

SENATE BILL REPORT

SB 5088

**AS REPORTED BY COMMITTEE ON GOVERNMENT OPERATIONS,
FEBRUARY 9, 1993**

Brief Description: Authorizing flexible approaches to developing administrative rules.

SPONSORS: Senators McCaslin and Barr

SENATE COMMITTEE ON GOVERNMENT OPERATIONS

Majority Report: That Substitute Senate Bill No. 5088 be substituted therefor, and the substitute bill do pass.

Signed by Senators Haugen, Chairman; Drew, Vice Chairman; Loveland, Oke, Owen, von Reichbauer, and Winsley.

Staff: Barbara Howard (786-7410)

Hearing Dates: February 2, 1993; February 9, 1993

BACKGROUND:

There are a number of similarities between state and federal rulemaking under the respective administrative procedure statutes. A relatively recent process which was developed at the federal level is known as "negotiated rulemaking," which was adopted at the suggestion of the Administrative Conference of the U.S. In this process, parties identified as interested in the development of a specific set of rules negotiate toward consensus before the formal proposal is filed for public notice and hearing. The Washington Administrative Procedure Act (APA) does not include provision for negotiated rulemaking.

A related procedure, called a "pilot rule," was used by the Department of Ecology (DOE) in the implementation of rules under a 1990 statute requiring facility operators to adopt hazardous waste reduction plans. Once the preliminary rules were in place, DOE convened a group of interested parties to test their application. As a result, significant amendments were adopted in 1991, with the goal of making the rules more workable. There is no statutory recognition of this type of collaboration in developing rules.

SUMMARY:

Legislative findings indicate that, while greater public participation in the rulemaking process was encouraged by the 1988 revisions to the APA, situations still arise where adversarial relationships develop, and parties seem unable to focus on solutions, with the result of added costs for all. The legislative intent is to encourage flexible approaches in developing administrative rules.

Agencies are encouraged to continue soliciting comments on subjects of possible rulemaking but also to use new procedures for reaching agreement among interested parties before publication of notice and the adoption hearing on the rule. Among the suggestions are the use of negotiated rulemaking, in which parties who should be included are identified, assurance is given that all pertinent issues are addressed, reasonable completion deadlines are set, and guidelines are established for settling disputes.

If it is determined that implementation of proposed or permanent rules may produce unreasonable economic or technical burdens, agencies are encouraged to develop methods for testing the feasibility of compliance with the rules, including the use of voluntary pilot study groups. Such methods should emphasize broad public participation, a high level of agency management involvement, and the need to reach consensus among the participants, assurance of fairness and reasonable completion dates. Where appropriate, findings of the pilot project should be adopted as amendments to the rules.

EFFECT OF PROPOSED SUBSTITUTE:

The criteria for conducting negotiated rulemaking are made more specific, to include: (1) identifying persons interested in or affected by a proposed rule; (2) soliciting participation by persons who are capable and appropriately authorized to enter into such negotiations; (3) assuring that participants recognize the consequences of not participating, are committed to negotiate in good faith, and recognize alternatives available to other parties; (4) agreeing on a reasonable time period in which the agency will be bound by a rule resulting from negotiation; and (5) providing a mechanism for one or more parties to withdraw or for the process to be terminated if it appears consensus cannot be reached.

With respect to the pilot rule process, the criteria for participation are clarified, and a process for withdrawal or termination is provided.

Appropriation: none

Revenue: none

Fiscal Note: none requested

TESTIMONY FOR:

Such a permissive proposal can encourage agencies to seek broader and more committed negotiation, and should make the rule making process less susceptible to litigation. It may involve additional staff time and effort early on, but could result in savings if the parties come to agreement. Small businesses are particularly interested in receiving assurance that there is an opportunity for their needs to be heard.

TESTIMONY AGAINST: None

TESTIFIED: PRO: Ron Holcomb and Stan Springer, Department of Ecology; Mal Murphy, Lane, Powell, Spears, Lubersky; Julia Porter, AWB; Tony Meinhard, Independent Business Association; Pilar Bonilla, NFIB