2510-S2
Sponsor(s): House Committee on Appropriations (originally sponsored by 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 Description: Implementing regulatory reform.

HB 2510-S2.E - DIGEST

(DIGEST AS ENACTED)

Specifies the evaluation process an agency must follow before adoption of a rule.

Requires public comment prior to adoption of the rule.

Requires the agency to prepare a written summary of all comments received and a response to the comments.

Requires agencies to determine whether negotiated rule-making, pilot rule-making, or another participation process is appropriate.

Provides for an appeal to the governor of a proposed emergency rule.

Provides for a review by JARRC to determine if rules have been adopted in accordance with rule-making requirements.

Redesignates the growth planning hearings board as the growth management hearings board.

Establishes criteria for agencies to consider prior to proposing new rules.

Authorizes an appeal to the governor when an agency refuses to repeal or amend a rule.

Encourages the reduction of economic impacts on small businesses.

Develops a model standardized format for reporting information required from the public for permits, licenses, and services.

Requires agencies to appoint technical assistance representatives to help the public comply with agency rules.

Revises appeal procedures for agency decisions.

Repeals RCW 19.85.010, 19.85.080, 34.05.670, and 34.05.680.

VETO MESSAGE ON HB 2510-S2

April 1, 1994

To the Honorable Speaker and Members,
The House of Representatives of the State of Washington
Ladies and Gentlemen:

I am returning herewith, without my approval as to sections 4, 5, 6, 13, 16(2), 20, 23, 25, 34, and 35, Engrossed Second Substitute House Bill No. 2510 entitled:

"AN ACT Relating to the implementation of the recommendations

of the governor's task force on regulatory reform;"

On August 9, 1993, I signed Executive Order 93-06. The Executive Order directed state agencies to initiate several efforts to coordinate among themselves and to provide better and more useful information to the public. I stated three goals for regulatory reform in the Executive Order. They are:

To institute immediate management improvements in state regulatory functions, reducing inefficiencies, conflicts, and delays.

To develop long-term solutions to complex regulatory issues that, if left unresolved, could impede the orderly growth and sustained economic development of the state.

To ensure that any regulatory reform solutions designed to support economic benefits to the state also ensure continued protection of the environment, the health, and the safety of our citizens.

The Executive Order also created the Governor's Task Force on Regulatory Reform, composed of representatives from a cross-section of state citizens and interest groups. The Task Force established three subcommittees to address the major issue areas set forth in the Executive Order and made its interim recommendation in its December 17, 1993 report upon which this legislation is based. The Task Force will continue its work through December 31, 1994 and will submit final recommendations to the Governor by December 1, 1994.

As introduced, House Bill No. 2510 met the goals I established for regulatory reform. I would have been able to sign all but one section had it passed as it was introduced. However, as passed by the Legislature, there are sections of Engrossed Second Substitute House Bill No. 2510 which I do not believe meet the goals I set for regulatory reform. In addition, many of the provisions of the bill would only increase the delays, bureaucracy, and paperwork of the rulemaking process imposing significant burdens on state agencies without providing any additional meaningful involvement or reduced burden for the regulated community. This is directly counter to the goals of regulatory reform.

While I am disappointed that I am unable to sign this bill in its entirety, there are several provisions I will soon incorporate into an Executive Order. In particular, the Executive Order will direct agencies engaged in rulemaking to evaluate criteria similar to those set forth in section 4 as proposed by the Task Force. I will also be directing agencies to increase the level of technical assistance they provide to businesses and to individuals intent on meeting state regulations but who may be unclear on how to comply.

Of all the issues addressed in the bill, section 4 served as the flash point for debate over regulatory reform during the 1994 Legislative Session. The Task Force, with considerable public comment, concluded that the state agencies needed additional direction in the rulemaking process and recommended a series of criteria for the agencies to consider before adopting a rule. I fully support the concept that agencies consider these criteria in their rulemaking process. However, section 4 strays from the

carefully balanced approach in the original bill. The bill provided the proper direction to agencies without creating additional, unnecessary paperwork and avoided turning rulemaking into a judicial like process which only encourages litigation. If this section is allowed to become law, the only certainty is that litigation will ensue over the meaning of its various provisions.

In addition, the specific criteria set forth in section 4 go well beyond the criteria proposed in the original bill. For example, this section requires an agency to determine that any overlap, duplication or difference between the rule and any federal law is necessary to achieve the objectives of the statute. There are many circumstances where differences from federal rules may be justified to protect the safety and quality of life in our state, yet these provisions would make it nearly impossible for an agency to adopt rules on a subject over which the federal government has adopted rules or passed legislation.

Section 4 also requires an agency to determine that the likely costs of a rule justify its likely benefits. While the original bill required agencies to consider the economic and environmental consequences of adopting a rule, the cost benefit analysis approach in section 4 goes beyond that requirement. This provision mandates a time consuming, expensive and controversial process. Although it is appropriate for agencies to consider the benefits and costs of their actions, many of the factors which should be considered, such as health, safety and environmental concerns, do not lend themselves to a formal cost-benefit determination.

Section 4 also requires agencies to determine that there are no reasonable alternatives proposed during the rule-making process which are less burdensome on those required to comply. This criteria creates the unacceptable assumption that impacts on the regulated community should be the only consideration for an agency when it adopts a rule. Agencies should also consider the cost to the taxpayers, to the environment and to the public's safety.

Section 4, in combination with section 5, was identified by state agencies as being particularly expensive to implement. The legislature did not appropriate funds in the supplemental budget to defray the added costs which this section would impose. For all of the above reasons, I am vetoing section 4.

Section 5 applies only to rules subject to the provisions of section 4. Therefore, I am also vetoing section 5.

Section 6 amends an existing statute which allows a person to petition an agency to adopt, amend, or repeal a rule, by allowing an appeal of an agency's decision to the governor. Section 6 directs the petitioner to address several specific factors which the agencies are not required to consider when they engage in rule-making. By including these as elements of the petition, the implication is made that they are also standards for rule adoption when in fact they are not. For this reason, I am vetoing section 6.

Section 13 is a new section which incorporates part of the requirements currently included in RCW 19.85.060. Section 13 states that an agency is not required to prepare a small business economic impact statement if the rule is adopted in order to comply with federal law. RCW 19.85.060, which section 13 replaces, provides that an agency is not required to prepare the statement if the rule

is adopted to comply with federal law or regulation. While this may have been an inadvertent action by the legislature, deletion of these words increases the circumstances under which agencies will need to prepare an impact statement even though the rule is required by the federal government. For this reason, I am vetoing section 13.

Section 16(2) repeals RCW 19.85.060, which contains the exemption addressed in section 13. Because I am vetoing section 13, I am also vetoing section 16(2).

Section 20 gives the Joint Administrative Rules Review Committee (JARRC) the ability to establish a rebuttable presumption in judicial proceedings that a rule does not comply with the legislature's intent. The Task Force included this recommendation in its report. It has been my wish to sign into law those recommendations in this bill which accurately reflect the recommendations of the Task Force. However, I have serious concerns about the constitutionality of this provision under the separation of powers doctrine. A committee of the legislature cannot be given authority to invalidate a rule. See, Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983). Allowing a committee of the legislature to affect the legal status of an agency rule adopted in compliance with all statutory procedures is an unwarranted intrusion into the role of the executive branch.

Through section 19 of the bill the legislature's authority, to object to rules is enhanced by lowering the threshold vote necessary for JARRC to recommend suspension of a rule. In addition, if the governor does not suspend the rule, section 19 provides that JARRC's recommendation is treated by the agency as a petition to repeal the rule. JARRC also may recommend to the full Legislature corrective legislation if it is dissatisfied with the agency's response to its objections. These are appropriate means to increase the authority of JARRC. For these reasons, I am vetoing section 20.

Section 23 addresses the issue of technical assistance and its relationship to enforcement. The original bill included a provision requiring agencies to provide technical assistance as an alternative to traditional enforcement approaches. This provision was based on successful programs in the Department of Ecology and the Department of Labor and Industries. Many other agencies have also developed similar approaches to enforcement. Section 23 goes beyond this positive approach to technical assistance by allowing a business which requests assistance from a selected set of state agencies to avoid penalties for violation of any rules administered by the agency unless the business has previously violated the same rule or does so knowingly. While I support increased technical assistance from agencies and will include this in my Executive Order, I cannot support the idea that ignorance is an excuse to violate state rules. This provision will be more likely to further the confrontational approach many businesses have complained about instead of fostering cooperation between business and state regulators.

There is also a serious question about the constitutionality of this provision since it applies only to business entities. Article 1, section 12 of the Washington Constitution prohibits the granting of privileges and immunities to corporations that are not

available to all others. Many individual citizens, as well as cities and counties, are required to comply with the same statutes and rules as businesses. They are not afforded the same favorable treatment this section would provide to business. For these reasons, I am vetoing section 23.

Section 25 modifies the requirements of the Administrative Procedure Act relating to the exhaustion of administrative remedies. A reference to the appeal provided for in section 6 is added. Since I have vetoed section 6, this section is also vetoed.

Sections 34 and 35 were added to Engrossed Second Substitute House Bill No. 2510 by the Conference Committee and received no discussion or debate prior to that time. They require city and county governments to expend considerable resources to coordinate their regulatory activities with the state and federal governments. As with so many sections of this bill, the goals of these two sections are sound. However, the requirements imposed by these two sections will only burden cities and counties without any benefit of the topic of coordinating local and state permitting and regulatory decisions is under active consideration by the Task Force. It is premature to enact these sections at this time. I am therefore vetoing sections 34 and 35.

With the exception of sections 4, 5, 6, 13, 16(2), 20, 23, 25, 34, and 35, Engrossed Second Substitute House Bill No. 2510 is approved.

Respectfully submitted,
Mike Lowry
Governor