# HOUSE BILL REPORT
# HB 1010

**As Reported By House Committee On:**
Government Operations

**Title:** An act relating to regulatory reform.

**Brief Description:** Implementing regulatory reform.

**Sponsors:** Representatives Reams, Horn, Lisk, Cairnes, Dyer, Van Luven, Ballasiotes, Buck, Casada, D. Schmidt, B. Thomas, Chandler, L. Thomas, Brumsickle, Sehlin, Sherstad, Carlson, Benton, Skinner, Kremen, Hargrove, Cooke, Delvin, Schoesler, Johnson, Thompson, Beeksma, Goldsmith, Radcliff, Hickel, Backlund, Crouse, Elliot, Pennington, Mastin, Carrell, Mitchell, K. Schmidt, Chappell, Basich, Grant, Smith, Robertson, Foreman, Honeyford, Pelesky, Blanton, Koster, Lambert, Mulliken, Boldt, McMorris, Clements, Fuhrman, Campbell, Sheldon, Huff, Mielke, Talcott, Silver, McMahan, Stevens, Morris and Hymes.

**Brief History:**
**Committee Activity:**
Government Operations: 1/11/95, 1/17/95 [DPS].

## HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Reams, Chair; Goldsmith, Vice Chair; L. Thomas, Vice Chair; Hargrove; Honeyford; Hymes; Mulliken; D. Schmidt and Van Luven.

**Minority Report:** Do not pass. Signed by 6 members: Representatives Rust, Ranking Minority Member; Scott, Assistant Ranking Minority Member; Chopp; R. Fisher; Sommers and Wolfe.

**Staff:** Bonnie Austin (786-7135).

**Background:** During the 1994 legislative session, the Legislature passed E2SHB 2510. The bill made substantial changes to the state agency rule-making process, the legislative review of rules, the regulatory fairness act, and state agency technical assistance. The Governor, who was conducting an executive branch task force on regulatory reform, vetoed numerous sections of the bill. In June, the Governor issued an executive order incorporating some of the vetoed elements into executive policy.

The Governor's task force completed its process in December and made final recommendations.

GRANTS OF RULE-MAKING AUTHORITY: The enabling statutes of many state agencies grant those agencies general authority to adopt rules. Typically, the language used will authorize rules "necessary or appropriate to carry out the provisions of this act," or "necessary or desirable to carry out the powers and duties imposed by the legislature." There is concern that some agencies have used these general grants of authority, without further legislative guidance or authorization, to regulate matters that the Legislature did not intend to regulate.

RULE-MAKING REQUIREMENTS: The state Administrative Procedures Act (APA) details procedures that state agencies are required to follow when adopting rules. First, an agency is required to prepare a "statement of intent" and solicit comments from the public on a subject of possible rule-making. When the agency is ready to hold a hearing on a proposed rule, it publishes a notice in the state register. A hearing is held and comments are received. An agency is required to consider, summarize, and respond to the oral and written comments it receives. The agency may then withdraw the rule, modify it, or adopt the rule as proposed.

The APA encourages agencies to use new procedures for reaching agreement among interested parties before publishing a notice of a proposed rule adoption. One of these new methods is measuring or testing the feasibility of compliance with a rule with a pilot study group or pilot project.

Agencies are 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 written summary of those comments and a substantive response by category or subject matter; 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; documents publicly cited by the agency in connection with its decision; and citations to data and factual information relied on in rule adoption. Unless otherwise required by law, the rule-making file need not be the exclusive basis for agency action on a rule.

A court may invalidate an agency rule if it determines that the rule "could not conceivably have been the product of a rational decision maker." The state Supreme Court has interpreted this language to be the equivalent of the familiar "arbitrary and capricious" standard.

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.

REGULATORY FAIRNESS: The Regulatory Fairness Act was adopted to minimize the proportionally higher impact of state agency rules on small businesses. When a proposed rule will impose more than minor costs 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 (SBEIS). As part of the notice of a proposed rule adoption, an agency must file notice of how a copy of the SBEIS can be obtained.

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, reducing or modifying fine schedules for noncompliance, or establishing performance rather than design standards.

LEGISLATIVE REVIEW OF RULES: The Joint Administrative Rules Review Committee (JARRC) is an eight-member bipartisan legislative committee established to selectively review proposed and existing state agency rules. JARRC 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 or was not adopted in compliance with applicable provisions of law. 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. A JARRC suspension recommendation does not establish a presumption as to the legality or constitutionality of the rule in subsequent judicial proceedings.

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.

The Department of Ecology operates a similar program that provides 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.

FEES AND EXPENSES: Under federal law, the prevailing party in any civil action brought by or against the United States may be awarded costs and attorneys' fees. However, if the court finds that the position of the United States was substantially justified, or that special circumstances make an award unjust, fees and costs may not be awarded. Additionally, the court is directed to reduce the amount to be awarded to the extent that the prevailing party engaged in conduct which unduly and unreasonably protracted resolution of the case.

REFERENDUM: Under Article II, section 1 of the Washington State Constitution, the Legislature may order a referendum on a bill passed by the Legislature. Referendum bills are filed with the Secretary of State and submitted to the people at the next succeeding regular general election. The veto power of the Governor does not extend to acts referred to the people.

**Summary of Substitute Bill:** GRANTS OF RULE-MAKING AUTHORITY: The general grants of rule-making authority to the following state agencies are repealed: the Department of Health, the Department of Revenue, the Department of Ecology, the Department of Labor and Industries, the Department of Licensing, the Department of Employment Security, the Department of Social and Health Services, the Forest Practices Board, the Commissioner of Public Lands, the Wildlife Commission, and the Office of Insurance Commissioner. These agencies may only adopt rules as specifically required by federal law or as specifically authorized by the Legislature. These limitations do not apply to emergency rules. Courts are directed to narrowly construe grants of rule-making authority to all state agencies.

RULE-MAKING REQUIREMENTS: An agency "statement of intent" must identify other agencies that have rule-making authority over the subject matter or activity of a new rule and describe the process for coordination with those agencies.

Current law related to pilot projects is clarified. Volunteers who agree to test a rule cannot be issued a penalty or any other sanction for failure to comply with the draft rule. Agencies are authorized to use the pilot rule process in lieu of preparing a small business economic impact statement. If an agency chooses to do this, requirements for small business participation in the pilot process must be met. Prior to filing notice of a proposed rule-making, agencies are required to produce a report of the pilot project.

The rule-making file must contain evidence that a rule is: authorized; necessary; cost-effective; consistent with and not duplicated by other federal, state, or local laws; enforceable; targeted; measurable; the least burdensome alternative; and not in excess of federal law unless authorized by state statute. Courts are directed to review compliance with this requirement under a new "substantial evidence" standard. Agencies are not required to place the evidence in the rule-making file when adopting

emergency rules if they provide a reasonable justification in writing for failing to do so.

The rule-making file is the exclusive basis for agency action on a rule. The current "conceivably the product of a rational decision maker" language is changed to "arbitrary and capricious" to conform with judicial interpretation.

Upon the adoption of a rule, agencies are required to inform and educate affected persons about the rule and promote voluntary compliance. If the rule regulates the same subject matter or activity as another provision of federal, state, or local law, agencies are required to: (1) provide the Business Assistance Center with a listing of those other laws; (2) coordinate implementation with the other federal, state and local entities by either deferring to the other entity, designating a lead agency, or entering into an agreement to coordinate implementation and enforcement; and (3) report to the Legislature regarding statutory changes that may be necessary.

Rules adopted by the following agencies are given a maximum life span of seven years: the Department of Health, the Department of Revenue, the Department of Ecology, the Department of Labor and Industries, the Department of Licensing, the Department of Employment Security, the Department of Social and Health Services, the Department of Fish and Wildlife, the Forest Practices Board, the Commissioner of Public Lands, and the Office of Insurance Commissioner. These agencies are required to review their existing rules on a schedule over the next seven years.

If an agency under the Governor's authority denies a petition to repeal or amend a rule, the petitioner may appeal to the Governor. The Governor is required to respond to the appeal within 60 days, and file the response with the Regulatory Oversight Committee and the code reviser for publication in the state register. Criteria for the Governor to consider when ruling on the appeal are included.

REGULATORY FAIRNESS: The qualification that a Small Business Economic Impact Statement (SBEIS) need only be prepared when a rule impacts more than 20 percent of all industries or 10 percent of any one industry is repealed. A SBEIS must e prepared whenever a rule will impose more than minor costs on businesses in an industry. "More than minor costs" is defined as equal to or exceeding 0.1 percent of the average yearly profit for businesses in the industry.

The SBEIS must be filed with the code reviser along with the notice of a proposed rule. A SBEIS prepared at the request of the Regulatory Oversight Committee must be filed with the code reviser before the adoption of a rule.

Based on the extent of disproportionate impact identified in the SBEIS, agencies are required to reduce the costs imposed by rules on small businesses if legal and possible

to do so. Current methods for reducing the impact are repealed and new methods for reducing the impact are authorized.

Unless a SBEIS is requested by the Regulatory Oversight Committee, an agency is not required to prepare a SBEIS when adopting a rule solely for the purpose of complying with federal law or regulations. Instead of the SBEIS, the agency must file with the code reviser a statement specifically citing the federal law or regulation, and describing the consequences to the state if the rule is not adopted.

LEGISLATIVE REVIEW OF RULES: The name of the Joint Administrative Rules Review Committee (JARRC) is changed to the Legislative Regulatory Oversight Committee (LROC). The sections of law establishing the committee are recodified as a separate chapter of law.

LROC may not render a decision on a rule unless a quorum of five members is present. Once a quorum is established, a majority of the quorum may render any decision except a suspension recommendation. A suspension recommendation requires a majority of LROC membership.

Upon filing notice of a proposed rule, agencies are required to send three copies of the proposed rule, as well as the evidence required by this act to be placed in the rule-making file, to LROC. LROC is required to send copies of all proposed rules, and all existing rules that it is reviewing, to the appropriate standing committee of the Legislature. Standing committees are required to make a recommendation on the rule within 60 days of the referral, and forward that recommendation to LROC.

Any person potentially impacted by a proposed rule or currently impacted by an existing rule may petition for LROC review. LROC is required to acknowledge receipt of the petition and describe the initial action taken, or the reasons for the rejection of the petition, within 30 days. LROC is required to make a final decision on the rule within 90 days of the receipt of the petition.

LROC may recommend to the Legislature the amendment or repeal of original enabling legislation serving as authority for the adoption of any rule it reviews. This recommendation may be submitted in the form of request legislation.

A LROC recommendation to suspend a rule establishes a presumption in any subsequent judicial review of the rule that the rule is invalid. In this case, the burden of demonstrating the rule's validity is on the adopting agency.

LROC is required to keep complete minutes of its meetings. It is authorized to establish ad hoc advisory boards and to hire staff as needed. LROC is granted the authority to issue subpoenas and compel the attendance of witnesses and the production of documents. In the case of a refusal to comply with a LROC subpoena

or request to testify, the superior court is directed to compel obedience by proceedings for contempt.

Any individual employed or holding office in any state agency may submit rules warranting review to LROC. State employees who identify rules warranting review or provide information to LROC are protected from retaliation under state employee whistle blower provisions.

TECHNICAL ASSISTANCE: The Department of Health, the Department of Revenue, the Department of Ecology, the Department of Labor and Industries, the Department of Licensing, the Department of Employment Security, the Department of Fish and Wildlife, and the Office of Insurance Commissioner are prohibited from immediately issuing a penalty for the violation of a rule unless the violation was willful. Instead, the agency will issue a "statement of deficiency" that will specify the rule violated, suggested actions, technical assistance personnel contacts, and a negotiated date when the entity will be revisited. At the revisit, the technical assistance personnel will assess compliance, make further recommendations for action, and set a date for compliance. Noncompliance by the date specified subjects the entity to the penalty otherwise provided by law.

The prohibition against immediately issuing penalties does not apply to any violation that: places a person in danger of death or substantial bodily harm; is causing or is likely to cause significant environmental harm; or has caused or is likely to cause property damage exceeding $1,000.

Agencies who are enforcing federally delegated laws or regulations are required to submit a written petition to the appropriate federal agency for authorization to comply with these requirements. If federal approval is not granted, the agency will only comply with these requirements once the minimum number of inspections necessary to retain federal enforcement delegation has been achieved.

Enforcement personnel in the Department of Health, the Department of Revenue, the Department of Ecology, the Department of Labor and Industries, the Department of Licensing, the Department of Employment Security, the Department of Social and Health Services, the Department of Fish and Wildlife, the Department of Natural Resources, and the Office of Insurance Commissioner are converted to technical assistance personnel. However, this requirement does not apply where enforcement personnel are required to maintain the state's authority to administer a federally delegated program.

FEES AND EXPENSES: Qualified parties who successfully challenge a rule will be awarded fees and expenses not exceeding $10,000. Qualified parties include: individuals whose net worth does not exceed $1 million; a sole owner of an unincorporated business or organization whose net worth does not exceed $5 million,

except that certain nonprofits and agricultural cooperatives are eligible regardless of net worth; or the sole owner of an unincorporated business or organization having not more than 100 employees. Fees and expenses to be awarded include reasonable attorneys' fees (generally limited to $150 per hour), expert witness expenses, and costs of studies or other projects or tests found by the court to be necessary for preparation of the party's case.

Awarded fees and expenses will be paid from the operating funds appropriated to the agency that adopted the invalid rule. Payments will be reported to the Office of Financial Management (OFM). Interest will accrue at the rate of 1 percent per month. OFM is required to report annually to the Legislature on the amount of fees and expenses awarded.

REFERENDUM: This act will be submitted to the people for their approval or rejection at the November 1995 general election.

**Substitute Bill Compared to Original Bill:** The act will apply prospectively only and not retroactively. Existing rules will be reviewed under the statutory rule-making authority and statutory rule-making procedures in effect when the rule was adopted.

Specific grants of rule-making authority are required for rules adopted by the Department of Social and Health Services and the Commissioner of Public Lands. Enforcement of these rules may only occur under the conditions prescribed in the technical assistance provisions of the bill.

Current law related to pilot projects is clarified. Volunteers who agree to test a rule cannot be issued a penalty or any other sanction for failure to comply with the draft rule. Agencies are authorized to use the pilot rule process in lieu of preparing a small business economic impact statement. If an agency chooses to do this, requirements for small business participation in the pilot process must be met. Prior to filing notice of a proposed rule-making, agencies are required to produce a report of the pilot project.

Agencies are not required to place the new rule-making evidence in the rule-making file when adopting emergency rules if they provide a reasonable justification in writing for failing to do so.

Language is deleted that would have allowed agencies to forego reducing the costs of rules on small businesses if they listed reasonable justifications for doing so. Instead, agencies must reduce the costs if legal and possible to do so. The mitigation method of establishing performance rather than design standards is deleted. Other mitigation techniques are specifically authorized.

Language is added clarifying that LROC decisions can be rendered by a majority of the quorum. However, a suspension recommendation can only be rendered upon a majority vote of the LROC membership.

Language is added clarifying that technical assistance personnel may impose penalties for rule violations when: the violation was willful or exceeds one of the threshold threats to persons, the environment, or property; or upon the completion of the "statement of deficiency" process. A definition of "willfully" is added. A violation is willful when the owner or operator is aware of the violation, or has information which would lead a reasonable person to believe that a violation exists.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Substitute Bill**: Thirty days after the election at which the referendum bill is approved (December 7, 1995).

**Testimony For:** Agencies need to have more specific standards for rule-making. Agencies should not be allowed to adopt rules that are more stringent than federal rules unless the Legislature has authorized it. Enhanced judicial review must be paired with attorneys' fees or the new provisions are useless to small businesses. The seven-year review of existing rules is necessary.

Last year's bill was a weak first step, but even that was vetoed by the Governor. We need to send this issue to the people. Businesses will leave the state if they don't obtain some relief from oppressive regulations. The number of regulations has increased dramatically over the last two decades. The enhancement of LROC is needed to better oversee agency regulators.

Some agency enforcement personnel have been unfair and unreasonable. It is impossible for small business owners to be aware of all the rules affecting their businesses. Businesses should be given technical assistance prior to enforcement.

**Testimony Against:** The committee should consider the task force proposal. The attorney fee section is income security for lawyers. Don't abandon enforcement when providing technical assistance. The sunset of rules that aren't a problem wastes taxpayer dollars. The new criteria should only apply to legislative rules. Eliminating enforcement abdicates our responsibility as public servants.

It is critical for agencies to be able to adopt rules that go beyond the federal standards. The fall protection standards that apply to Kingdome workers is beyond the federal standards. This bill will undermine environmental and public health protections. The bill essentially tells agencies not to enforce the law. Limiting grants

of authority to federal or legislative mandates subverts local control. The fiscal impact of this proposal should be considered.

**Testified:** Carolyn Logue, NFIB; Senator Ann Anderson; Karen Lane and Corey Knutsen, Governor's Task Force on Regulatory Reform; Mike Nykrem; Don Brunell, AWB; Steve Hulbert, Hulbert Cadillac; Jim Jesernig, Dept. of Agriculture; Ron Judd, King County Labor Council; Bruce Wishart, Sierra Club; Naki Stevens, People for Puget Sound; Ron Schultz, Audubon Society; Scott Merriman, Washington Environmental Council; and Krista Eichler; Greater Seattle Chamber of Commerce.