HOUSE BILL REPORT

HB 2510

As Reported By House Committee On:
State Government

Title: An act relating to implementation of the recommendations of the governor's task force on regulatory reform.

Brief Description: Implementing regulatory reform.

Sponsors: Representatives R. Meyers, Reams, Brough, Dorn, Dunshee, Johanson, Pruitt, Shin, Zellinsky, Carlson, R. Johnson, J. Kohl, Karahalios, Basich, Jones, Bray, R. Fisher, Holm, Moak, Sheldon, Valle, Chappell, Eide, Wolfe, B. Thomas, Dyer, King, G. Fisher, L. Johnson, Dellwo, Ogden, Roland, Grant, Jacobsen, Quall, Rayburn, Morris, Romero, Rust, Kremen, Conway, Linville, Patterson, Forner, Long, Mielke, Springer, Cothern, Kessler, H. Myers, Tate, Backlund, Cooke, Wood and Mastin; by request of Governor Lowry.

Brief History:
Reported by House Committee on:
State Government, January 31, 1994, DPS.

HOUSE COMMITTEE ON STATE GOVERNMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 6 members: Representatives Anderson, Chair; Veloria, Vice Chair; Campbell; Conway; King and Pruitt.

Minority Report: Do not pass. Signed by 3 members: Representatives Reams, Ranking Minority Member; L. Thomas, Assistant Ranking Minority Member; and Dyer.

Staff: Bonnie Austin (786-7135); Harry Reinert (786-7110).

Background: In August of 1993, Governor Lowry established, by executive order, the Task Force on Regulatory Reform. The task force was directed to develop recommendations for statutory and administrative changes to achieve more reasonable, efficient, cost-effective, and coordinated regulatory actions. Although the work of the task force is scheduled to be completed by December 1, 1994, the task force has submitted interim recommendations to the Governor that address legislation, the Joint Administrative Rules

Review Committee, state agency rule-making, small business impacts, standardized forms, technical assistance, State Environmental Policy Act (SEPA) and Growth Management appeals, local development regulations, and the model toxics control act.

I. LEGISLATION AND RULE-MAKING

LEGISLATION: The Washington State Constitution contains a number of provisions which govern the passage of legislation. These include specific provisions pertaining to bill titles, subject matter, and amendments. Additionally, the court may review and invalidate statutes based on a number of due process and other constitutional grounds, including vagueness and the improper delegation of legislative authority. Regarding the delegation of rule-making authority, the Legislature must provide standards or guidelines that define in general terms what must be done and the instrumentality which is to accomplish the task.

JOINT ADMINISTRATIVE RULES REVIEW COMMITTEE (JARRC): The Joint Administrative Rules Review Committee is authorized to recommend the suspension of an agency rule when it finds that the rule does not conform with the intent of the Legislature. A suspension recommendation requires a two-thirds vote. The Governor is required to approve or disapprove the recommended suspension within 30 days. If the Governor approves the suspension, the suspension is effective until 90 days after the expiration of the next regular legislative session. The code revisor is required to publish JARRC's suspension recommendation and the Governor's approval or disapproval in the Washington State register and reference this entry in the next edition of the Washington Administrative Code. However, a JARRC suspension recommendation does not establish a presumption as to the legality or constitutionality of the rule in subsequent judicial proceedings.

AGENCY RULE-MAKING: Under the Administrative Procedures Act, an agency is required to maintain a rule-making file for each rule that it proposes or adopts. This file and the materials it incorporates must be available for public inspection. Among other items, the file must contain: all written comments received by the agency on the proposed rule adoption; a transcript or recording of presentations made during rule-making proceedings and any memorandum prepared summarizing the presentations; petitions for exceptions to, amendment of, or repeal or suspension of the rule; a concise explanatory statement identifying the agency's reasons for adopting a rule and a description of any differences between the proposed and adopted rule; and documents publicly cited by the agency in connection with its decision.

Any person may petition a state agency to adopt, amend, or repeal a rule. Within 60 days, the agency is required to either deny the petition and state the reasons for the denial, or initiate rule-making proceedings.

SMALL BUSINESS IMPACT: The Regulatory Fairness Act was adopted to minimize the proportionally higher impact of agency rules on small businesses. When a proposed rule will have an economic impact on more than 20 percent of all industries, or more than 10 percent of any one industry, the agency is required to: (1) reduce the economic impact of the rule on small businesses; and (2) prepare a small business economic impact statement.

Agencies may reduce the impact of rules by exempting small businesses from some or all of the requirements of the rule, simplifying compliance or reporting requirements for small businesses, establishing different timetables for small businesses, or establishing performance rather than design standards.

Small business economic impact statements analyze the cost of business compliance with the rule, including costs of labor, supplies, equipment, and increased administrative costs. Small business compliance costs are compared with the costs of compliance for the largest businesses. Costs are analyzed in terms of cost per employee, cost per hour of labor, or cost per $100 of sales. Statements also include a description of reporting, record keeping and other compliance requirements, and the kinds of professional services that a small business is likely to need to comply. Agencies are not required to prepare a small business economic impact statement if the rule will have a minor or negligible economic impact.

STATE AGENCY TECHNICAL ASSISTANCE: The Department of Labor and Industries operates a voluntary compliance program that provides on-site or other types of consultations to employers regarding their compliance with health and safety standards. These visits are not regarded as inspections, nor is any enforcement action taken unless a serious violation is found and the violation is not or cannot be satisfactorily abated by the employer.

Additionally, in 1992, the Department of Ecology was authorized to appoint technical assistance officers to provide on-site consultation to businesses to help them comply with environmental regulations. The technical assistance officer may report violations to enforcement personnel within the department, but may not take enforcement action unless persons or property are at risk of substantial harm.

II. ENVIRONMENTAL AND LAND USE REGULATION

There are two state statutes which have significant impact on land use decisions made by state and local governments: the State Environmental Policy Act (SEPA) and the Growth Management Act (GMA).

STATE ENVIRONMENTAL POLICY ACT: SEPA was adopted in 1971, around the same time similar federal legislation was adopted. SEPA requires a state agency or a local government to review the potential environmental impact of a decision if that decision may significantly affect the quality of the environment. This review is necessary for legislative actions, such as land use and planning decisions by a local government, as well as other major actions.

The rules implementing SEPA provide for a two step process. The first step is for the lead agency to make a threshold determination of whether the proposal will have a significant adverse impact on the environment. If the lead agency determines the proposal will not have a significant impact, no further action is required under SEPA. If the threshold determination is that the proposal will have a significant impact, an Environmental Impact Statement (EIS) must be prepared. This is an analysis of the impacts which the proposal as made will likely have on the environment and an analysis of options to mitigate or lessen those impacts. A third option not specifically provided for in statute but authorized under the SEPA rules is the mitigated determination of non-significance. The lead agency may notify the proponent that an EIS will probably be required. The proponent may then seek to mitigate the adverse impacts which have been identified by the lead agency in order to avoid the need for an EIS.

GROWTH MANAGEMENT ACT: The other major piece of legislation affecting land use planning in the state is the Growth Management Act. The GMA was adopted in two stages. In 1990, counties with specified levels of growth, and the cities in those counties, were directed to develop comprehensive growth management plans. After a county or a city adopts its comprehensive plan, it must adopt development regulations to implement the comprehensive plan. The proposed adoption of a comprehensive plan and the proposed adoption of development regulations are both actions which require environmental review under SEPA. In 1991, a number of amendments to the Growth Management Act were adopted.

Growth Planning Hearings Boards: The 1991 legislation created three Growth Planning Hearings Boards to hear appeals of local government growth management plans and

development regulations. Each board has jurisdiction to hear appeals from counties located within its region of the state.

Each board has three members appointed by the Governor. They are subject to Senate confirmation. The Governor may determine whether the boards shall operate on a part-time or full-time basis. When he made the appointments to the Growth Planning Hearings Boards, Governor Gardner determined that they should be full-time.

Orders, decisions, and rule-adoption proceedings of a board require support by a majority of a board. A board may appoint a hearing examiner to assist in conducting hearings, however the board must make the final decision. It must approve any findings made by the hearing examiner.

A petition may be filed with a board alleging that a local government comprehensive plan, development regulation, or amendment to a plan or regulation does not comply with the GMA. The petition must be filed within 60 days after the notice of the adoption of the plan, regulation, or amendment has been published. The boards also have jurisdiction to consider a claim that a plan, regulation, or amendment was not adopted in accordance with the requirements of SEPA. There is no time limit on when a SEPA appeal may be filed.

Appeals from decisions of a board are handled by the Thurston County Superior Court. A party dissatisfied with the Superior Court's decision may file subsequent appeals to the Court of Appeals and the Supreme Court.

Development Regulations: Once a local government has adopted its comprehensive plan, it must follow with development regulations to implement that plan. The development regulations are controls placed on development or land use activities. The development regulations must be adopted within one year after the comprehensive plan has been adopted and must implement the comprehensive plan.

APPEALS OF PLANNING DECISIONS: Prior to the adoption of the GMA, the Legislature had authorized cities and counties to establish planning procedures in order to make their land use decisions. A city or county may establish a planning commission to hear and decide appeals of plat approval decisions by a local government administrative officer. A city or county may instead appoint a hearing examiner to review appeals of the administrative officers' decision. In this case, the city or county must specify in its ordinance whether the decision of a hearing examiner will be treated as a recommendation to the local government's legislative

body or whether it will be treated as an administrative decision appealable to the legislative body.

SEPA also regulates the appeals of some planning decisions. SEPA allows only one appeal of a procedural decision within the agency or government making the decision. Subsequent appeals must be to the court. A procedural decision is defined as a determination of the adequacy of a threshold determination or an environmental impact statement. However, SEPA also provides that if another statute authorizes an appeal to a local legislative body, this limitation does not apply. The effect of these two provisions is to allow a city or county with a hearing examiner to require multiple appeals of an environmental determination within the city or county government before the decision may be appealed to the judiciary.

MODEL TOXICS CONTROL ACT: In 1988, the state's voters approved Initiative 97, the Model Toxics Control Act (MTCA). MTCA establishes a scheme for determining liability for hazardous waste contamination. The initiative also imposes a tax on hazardous products which is used in part to help pay for the cleanup of hazardous waste sites in the state. MTCA gives the Department of Ecology (Ecology) the authority to conduct its own remedial actions on a hazardous waste site or to issue orders to a potentially liable party to conduct a remedial action. Ecology is also authorized to enter an order directing a person who it determines may be a responsible party to begin a remedial action. Ecology may also enter into a consent decree with a responsible party in which the responsible party agrees to take remedial action or otherwise resolve its liability.

In addition to MTCA, a number of other statutes also establish procedural criteria related to specific types of pollution. These include statutes governing facilities handling either hazardous wastes or hazardous substances and solid waste. Water and air pollution control statutes also include a number of procedural requirements if pollutants will be introduced into the water or air. The Shorelines Management Act also imposes a number of procedural requirements on activities within the shorelines of the state.

Summary of Substitute Bill:

I. LEGISLATION AND RULE-MAKING

LEGISLATION: Legislative standing committees are required to selectively review existing statutes that contain legislative intent statements and grant rule-making authority to state agencies. These statutes must be

evaluated based on the following criteria: (1) continued need; (2) clear and comprehensive intent statements and grants of rule-making authority; (3) consistency with agency missions and goals; (4) allowance for voluntary compliance; and (5) consistency with regulatory statutes of other agencies. Where statutes do not meet these criteria, corrective legislation must be submitted. (Sec. 1(2))

To the extent practicable, bills that grant rule-making authority are required to contain clear intent statements and direction regarding desired outcomes and rule-making authority. (Sec. 1(3))

Legislative standing committees are required to prepare a "regulatory note" as part of every bill reported out of committee. The regulatory note must: (1) identify whether rule-making is required or authorized; (2) describe the nature of the rule-making; (3) identify agencies to which rule-making authority is delegated; and (4) identify other agencies that may have related rule-making authority.

Additionally, the regulatory note must contain a checklist confirming that the committee addressed the following criteria: (1) whether the bill responds to a specific need and whether government is the appropriate institution to address the need; (2) whether the bill contains a clear statement of legislative intent and clear identification of entities to carry out the intent; (3) whether the bill is consistent with program objectives and contains an evaluation process; (4) whether costs of compliance and administration have been estimated and whether the bill achieves its outcomes with the least cost and burden; and (5) whether there is adequate allowance for voluntary compliance. (Sec. 1(4))

JOINT ADMINISTRATIVE RULES REVIEW COMMITTEE (JARRC) REVIEW: JARRC is authorized to recommend suspension of an existing rule by a majority vote, instead of the current two-thirds requirement. If the Governor disapproves JARRC's suspension recommendation, the agency is required to either state in writing why the rule was adopted within the scope of the agency's statutory authority, or commence rule repeal or amendment proceedings. (Sec. 12)

A JARRC suspension recommendation by a two-thirds vote establishes a rebuttable presumption in any proceeding challenging the validity of the rule that the rule was adopted outside the scope of the agency's authority. (Sec. 13 & 14)

AGENCY RULE-MAKING: Before adopting a rule, agencies are required to consider the following criteria: (1) Statutory

authority; (2) necessity and consistency with missions, goals and objectives; (3) economic and environmental consequences; (4) consistency with other laws and rules; (5) alternatives that may achieve the same purpose at less cost; (6) differences between rules adopted by the federal government on the same subject, and the costs and benefits of differences; (7) differences in applicability to public and private entities; and (8) whether outcomes can be evaluated. Agency consideration of these factors must be in writing and must be part of the agency's rule-making file except when the rule deals only with seasons, limits, and geographical areas for shellfish removal. Agency failure to consider these criteria or failure to make the written consideration part of the rule-making file is subject to judicial review, but the adequacy or accuracy of the agency's consideration is not subject to judicial review. (Sec. 4)

As part of the concise explanatory statement about the rule, agencies are required to produce a written summary of the agency's responses to comments or categories of comments received on a proposed rule. Upon request, this statement must be provided to anyone who requests a copy or has commented on the rule. (Sec. 6)

If an agency denies a petition to amend or repeal a rule, the petitioner may appeal the decision to the Governor within 30 days. Within 60 days of receipt, the Governor is required to either reject the appeal in writing, stating the reasons for the rejection, or order the agency to commence rule-making proceedings. (Sec. 5)

SMALL BUSINESS IMPACT: To reduce the impact of rules on small businesses, agencies are authorized to use mitigation techniques other than the ones currently authorized. Agencies are required to prepare small business economic impact statements before filing notice of a proposed rule. "Industry" is redefined to include any business in a four-digit standard industrial classification, except where confidentiality requirements would be violated. New data gathered by the agency must be used when analyzing the costs of compliance. Small business economic impact statements must include a summary of mitigation options considered and an explanation of each option not included in the rule. Agencies are encourage to use committees when analyzing costs and identifying mitigation measures. (Sec. 7-11)

OTHER AGENCY REQUIREMENTS: The Department of Community, Trade, and Economic Development is required to develop a

model standardized format for reporting information commonly required from the public for permits, licenses, approvals, and services. The format, and recommendations for implementation, must be submitted to the Legislature by December 31, 1994. (Sec. 15)

Where appropriate, the Governor will require state agencies to designate technical assistance representatives to coordinate voluntary compliance with the agency's requirements. Technical assistance employees may not issue orders or assess penalties. If violations of the law are observed, the owner or operator will be informed of the violation, technical assistance concerning compliance will be provided, and agency enforcement personnel will be notified. The owner or operator will be given a reasonable period of time to correct observed violations. The enforcement exemption does not apply if the observed violation poses a likely risk of death, substantial bodily harm, significant environmental harm, or physical damage exceeding $1,000. The state is not liable for actions that arise from technical assistance representatives performing their duties or from agency failure to supply technical assistance. (Sec. 16)

II. ENVIRONMENTAL AND LAND USE REGULATION

GROWTH PLANNING HEARINGS BOARDS: The authority of a Growth Planning Hearings Board to appoint a hearing examiner is modified. A hearing examiner must have demonstrated knowledge of land use planning and law. In addition to the current authority to make written findings of fact, a hearing examiner may also make conclusions of law. The board may also request a hearing examiner to issue a written decision. In their joint rules for practice and procedure, the three boards may authorize a hearing examiner's written findings and conclusions and decision to become the decision of the board. Otherwise, the hearing examiner's written findings, conclusions, and decision must be approved by the board which has appointed the hearing examiner.

A petition alleging that a comprehensive plan, development regulation, or an amendment to a plan or regulation was not adopted in compliance with the State Environmental Policy Act must be filed within 60 days after the plan, regulation, or amendment was adopted, the same time limit imposed by GMA on other challenges to these actions.

An appeal of a Growth Planning Hearing Board decision of a city or county action shall be filed with the Court of Appeals with jurisdiction over the county in which the city or county is located. The appeals of a Growth Planning Hearing Board decision of a state agency action shall be

filed with the Court of Appeals with jurisdiction over Thurston County.

The name of the Growth Planning Hearing Boards is changed to the Growth Management Hearing Boards.

DEVELOPMENT REGULATIONS: The development regulations adopted by a city or county shall include a process to determine whether a completed development application meets the development regulations. The regulations must also specify what is required for a complete application. Within 30 days after a development permit application is received, a city or county must notify the applicant whether the application is complete, and if not, what is required to complete the application.

APPEALS OF PLANNING DECISIONS: If a local government has established a hearing examiner system to hear appeals of decisions of a planning commission or of a planning decision of an administrative officer, the appeal of a procedural determination concerning the adequacy of the threshold determination or of an environmental impact statement prepared under the State Environmental Policy Act shall be filed with the Superior Court.

MODEL TOXICS CONTROL ACT: The Department of Ecology is authorized to enter into an agreed order with a person who is potentially liable for a hazardous waste site to begin remedial action. The agreed order does not resolve liability issues and may not contain a covenant not to sue, provide protection from a claim for contribution, or authorize public funding for the remedial action.

A Model Toxics Control Act remedial action conducted pursuant to a consent decree, an Ecology order, or an agreed order, and a remedial action conducted by Ecology, must be performed in compliance with the substantive requirements of the state's air pollution, hazardous waste, solid waste, water pollution, and shoreline management statutes and local government requirements implementing those statutes. The remedial action is not subject to the procedural requirements of those statutes or to local government procedural permits or approvals unless failure to comply would result in loss of authority delegated to the state under federal law. Ecology is directed to establish procedures, in consultation with local governments and state agencies, to ensure that remedial actions do comply with the substantive requirements. The procedures must provide for public comment.

Substitute Bill Compared to Original Bill: The standing committees will review statutes granting rule-making

authority on a selective basis. Regulatory notes will not address the adequacy of involvement of affected interests, drafting issues, or conflicts with other laws. The standing committee review process and the regulatory notes are linked to missions, goals, and program objectives established by agencies. State agencies are required to report to the Legislature on these missions, goals, and objectives. Court standards on the delegation of rule-making authority are not impacted.

Agencies are required to consider the consistency of a proposed rule with their mission, goals, and program objectives, and place this consideration in the rule-making file. Agencies are not required to consider the new rule-making criteria when addressing only seasons, bag or catch limits, or geographical areas for fishing or shellfish removal. Agencies will not be required to produce small business economic statements when the impact is minor or negligible.

The rebuttable presumption resulting from a JARRC suspension recommendation will only be effective upon a two-thirds vote of JARRC.

The name of the Growth Planning Hearings Boards is changed to the Growth Management Hearings Boards. The time by which a city or county would be required to respond to a development permit application is extended from 10 to 30 days. Remedial actions under the MTCA are not subject to procedural requirements unless failure to comply would result in the loss of authority delegated by federal law. Other technical changes are made.

Fiscal Note: Requested January 18, 1994.

Effective Date of Substitute Bill: Ninety days after adjournment of session in which bill is passed, except sections 8, 21, and 41 which take effect July 1, 1994.

Testimony For: This bill improves accountability and increases efficiency by reshaping state government. It improves the business climate without sacrificing the environment. Regulatory reform is one of the top issues for both large and small business. The technical assistance provisions are especially helpful to small businesses. Environmental laws are not being effectively implemented, therefore environmental groups also want regulatory reform. Local governments and others agree that the 10 day turn-around for development permits is too short. The integration of the SEPA and GMA appeal provisions is a good first step.

Testimony Against: None.

Witnesses: Representative Ron Meyers, Prime Sponsor (pro); Karen Lane, Governor's Task Force (pro); Mary Riveland, Governor's Task Force (pro); Walter Toner Jr., Governor's Task Force (pro); Kathleen Collins, Association of Washington Cities (pro); Dave Williams, Association of Washington Cities (pro); Paul Parker, Washington State Association of Counties (pro); Caroline Logue, National Federation of Independent Business (pro); Gary Smith, Independent Business Association (pro); Naki Stevens, People of Puget Sound (pro); Jeff Parsons, National Audubon Society (pro); Bruce Wishart, Sierra Club (pro); Kris Backes, Association of Washington Business (pro); Julia Porter, Association of Washington Business (pro); and Glen Hudson, Washington Associated Realtors (pro).