

ESSB 5034 - H AMD TO APP COMM AMD (H-2378.4/13) **388**

By Representative Taylor

FAILED 04/12/2013

1 On page 241, after line 18, insert the following:

2 "NEW SECTION. Sec. 968. (1) The legislature finds that Washington
3 families, workers, and employers continue to struggle to make ends
4 meet. As families and employers have streamlined their budgets and
5 services, so should state government. Government continues to
6 increase the burden on citizens and employers through perpetual
7 alteration and expansion of rules. During 2012, an estimated 1,129
8 new sections to the Washington Administrative Code were permanently
9 adopted, 2,211 sections were permanently amended, 393 emergency rule
10 filings were made, and 961 sections were permanently repealed. A
11 total of 5,511 pages of permanent rule changes were made and 2,398
12 pages of emergency rules were adopted. The constant changing of rules
13 provides uncertainty to citizens and employers and adds additional
14 costs to taxpayers as agencies hold public meetings and telephone
15 conferences, and employees spend untold hours working on drafts for
16 rules. Furthermore, continual proposal of new rules distracts
17 employers from being productive in their respective enterprises due to
18 a need to comment against these proposed rules. Most agencies do not
19 track the number of hours employees spend on rule making nor do they
20 track the cost to the agency to do this task. One way to reduce
21 millions of dollars in employee and administrative costs is to impose
22 a moratorium on formal and informal rule making by state agencies
23 except in certain specified instances. This moratorium is to last for
24 three years or until the state is no longer facing financial deficits.

25 (2) For state agencies provided appropriation authority under this
26 act, no appropriations under this act shall be used for agency rule
27 making during the 2013-15 biennium, except in the following cases:

1 (a) A rule is needed to implement a federal law and the rule is
2 not more stringent than federal law;

3 (b) A rule is needed to implement the terms of a governor-declared
4 state of emergency;

5 (c) A rule is needed by the department of health to respond to a
6 public health emergency;

7 (d) A rule is needed to set the times for the taking of wildlife,
8 fish, or shellfish pursuant to RCW 77.12.047(1) or 77.04.055(2); or

9 (e) Legislation enacted after January 1, 2013, specifically
10 directs that rulemaking be undertaken. Rules adopted under this
11 subsection (2)(e) during the 2013-15 biennium must be approved by the
12 legislature in the ensuing legislative session before the rule may
13 take effect.

14 (3) This section does not prohibit an agency from repealing rules.
15

16 NEW SECTION. **Sec. 969.** RCW 34.05.328 and 2011 c 298 s 21 and 2011
17 c 149 s 1 are each reenacted and amended to read as follows:

18 (1) Before adopting a rule described in subsection (~~(5)~~) (6) of
19 this section, an agency must:

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

22 (b) Determine that the rule is needed to achieve the general goals
23 and specific objectives stated under (a) of this subsection, and
24 analyze alternatives to rule making and the consequences of not
25 adopting the rule;

26 (c) Provide notification in the notice of proposed rule making
27 under RCW 34.05.320 that a preliminary cost-benefit analysis is
28 available. The preliminary cost-benefit analysis must fulfill the
29 requirements of the cost-benefit analysis under (d) of this
30 subsection. If the agency files a supplemental notice under RCW
31 34.05.340, the supplemental notice must include notification that a
32 revised preliminary cost-benefit analysis is available. A final cost-
33 benefit analysis must be available when the rule is adopted under RCW
34 34.05.360;

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

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

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

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

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

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

21 (ii) Substantial evidence that the difference is necessary to
22 achieve the general goals and specific objectives stated under (a) of
23 this subsection; (~~and~~)

24 (i) Coordinate the rule, to the maximum extent practicable, with
25 other federal, state, and local laws applicable to the same activity
26 or subject matter; and

27 (j) For the 2013-15 biennium, receive the governor's signature on
28 the final rule.

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

33 (3) Before adopting rules described in subsection (~~(+5)~~) (6) of
34 this section, an agency must place in the rule-making file a rule

1 implementation plan for rules filed under each adopting order. The
2 plan must describe how the agency intends to:

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

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

6 (c) Promote and assist voluntary compliance; and

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

11 (4) For the 2013-15 biennium, the adoption of rules described in
12 subsection (5) of this section must be made before December 1st of any
13 year, and the rules may not take effect before the end of the regular
14 legislative session in the next year.

15 (5) After adopting a rule described in subsection ~~((+5+))~~ (6) of
16 this section regulating the same activity or subject matter as another
17 provision of federal or state law, an agency must do all of the
18 following:

19 (a) Coordinate implementation and enforcement of the rule with the
20 other federal and state entities regulating the same activity or
21 subject matter by making every effort to do one or more of the
22 following:

23 (i) Deferring to the other entity;

24 (ii) Designating a lead agency; or

25 (iii) Entering into an agreement with the other entities
26 specifying how the agency and entities will coordinate implementation
27 and enforcement.

28 If the agency is unable to comply with this subsection ~~((+4+))~~
29 (5)(a), the agency must report to the legislature pursuant to (b) of
30 this subsection;

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

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

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

4 (~~(+5)~~) (6)(a) Except as provided in (b) of this subsection, this
5 section applies to:

6 (i) Significant legislative rules of the departments of ecology,
7 labor and industries, health, revenue, social and health services, and
8 natural resources, the employment security department, the forest
9 practices board, the office of the insurance commissioner, and to the
10 legislative rules of the department of fish and wildlife implementing
11 chapter 77.55 RCW; and

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

17 (b) This section does not apply to:

18 (i) Emergency rules adopted under RCW 34.05.350;

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

21 (iii) Rules adopting or incorporating by reference without
22 material change federal statutes or regulations, Washington state
23 statutes, rules of other Washington state agencies, shoreline master
24 programs other than those programs governing shorelines of statewide
25 significance, or, as referenced by Washington state law, national
26 consensus codes that generally establish industry standards, if the
27 material adopted or incorporated regulates the same subject matter and
28 conduct as the adopting or incorporating rule;

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

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

34

1 (vi) Rules that set or adjust fees under the authority of RCW
2 19.02.075 or that set or adjust fees or rates pursuant to legislative
3 standards, including fees set or adjusted under the authority of RCW
4 19.80.045;

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

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

11 (c) For purposes of this subsection:

12 (i) A "procedural rule" is a rule that adopts, amends, or repeals
13 (A) any procedure, practice, or requirement relating to any agency
14 hearings; (B) any filing or related process requirement for making
15 application to an agency for a license or permit; or (C) any policy
16 statement pertaining to the consistent internal operations of an
17 agency.

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

21 (iii) A "significant legislative rule" is a rule other than a
22 procedural or interpretive rule that (A) adopts substantive provisions
23 of law pursuant to delegated legislative authority, the violation of
24 which subjects a violator of such rule to a penalty or sanction; (B)
25 establishes, alters, or revokes any qualification or standard for the
26 issuance, suspension, or revocation of a license or permit; or (C)
27 adopts a new, or makes significant amendments to, a policy or
28 regulatory program.

29 (d) In the notice of proposed rule making under RCW 34.05.320, an
30 agency must state whether this section applies to the proposed rule
31 pursuant to (a)(i) of this subsection, or if the agency will apply
32 this section voluntarily.

33 ((+6)) (7) By January 31, 1996, and by January 31st of each even-
34 numbered year thereafter, the office of regulatory assistance, after

1 consulting with state agencies, counties, and cities, and business,
2 labor, and environmental organizations, must report to the governor
3 and the legislature regarding the effects of this section on the
4 regulatory system in this state. The report must document:

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

8 (b) The costs incurred by state agencies in complying with this
9 section;

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

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

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

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

20
21 NEW SECTION. **Sec. 970.** (1) The legislature finds that there have
22 been instances where regulatory agencies discovered actions by a
23 regulated entity that are in error after reports have been accepted
24 and approved or inspections have been conducted and approved.
25 Retroactively applying fines after governmental approval creates an
26 unfriendly business environment and can place unexpected financial
27 burdens on businesses. Businesses should be able to rely on
28 government approval and acceptance of reports and inspections and not
29 risk penalties when mistakes are made by government personnel or
30 contractors. It is the intent of the legislature that regulated
31 parties who have received acceptance and approval by the regulating
32 government authority should not be subsequently fined or penalized,
33 but should be encouraged to correct action that is deemed in error or
34 violates reporting or inspection requirements during the next

1 reporting period. The regulating authority should notify the
2 regulated party of the violation to prevent future violations.

3 (2) For state agencies provided appropriation authority under this
4 act, an agency may not issue a fine or impose a penalty on a person
5 during the 2013-15 biennium if:

6 (a) An inspection is approved by an official of the agency
7 requiring the inspection and a subsequent reevaluation of the approved
8 inspection by the regulating agency identifies a violation by the
9 regulated party; or

10 (b) Documentation required under an agency's reporting
11 requirements is submitted to the agency by a regulated party and is
12 accepted and approved by the regulating agency and a subsequent
13 reevaluation of the approved documentation identifies a violation
14 based on failure to provide required documentation or information.

15 (3) During the 2013-15 biennium, a rule may not authorize the
16 imposition of a civil fine on a person based on the following
17 circumstances if:

18 (a) An inspection is approved by an official of the agency
19 requiring the inspection and a subsequent reevaluation of the approved
20 inspection by the regulating agency identifies a violation by the
21 regulated party; or

22 (b) Documentation required under an agency's reporting
23 requirements is submitted to the agency by a regulated party and is
24 accepted and approved by the regulating agency and a subsequent
25 reevaluation of the approved documentation identifies a violation
26 based on failure to provide required documentation or information.

27 (4) For the 2013-15 biennium, violations identified after an
28 inspection or documentation has been approved may be remedied through
29 technical assistance provided to the regulated party allowing
30 correction of the circumstances of the violation for future reporting
31 periods or inspections.

32
33 NEW SECTION. **Sec. 971.** After August 1, 2013 and until June 30,
34 2015, rules adopted by agencies must be based upon a specific grant of

1 legislative authority for each rule as explicitly set forth in
2 statute. Such rules must include the citation of the specific
3 statutory sections from which the authority is derived, and may not be
4 based solely upon the statute's intent or the general enabling
5 statutes authorizing the activities of the agency.

6
7 NEW SECTION. **Sec. 972.** During the 2013-15 biennium, the State
8 Parks and Recreation Commission, the Washington Department of Fish and
9 Wildlife Commission, and the Department of Natural Resources are
10 required to coordinate their respective agency land use plans with all
11 applicable local government officials. The coordination of plans must
12 occur in the plan development stage, along with the plan revision and
13 implementation stages. At a minimum, all three agencies are required
14 to keep apprised of all relevant local and tribal land use ordinances
15 and plans, strive to ensure state policies and actions are consistent
16 with local land use plans, assist in resolving inconsistencies between
17 state and local land use policies, and provide meaningful public
18 involvement, access to the agency director, and early notice of agency
19 actions to local government officials. The agencies are required to
20 report to the Legislature any instances that arise causing the agency
21 to be incapable of compliance with local plans and ordinances because
22 of conflicting statutory limitations or responsibilities.

23
24 NEW SECTION. **Sec. 973.** (1) During the 2013-15 biennium, agencies
25 must provide to any business licensed to do business in the state of
26 Washington a period of at least five business days to correct any
27 violation of state law or agency rule before the agency may impose any
28 fines, civil penalties, or administrative sanctions. If no correction
29 is possible, this subsection does not apply.

30 (2) Exceptions to requirements of subsection (1) of this section
31 may be made for any of the following reasons:

32 (a) The agency head determines that the effect of the violation or
33 waiver presents a direct danger to the public health, poses a
34

1 potentially significant threat to human health or safety, or causes
2 serious harm to the public interest;

3 (b) The order is one to cease and desist an activity that violates
4 a statute or rule protecting public health or safety, the environment,
5 or would cause serious harm to the public interest;

6 (c) The violation involves a knowing or willful violation;

7 (d) The violation is of a requirement concerning the assessment,
8 collection, or administration of any tax, tax program, debt, revenue,
9 receipt, a regulated entity's financial filings, or insurance rate or
10 form filing;

11 (e) The requirements in this section are in conflict with federal
12 law or program requirements, federal requirements that are a
13 prescribed condition to the allocation of federal funds to the state,
14 or the requirements for eligibility of employers in this state for
15 federal unemployment tax credits, as determined by the agency head;

16 (f) The business committing the violation previously violated the
17 exact or substantially similar requirement; or

18 (g) The owner or operator of the business committing the violation
19 owns or operates, or owned or operated a different business that
20 previously violated a substantially similar requirement.

21 (3) This section does not prohibit an agency from waiving fines,
22 civil penalties, or administrative sanctions incurred by a business
23 for a violation.

24 (4) This section may be construed to diminish the responsibility
25 for any citizen or business to apply for and obtain a permit, license,
26 or authorizing document that is required to engage in a regulated
27 activity, or otherwise comply with state or federal law.

28 (5) This section may not be construed to apply to businesses
29 required to provide accurate and complete information and
30 documentation in relation to any claim for payment of state or federal
31 funds or who are licensed or certified to provide care and services to
32 vulnerable adults or children.

33 (6) This section does not affect the attorney general's authority
34 to impose fines, civil penalties, or administrative sanctions as

1 otherwise authorized by law; nor does this section affect the attorney
2 general's authority to enforce the consumer protection act, chapter
3 19.86 RCW."

4
5
6

EFFECT: No appropriation made to a state agency may be used for agency rulemaking during the 2013-15 biennium except for rules needed to implement a federal law and the rule is not more stringent than federal law; rules necessary to implement the terms of a governor-declared state of emergency, rules needed by the Department of Health to respond to a public health emergency, or rules specifically required by legislation (which must sit through the next legislative session). The Governor's signature must be on any final rule adopted by an agency during the 2013-15 biennium.

During the 2013-15 biennium, an agency may not impose a fine or penalty retroactively if the agency first approves an inspection or document and then later finds a rule violation.

Between August 1, 2013 and June 30, 2015, rules adopted by agencies must be based on specific authority granted by the legislature and not on a statute's intent or general enabling statutes.

During the 2013-15 biennium, the State Parks and Recreation Commission, the Department of Fish and Wildlife, and the Department of Natural Resources must coordinate their agency land use plans with all applicable local land use officials.

During the 2013-15 biennium, agencies must provide a period of at least five days to Washington businesses to correct any violation of state law or agency rule before the agency may impose a fine, civil penalty, or administrative sanctions. This does not apply to cases related to public health and safety, a knowing or willful violation, a violation concerning taxes or revenues or insurance rate form filings, a violation of federal law, or multiple violations.

FISCAL IMPACT: No net change to appropriated levels.

--- END ---