 court decision;

21 (h) When, where, and how persons may present their views on the  
22 proposed rule;

23 (i) The date on which the agency intends to adopt the rule;

24 (j) A copy of the small business economic impact statement prepared  
25 under chapter 19.85 RCW, or an explanation for why the agency did not  
26 prepare the statement;

27 (k) A statement indicating whether RCW 34.05.328 applies to the  
28 rule adoption; and

29 (l) If RCW 34.05.328 does apply, a statement indicating that a copy  
30 of the preliminary cost-benefit analysis described in RCW  
31 34.05.328(~~(+1)~~) (2)(c) is available.

32 (~~(+2)~~) (3)(a) Upon filing notice of the proposed rule with the  
33 code reviser, the adopting agency shall have copies of the notice on  
34 file and available for public inspection. Except as provided in (b) of  
35 this subsection, the agency shall forward three copies of the notice to  
36 the rules review committee.

37 (b) A pilot of at least ten agencies, including the departments of  
38 labor and industries, fish and wildlife, revenue, ecology, retirement

1 systems, and health, shall file the copies required under this  
2 subsection, as well as under RCW 34.05.350 and 34.05.353, with the  
3 rules review committee electronically for a period of four years from  
4 June 10, 2004. The office of regulatory assistance shall negotiate the  
5 details of the pilot among the agencies, the legislature, and the code  
6 reviser.

7 ~~((3))~~ (4) No later than three days after its publication in the  
8 state register, the agency shall cause either a copy of the notice of  
9 proposed rule adoption, or a summary of the information contained on  
10 the notice, to be mailed to each person, city, and county that has made  
11 a request to the agency for a mailed copy of such notices. An agency  
12 may charge for the actual cost of providing a requesting party mailed  
13 copies of these notices.

14 ~~((4))~~ (5) In addition to the notice required by subsections  
15 ~~((1))~~ (2) and ~~((2))~~ (3) of this section, an institution of higher  
16 education shall cause the notice to be published in the campus or  
17 standard newspaper of the institution at least seven days before the  
18 rule-making hearing.

19 **Sec. 6.** RCW 34.05.328 and 2010 c 112 s 15 are each amended to read  
20 as follows:

21 (1) The provisions of this section are subject to section 2 of this  
22 act.

23 (2) Before adopting a rule described in subsection ~~((5))~~ (6) of  
24 this section, an agency shall:

25 (a) Clearly state in detail the general goals and specific  
26 objectives of the statute that the rule implements;

27 (b) Determine that the rule is needed to achieve the general goals  
28 and specific objectives stated under (a) of this subsection, and  
29 analyze alternatives to rule making and the consequences of not  
30 adopting the rule;

31 (c) Provide notification in the notice of proposed rule making  
32 under RCW 34.05.320 that a preliminary cost-benefit analysis is  
33 available. The preliminary cost-benefit analysis must fulfill the  
34 requirements of the cost-benefit analysis under (d) of this subsection.  
35 If the agency files a supplemental notice under RCW 34.05.340, the  
36 supplemental notice shall include notification that a revised



1 preliminary cost-benefit analysis is available. A final cost-benefit  
2 analysis shall be available when the rule is adopted under RCW  
3 34.05.360;

4 (d) Determine that the probable benefits of the rule are greater  
5 than its probable costs, taking into account both the qualitative and  
6 quantitative benefits and costs and the specific directives of the  
7 statute being implemented;

8 (e) Determine, after considering alternative versions of the rule  
9 and the analysis required under (b), (c), and (d) of this subsection,  
10 that the rule being adopted is the least burdensome alternative for  
11 those required to comply with it that will achieve the general goals  
12 and specific objectives stated under (a) of this subsection;

13 (f) Determine that the rule does not require those to whom it  
14 applies to take an action that violates requirements of another federal  
15 or state law;

16 (g) Determine that the rule does not impose more stringent  
17 performance requirements on private entities than on public entities  
18 unless required to do so by federal or state law;

19 (h) Determine if the rule differs from any federal regulation or  
20 statute applicable to the same activity or subject matter and, if so,  
21 determine that the difference is justified by the following:

22 (i) A state statute that explicitly allows the agency to differ  
23 from federal standards; or

24 (ii) Substantial evidence that the difference is necessary to  
25 achieve the general goals and specific objectives stated under (a) of  
26 this subsection; and

27 (i) Coordinate the rule, to the maximum extent practicable, with  
28 other federal, state, and local laws applicable to the same activity or  
29 subject matter.

30 ~~((+2))~~ (3) In making its determinations pursuant to subsection  
31 ~~((+1))~~ (2)(b) through (h) of this section, the agency shall place in  
32 the rule-making file documentation of sufficient quantity and quality  
33 so as to persuade a reasonable person that the determinations are  
34 justified.

35 ~~((+3))~~ (4) Before adopting rules described in subsection ~~((+5))~~  
36 (6) of this section, an agency shall place in the rule-making file a  
37 rule implementation plan for rules filed under each adopting order.  
38 The plan shall describe how the agency intends to:

1 (a) Implement and enforce the rule, including a description of the  
2 resources the agency intends to use;

3 (b) Inform and educate affected persons about the rule;

4 (c) Promote and assist voluntary compliance; and

5 (d) Evaluate whether the rule achieves the purpose for which it was  
6 adopted, including, to the maximum extent practicable, the use of  
7 interim milestones to assess progress and the use of objectively  
8 measurable outcomes.

9 ~~((4))~~ (5) After adopting a rule described in subsection ~~((5))~~  
10 (6) of this section regulating the same activity or subject matter as  
11 another provision of federal or state law, an agency shall do all of  
12 the following:

13 (a) Coordinate implementation and enforcement of the rule with the  
14 other federal and state entities regulating the same activity or  
15 subject matter by making every effort to do one or more of the  
16 following:

17 (i) Deferring to the other entity;

18 (ii) Designating a lead agency; or

19 (iii) Entering into an agreement with the other entities specifying  
20 how the agency and entities will coordinate implementation and  
21 enforcement.

22 If the agency is unable to comply with this subsection ~~((4))~~  
23 (5)(a), the agency shall report to the legislature pursuant to (b) of  
24 this subsection;

25 (b) Report to the joint administrative rules review committee:

26 (i) The existence of any overlap or duplication of other federal or  
27 state laws, any differences from federal law, and any known overlap,  
28 duplication, or conflict with local laws; and

29 (ii) Make recommendations for any legislation that may be necessary  
30 to eliminate or mitigate any adverse effects of such overlap,  
31 duplication, or difference.

32 ~~((5))~~ (6)(a) Except as provided in (b) of this subsection, this  
33 section applies to:

34 (i) Significant legislative rules of the departments of ecology,  
35 labor and industries, health, revenue, social and health services, and  
36 natural resources, the employment security department, the forest  
37 practices board, the office of the insurance commissioner, and to the

1 legislative rules of the department of fish and wildlife implementing  
2 chapter 77.55 RCW; and

3 (ii) Any rule of any agency, if this section is voluntarily made  
4 applicable to the rule by the agency, or is made applicable to the rule  
5 by a majority vote of the joint administrative rules review committee  
6 within forty-five days of receiving the notice of proposed rule making  
7 under RCW 34.05.320.

8 (b) This section does not apply to:

9 (i) Emergency rules adopted under RCW 34.05.350;

10 (ii) Rules relating only to internal governmental operations that  
11 are not subject to violation by a nongovernment party;

12 (iii) Rules adopting or incorporating by reference without material  
13 change federal statutes or regulations, Washington state statutes,  
14 rules of other Washington state agencies, shoreline master programs  
15 other than those programs governing shorelines of statewide  
16 significance, or, as referenced by Washington state law, national  
17 consensus codes that generally establish industry standards, if the  
18 material adopted or incorporated regulates the same subject matter and  
19 conduct as the adopting or incorporating rule;

20 (iv) Rules that only correct typographical errors, make address or  
21 name changes, or clarify language of a rule without changing its  
22 effect;

23 (v) Rules the content of which is explicitly and specifically  
24 dictated by statute;

25 (vi) Rules that set or adjust fees or rates pursuant to legislative  
26 standards;

27 (vii) Rules of the department of social and health services  
28 relating only to client medical or financial eligibility and rules  
29 concerning liability for care of dependents; or

30 (viii) Rules of the department of revenue that adopt a uniform  
31 expiration date for reseller permits as authorized in RCW 82.32.780 and  
32 82.32.783.

33 (c) For purposes of this subsection:

34 (i) A "procedural rule" is a rule that adopts, amends, or repeals  
35 (A) any procedure, practice, or requirement relating to any agency  
36 hearings; (B) any filing or related process requirement for making  
37 application to an agency for a license or permit; or (C) any policy

1 statement pertaining to the consistent internal operations of an  
2 agency.

3 (ii) An "interpretive rule" is a rule, the violation of which does  
4 not subject a person to a penalty or sanction, that sets forth the  
5 agency's interpretation of statutory provisions it administers.

6 (iii) A "significant legislative rule" is a rule other than a  
7 procedural or interpretive rule that (A) adopts substantive provisions  
8 of law pursuant to delegated legislative authority, the violation of  
9 which subjects a violator of such rule to a penalty or sanction; (B)  
10 establishes, alters, or revokes any qualification or standard for the  
11 issuance, suspension, or revocation of a license or permit; or (C)  
12 adopts a new, or makes significant amendments to, a policy or  
13 regulatory program.

14 (d) In the notice of proposed rule making under RCW 34.05.320, an  
15 agency shall state whether this section applies to the proposed rule  
16 pursuant to (a)(i) of this subsection, or if the agency will apply this  
17 section voluntarily.

18 ((+6+)) (7) By January 31, 1996, and by January 31st of each even-  
19 numbered year thereafter, the office of financial management, after  
20 consulting with state agencies, counties, and cities, and business,  
21 labor, and environmental organizations, shall report to the governor  
22 and the legislature regarding the effects of this section on the  
23 regulatory system in this state. The report shall document:

24 (a) The rules proposed to which this section applied and to the  
25 extent possible, how compliance with this section affected the  
26 substance of the rule, if any, that the agency ultimately adopted;

27 (b) The costs incurred by state agencies in complying with this  
28 section;

29 (c) Any legal action maintained based upon the alleged failure of  
30 any agency to comply with this section, the costs to the state of such  
31 action, and the result;

32 (d) The extent to which this section has adversely affected the  
33 capacity of agencies to fulfill their legislatively prescribed mission;

34 (e) The extent to which this section has improved the acceptability  
35 of state rules to those regulated; and

36 (f) Any other information considered by the office of financial  
37 management to be useful in evaluating the effect of this section.

1        NEW SECTION.    **Sec. 7.**    If any provision of this act or its  
2 application to any person or circumstance is held invalid, the  
3 remainder of the act or the application of the provision to other  
4 persons or circumstances is not affected.

5        NEW SECTION.    **Sec. 8.**    This act is necessary for the immediate  
6 preservation of the public peace, health, or safety, or support of the  
7 state government and its existing public institutions, and takes effect  
8 immediately.

--- END ---