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## Government Operations & Elections Committee

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### HB 1163

**Brief Description:** Regarding administrative procedures that promote accountability, transparency, and economic relief.

**Sponsors:** Representatives Taylor, Shea, Overstreet, Short, Manweller, Holy, Haler and Hargrove.

#### Brief Summary of Bill

- Makes changes to the Washington Administrative Procedures Act.
- Requires the Parks Commission, the Department of Fish and Wildlife, and the Department of Natural Resources to coordinate their respective agency land use plans with all applicable local government officials.
- Requires state and federal governments to coordinate with local governments if state or federal laws are more restrictive than local laws.
- Requires state and local agencies to make decisions for applications for certain permits, variances, etc., within 90 days and provides for an alternate appeal process.
- Requires government authorities to provide just compensation to property owners whenever certain government actions make requirements of property owners.
- Requires state agencies, under certain conditions, to complete a private property taking impact analysis and an economic impact analysis before adopting any rule, policy, regulation or other agency action.

**Hearing Date:** 2/12/13

**Staff:** Marsha Reilly (786-7135)

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

## **Background:**

### Administrative Procedure Act.

Washington's Administrative Procedure Act (APA) establishes procedures under which state agencies adopt rules and conduct adjudicative proceedings. The APA also sets out procedures for judicial and legislative review. Generally, a rule is any agency order, directive, or regulation of general applicability which: (1) subjects a person to a sanction if violated; or (2) establishes or changes any procedure or qualification relating to agency hearings, benefits or privileges conferred by law, licenses to pursue any commercial activity, trade, or profession, or standards for the sale or distribution of products or materials. An agency may not adopt rules absent a grant of authority by the Legislature. Such rule making authority may be derived through a broad, general grant of such authority in the enabling statutes pertaining to an agency or it may be explicitly conferred by statute in order to enable an agency to implement a specific legislative provision.

Before adopting a rule, an agency must follow specified procedures, including publishing notice in the state register and holding hearings.

The APA designates certain types of rules as being "significant legislative rules," which are subject to special requirements and procedures before they may be adopted by an agency. A significant legislative rule is a rule other than a procedural or interpretive rule that:

- adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction;
- establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or
- adopts new, or makes significant amendments to, a policy or regulatory program.

Generally speaking, the requirements controlling the adoption of significant legislative rules are applicable only to those rules proposed or adopted by specified regulatory agencies and which meet the statutory definition. The specified state agencies are the:

- Department of Ecology;
- Department of Labor and Industries;
- Department of Health;
- Department of Revenue;
- Department of Social and Health Services;
- Department of Natural Resources;
- Employment Security Department;
- Forest Practices Board;
- Office of the Insurance Commissioner; and
- Department of Fish and Wildlife.

### *Legal Challenges to Agency Rules.*

Under the APA, the validity of any rule adopted by an agency may be challenged by a petition for declaratory judgment when it appears the rule or application of the rule interferes with or impairs the legal rights or privileges of the petitioner. The petitioner has the burden of demonstrating the invalidity of the rule. The court may declare a rule invalid only if it finds that the rule: (1) violates the Constitution; (2) exceeds the statutory authority of the agency; (3) was

adopted without compliance with rule-making procedures; or (4) is arbitrary and capricious. The petition for declaratory judgment on the validity of an agency rule must be filed in Thurston County Superior Court.

### Land Management.

#### *State Land Management.*

The management of land owned in the name of the state has been delegated to a number of state agencies and universities. The management approach for the land is generally determined by the jurisdiction, authorities, and priorities of the agency delegated the management responsibilities.

The State Parks and Recreation Commission (Parks Commission), the Department of Fish and Wildlife (WDFW), and the Department of Natural Resources (DNR) are three agencies that manage many acres of undeveloped public lands in the state. Each of these agencies implement different management goals. For instance, the Parks Commission primarily provides recreational access, the WDFW manages land to enhance wildlife habitat and hunting access, while the DNR is primarily responsible for managing land in a manner that satisfies its fiduciary duty to the various state trust beneficiaries.

#### *Federal Land Management.*

The federal government requires, to the extent consistent with the laws governing the administration of the public lands, the coordination of certain land use inventory, planning, and management activities of the federal government with the land use planning and management programs of other federal departments, states, local governments, and Indian tribes [43 U.S.C. Sec. 1712(c)(9)].

This coordination must include the consideration of the policies of state and tribal land resource management programs. In implementing this directive, the Secretary of the Interior must:

- keep apprised of state, local, and tribal land use plans;
- assure that consideration is given to those state, local, and tribal plans that are germane in the development of land use plans for public lands;
- assist in resolving, to the extent practical, inconsistencies between federal and non-federal government plans;
- provide for meaningful public involvement of state and local government officials in the development of land use programs, land use regulations, and land use decisions for public lands; and
- enable state officials to furnish advice to the Secretary of the Interior with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within the state.

### Applications for Permits, Variances, Licenses.

Applications for permits, variances, licenses, or exemptions must be made to state or local agencies for a number of actions that may have an impact on the environment or to the public health and safety. For example, any person or agency undertaking a hydraulic project must get a permit from the Department of Ecology (DOE) to ensure the protection of fish life. A decision for the permit must be made within 45 days of receipt of the application. An application for a variance from the rules or regulations concerning the quality, nature or duration or extent of

discharges of air contaminants must be made to the DOE and a decision on the application must be made within 65 days.

Applicants denied a permit, variance, license, or exemption may appeal the decision in accordance with the Administrative Procedures Act through the appropriate hearings board.

### Relationship of State and Federal Law to Municipal Governments.

Under the state constitution, municipal corporations are vested with authority to make local police, sanitary, and other regulations only to the extent that these regulations do not conflict with general laws of the state. Similarly, the state Supreme Court has ruled that under the state constitution, county home rule charter rights are subordinate to express state law requirements that go beyond matters of local concern. In the event of an inconsistency between an ordinance, regulation, plan, or policy of a city, county, or special purpose district, and a more restrictive state law, the statute prevails. Similarly, under the Supremacy and Commerce Clauses of the United States Constitution, Congress may preempt state regulation, and under the Spending Clause, Congress may attach conditions on the receipt of federal funds.

### Compensation to Property Owners.

The Fifth Amendment of the federal Constitution provides that no person may be deprived of property without due process of law and that no property may be taken for public use without just compensation. The state Constitution similarly provides that no private property shall be taken or damaged for public or private use without just compensation having first been made.

Courts have identified a few broad categories of takings. In a regulatory taking, compensation is required when a government regulates a property to such a degree that the regulation effectively amounts to an exercise of the government's eminent domain power without actually divesting the property's owner of title to the property. In a physical taking, the government physically occupies some part of a landowner's property, entitling the landowner to compensation in the form of damages.

A regulation restricting the use of property to further legitimate public ends will generally not be considered a taking merely because it impairs the value or the utility of that land. Many zoning regulations and regulations issued pursuant to the police power to control harmful effects of land use fall into this category. However, when a regulation goes so far as to deprive the property owner of all reasonable use or value of the property, it will be judicially recognized as the equivalent of a taking that may not take place without payment of just compensation to the property's owner.

Regulatory activities by government agencies at all levels have been increasingly the subject of lawsuits claiming that property has been taken without compensation or that the owner has been deprived of a property right without due process of law.

## Summary of Bill:

### Administrative Procedure Act.

#### *Rule Making Moratorium.*

Subject to specified exceptions, rule making by all state agencies is suspended until either July 1, 2016, or such time as the Economic and Revenue Forecast Council reports that for three consecutive quarters state revenue collections have increased above the amounts predicted in the preceding yearly forecast, whichever occurs later. However, rule making is allowed if:

- a rule is needed to implement a federal law;
- a rule is needed in response to a state of emergency;
- the Department of Health needs a rule to respond to a public health emergency;
- a rule is needed to set times for fishing and hunting seasons; or
- legislation enacted after January 1, 2013, directs that rule making is allowed. (Rules adopted pursuant to such legislation must be approved by the Legislature in the ensuing legislative session before they may take effect.)

#### *Constitutional Basis for Governmental Acts.*

The text of every bill, act, ordinance, resolution, or rule adopted or enacted by an executive or legislative body, or the people [to be collectively referred to as "governmental acts"], must:

- include the citation of specific language from either the federal or state Constitution expressly establishing the constitutional basis for the governmental act;
- ensure that the provisions of the governmental act fall squarely within the authority expressly provided by the pertinent constitutional citation; and
- include a brief explanation of how the provisions of the governmental act are expressly authorized under the specific language provided by the federal or state Constitution, which may include contextual references regarding constitutional history and the intent of the drafters of the federal and state Constitutions.

#### *Significant Legislative Rules.*

Significant legislative rules must be adopted by an agency before December 1 of any year and may not take effect until the end of the next regular legislative session. A significant legislative rule must be signed by the Governor before it may be adopted by an agency.

#### *Rules With Specified Economic Impacts.*

Before adopting a rule, an agency must determine if the rule will result in a "specified economic impact." Rules that have a specified economic impact are those that either:

- impose annual costs of at least \$1,000 on an individual; or
- impose annual costs of at least \$5,000 on any business, partnership, corporation, association, or public or private organization.

If an agency determines that a proposed rule has a specified economic impact, the following requirements apply:

- the agency may not enforce the rule until the rule is enacted into law by the Legislature; and
- the agency must "provide notification" to both the Code Reviser (for publication) and the appropriate committees of the Legislature, which must include the text of the rule, any findings regarding the economic impacts, and any relevant public comments.

Each agency is required to annually assess whether or not any of its existing rules have resulted in a specified economic impact in the preceding year. If so, the agency must cease enforcing the rule until such time as the rule is enacted into law by the Legislature, and provide notification to both the Code Reviser and the appropriate Legislative committees.

An individual may bring a court action against an agency to bring the agency in compliance with the procedural requirements applicable to rules with specified economic impacts.

*Prohibition Against the Retroactive Imposition of Fines and Penalties.*

Agencies are prohibited from imposing fines or penalties for rules violations under the following circumstances:

- if an initial inspection of a regulated party is approved by the agency, but a subsequent reevaluation of the inspection identifies a rule violation; or
- if an agency initially approves documentation provided by a regulated party, but subsequently determines that the party failed to provide the requisite documentation.

Agencies are prohibited from adopting rules authorizing the imposition of fines or penalties under the circumstances outlined above.

If rules violations are identified by an agency subsequent to its approval of an inspection or approval of documentation, then the agency must provide technical assistance to the regulated party so as to allow the regulated party an opportunity to correct the problem underlying the rules violation.

*Limits on the Delegation of Authority to an Agency by the Legislature.*

Unless expressly provided otherwise in statute, the Legislature's delegation of its authority to an agency is limited to the minimum authority necessary for the agency to implement the clear directives set forth in the legislation, and the authority necessary for the agency to address the circumstances and behaviors foreseeable at the time of the legislation's enactment.

*Agency Rulemaking and Grants of Legislative Authority.*

After August 1, 2013, rules adopted by specified agencies must be based upon a specific grant of legislative authority for each rule as explicitly set forth in statute. Such rules must include the citation of the specific statutory sections from which the authority is derived, and may not be based solely upon the statute's intent or the general enabling statutes authorizing the activities of the agency. The agencies subject to this requirement include the:

- The departments of Social and Health Services, Ecology, Labor and Industries, Agriculture, Fish and Wildlife, Transportation, Licensing, Enterprise Services, Commerce, Veterans Affairs, Revenue, Retirement Systems, Corrections, Health, Financial Institutions, Archaeology and Historic Preservation, Early Learning, and Natural Resources;
- Puget Sound Partnership;
- State Finance Commission;
- State Investment Board;
- Traffic Safety Commission;
- Veterans Rehabilitation Council;
- Criminal Justice Training Commission;

- State Commission on Hispanic Affairs;
- State Commission on Asian Pacific American Affairs;
- Public Works Board;
- Community Economic Revitalization Board;
- Liquor Control Board; and
- Utilities and Transportation Commission.

### Land Management.

The Parks Commission, the WDFW, and the DNR are required to coordinate their respective agency land use plans with all applicable local government officials. The coordination of plans must occur in the plan development stage, along with the plan revision and implementation stages. At a minimum, all three agencies are required to keep apprised of all relevant local and tribal land use ordinances and plans, strive to ensure state policies and actions are consistent with local land use plans, assist in resolving inconsistencies between state and local land use policies, and provide meaningful public involvement, access to the agency director, and early notice of agency actions to local government officials. The agencies are required to report to the Legislature any instances that arise causing the agency to be incapable of compliance with local plans and ordinances because of conflicting statutory limitations or responsibilities.

### Restrictive Laws.

If the ordinances, regulations, plans, or policies of a city, a county, or a special purpose district are less restrictive than applicable federal or state laws or requirements, the city, county, or special purpose district must demand that the federal or state government coordinate with the city before the federal or state government implements, enforces, expands, or extends the law or requirement within the jurisdictional boundaries of the city, county, or special purpose district. The coordination demand may be waived through a resolution adopted by the legislative body. If the federal or state government fails to coordinate in good faith, the legislative body of the applicable local entity must hold two or more public hearings, consider the evidence, and vote on whether to authorize litigation to enforce the coordination rights of that local entity.

Any person who resides or conducts business in the state may serve each member of the applicable local entity's legislative body with a written demand to comply with the coordination requirements. If the legislative body fails to comply in a manner that causes injury to the person, the person may submit a written demand for a response, which must specify the city ordinance, regulation, plan, or policy with which the federal or state government failed to coordinate. Within 30 days of receiving the written demand for a response, the legislative body must hold a public hearing to present information on the decision to not demand coordination.

### Decisions Relating to Applications for Permits.

State and local government decisions pertaining to applications for permits, variances, licenses, determinations, and designations must be completed and the applicant notified of the decision within 90 days of the time the application is submitted. If the 90-day deadline for the decision is not satisfied, the applicant may file a motion in the appropriate superior court requesting court approval of the application. If the application is denied, the applicant may file a motion in the appropriate superior court requesting the court to overturn the decision. The appeal process is an

alternative to any other provision of law establishing appeal procedures. Applicants choosing to utilize this appeal process are deemed to have satisfied all administrative remedies. These provisions apply to applications for:

- permits under the Washington Clean Air Act;
- variances related to the quality, nature, duration or extent of discharges of air;
- determination of classes of forest practices under the Forest Practices Act;
- waste disposal permits under the provisions of law regarding water pollution control;
- permits for hydraulic projects related to construction projects in state waters;
- designations of local environmentally sensitive areas under the provisions of law regarding underground storage tanks;
- reclamation permits for surface mining;
- licenses related to water well construction;
- designs and plans of structures built or rebuilt on floodplains;
- exemptions from solid waste permitting under solid waste management laws;
- use of waste-derived fertilizers or the micronutrient fertilizers;
- environmental impact statements;
- registration of aquatic farms;
- licenses or certificates of approval required for the sanitary control of shellfish;
- dairy nutrient management plans;
- registration of pesticides distributed or transported within the state;
- commercial pesticide applicator licenses;
- public livestock market licenses;
- permits for the use or disposal of biosolids;
- operating permits pertaining to public water systems;
- construction or modification of a dam or controlling works for water storage;
- reservoir permits;
- development permits on shorelines;
- operating permits for large on-site sewage disposal systems; and
- permits for the withdrawal of public waters for irrigation purposes.

#### Compensation to Property Owners.

Government authorities must provide just compensation to property owners whenever land use ordinances, regulations, or policies adopted under the Planning Enabling Act or part of a land use permitting decision, or under local project reviews of land use planning or development requiring property owners to:

- place signage on their property;
- pay for and place fencing around critical areas, open space, habitat areas, riparian areas, or other property features;
- record restrictive covenants, land use designations, or change any legal lot description on the property;
- restore vegetation in an area where no vegetation existed during the time the property owner owned the property or vegetation degraded through natural causes;
- make expenditures in furtherance of protecting the function and values of wetlands;
- make expenditures related to protecting riparian areas; or
- grant or set aside easements for public access on the property.



A state agency may not adopt a rule or policy that results in any governmental authority being required to provide just compensation, unless under specific statutory requirement.

#### Analyses Required for Private Property Takings.

A new chapter of law is added to Title 34. The policies, regulations, and public laws of the United States and the state of Washington shall be interpreted and administered by agencies in accordance with the policies under the new chapter.

State agencies are required to complete a private property taking impact analysis before adopting any rule, policy, regulation, or related agency action which is likely to result in a taking of private property, except as it applies to eminent domain or law enforcement action, including seizure of property for forfeiture or as evidence, for a violation of law. The analysis must include:

- an assessment of the likelihood that a taking of private property will occur under the rule, ordinance, policy, regulation, proposal, recommendation, or related agency action;
- an evaluation of whether the rule, ordinance, policy, regulation, proposal, recommendation, or related agency action is likely to require compensation to private property owners;
- alternatives to the rule, policy, regulation, proposal, recommendation, or related agency action that would achieve the intended purposes of the agency action and lessen the likelihood that a taking of private property will occur;
- an estimate of the potential liability of the agency, if the agency is required to compensate a private property owner; and
- if the rule, policy, regulation, proposal, recommendation, or related agency action is in response to a federal mandate, the name of the federal agency responsible for such action.

The analysis must be submitted to the board of county commissioners in affected jurisdictions prior to adoption. No final rule may be adopted if enforcement of the rule could reasonably be construed to require an uncompensated taking of private property.

State agencies must complete an economic impact analysis before adopting any rule, policy, regulation, proposed legislation, or related department action which may economically impact the citizens of the state. The analysis includes:

- the specific purpose of the rule, policy, regulation, legislative bill, proposal, recommendation, or related agency action;
- an assessment of the economic impacts likely to occur as a result of the rule, policy, regulation, proposal, legislative bill, recommendation, or related agency action. The economic assessment shall consider impacts to individual property owners, impacts to the affected jurisdictions economy and impacts to the state's general fund;
- alternatives to the rule, policy, regulation, proposal, recommendation, or related agency action that would achieve the intended purpose and lessen the economic impacts that are likely to occur; and
- for state agencies, if the rule, policy, regulation, proposal, recommendation, or related agency action is in response to a federal mandate, the name of the federal agency responsible for the policy, regulation, proposal, recommendation.

The analysis must be submitted to the board of county commissioners in affected jurisdictions prior to adoption.

Both the private property taking impact analysis and the economic impact analysis must be made available to the public.

Any person likely to be aggrieved or adversely effected by the failure to complete a private property taking impact analysis or an economic impact analysis may apply to the superior court of the county where the agency is located or to the Thurston County Superior Court if the defendant is a state agency. The superior court is authorized to grant a temporary or permanent injunction restraining any person, agency, or all agencies from implementing or enforcing rules where the agency analysis was not done or was insufficient.

A person is aggrieved or adversely affected if the agency action has prejudiced or is likely to prejudice that person, and that person's asserted interests are among those that the agency was required to consider when it engaged in the challenged action. An analysis is insufficient if it is not supported by substantial evidence or evidence pertinent to Washington, or the facts presented by the petitioning party clearly indicate a mistake of law or fact was made and implementation or enforcement of the regulation would cause substantial injustice.

An order restraining any person, agency, or all agencies may contain a provision for the payment of pertinent court costs and reasonable attorneys' fees and administration expenses as is equitable and the court deems appropriate in the circumstances. If the court issues an order restraining the implementation or enforcement of a state agency regulation as it applies to individuals not parties to the litigation, the court must send the order to the Code Reviser's Office to be published in the Washington State Register.

The petitioner does not have to exhaust administrative remedies prior to seeking a court order. A remedy that any person may have under the laws of the state of Washington or of the United States may not be limited.

Every agency, who under color of any law, statute, rule, ordinance, or regulation, subjects or causes to be subjected, any person within Washington to the deprivation of any property rights secured by the chapter is liable to the person injured in an action at law, suit in equity or other legal proceeding for redress. Any agency employee, under the color of law, statute, rule, ordinance, regulation, policy, custom or omission, subjects any person in Washington to the deprivation of any property rights secured or protected by this chapter, whether willfully or from negligence, is in violation of this chapter and may be fined up to \$1,000 per occurrence of a violation.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.