HOUSE BILL REPORT
ESHB 1010

As Passed Legislature

Title: An act relating to regulatory reform.

Brief Description: Implementing regulatory reform.

Sponsors: By House Committee on Government Operations (originally sponsored by 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].
Floor Activity:
Passed House: 2/1/95, 64-32.
Senate Amended.
House Concurred.
Passed Legislature.

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 Procedure 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.

Summary of Bill:

GRANTS OF RULE-MAKING AUTHORITY: The departments of Labor and Industries, Revenue, Ecology, Social and Health Services, Health, Licensing, Employment Security, and Agriculture, as well as the Fish and Wildlife Commission, the Forest Practices Board, the Commissioner of Public Lands, and the Insurance Commissioner are prohibited from relying solely on the agency's enabling provisions and/or a statement of intent as statutory authority to adopt a rule. However, the Insurance Commissioner may use enabling/intent provisions to adopt procedural or interpretive rules.

All other state agencies are prohibited from adopting rules based solely on enabling provisions and/or intent language when implementing future statutes, except to interpret ambiguities in a statute's other provisions.

The Insurance Commissioner's authority to adopt rules defining unfair methods of competition or unfair or deceptive acts or practices is repealed. The Legislature will define these methods, acts, and practices by statute.

RULE-MAKING REQUIREMENTS: When adopting significant legislative rules, the departments of Labor and Industries, Revenue, Ecology, Health, Employment Security, and Natural Resources, as well as the Forest Practices Board and the Insurance Commissioner must make specified determinations. The Department of Fish and Wildlife must also make these determinations when adopting certain hydraulics rules. Additionally, the Joint Administrative Rules Review Committee (JARRC) may require that any state agency rule be subject to these determinations.

For all of these rules, the agency must determine that: (1) The rule is needed to achieve statutory goals; (2) probable benefits are greater than probable costs; (3) the rule is the least burdensome alternative for those required to comply that will achieve

the statutory objectives; (4) the rule does not conflict with federal or state law; (5) the rule does not treat public and private entities differently, unless required by law to do so; and (6) any differences from federal law are justified by explicit statutory authorization, or by substantial evidence that the difference is necessary to meet statutory objectives. The agency is required to place documentation in the rule-making file of sufficient quantity and quality so as to persuade a reasonable person that these determinations are justified.

Until July 1, 1999, when adopting Clean Air Act rules, the Department of Ecology must consider additional factors when exceeding or preceding federal standards, unless those differences are explicitly authorized by the Legislature.

For all of the rules subject to the determinations, prior to adoption, a rule implementation plan must be developed and the rule must be coordinated, to the maximum extent practicable, with other applicable federal, state and local laws. After adoption of a rule that regulates the same subject matter or activity as another provision of federal or state law, the agency is required to: (1) provide the Business Assistance Center with a listing of those other laws; and (2) make every effort to coordinate implementation and enforcement with federal and state entities by deferring, designating a lead agency, or entering into a coordination agreement. If an agency is unable to comply with the coordination requirement, it is required to report to JARRC.

Every two years, the Office of Financial Management (OFM) is required to report on the effects of the new rule-making requirements.

OTHER ADMINISTRATIVE PROCEDURE ACT CHANGES: The "statement of intent" is renamed the "statement of inquiry." The statement must identify other federal and state 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. Specified rules are exempt from compliance with the statement of inquiry process.

Current law related to negotiated and pilot rule-making 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 existing requirements that an agency submit a concise explanatory statement of a rule and a summary and response to public comment are combined. Processes are established for the expedited repeal of obsolete or redundant agency rules and for

converting interpretive and policy statements into rules. The code reviser is required to issue a quarterly publication on state rule-making activity if money for this purpose is provided in the omnibus appropriations act.

A petitioner whose request to adopt, repeal, or amend a rule has been denied by an agency may appeal to Governor within 30 days of the denial. The Governor is required to respond within 45 days. OFM is required to develop a standardized petition format. An agency denial of a petition must address the petitioner's concerns.

The current "conceivably the product of a rational decision maker" standard of judicial review is changed to "arbitrary and capricious" to conform with judicial interpretation.

REGULATORY FAIRNESS: The requirement that a Small Business Economic Impact Statement (SBEIS) be prepared when a rule impacts more than 20 percent of all industries or 10 percent of any one industry is repealed. Instead, a SBEIS must be prepared whenever a rule will impose more than minor costs on businesses in an 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 JARRC 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 feasible 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 JARRC, 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.

An agency is not required to prepare a SBEIS for rules subject to expedited repeal or rules not subject to the "statement of inquiry" process.

LEGISLATIVE REVIEW OF RULES: The Joint Administrative Rules Review Committee (JARRC) 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 vote of the entire JARRC membership.

Any person potentially impacted by a proposed rule or currently impacted by an existing rule may petition for JARRC review. JARRC 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. JARRC is required to make a final decision on the rule within 90 days of the receipt of the petition.

A JARRC recommendation to suspend a rule because it does not conform with the intent of the Legislature establishes a rebuttable 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.

JARRC is required to keep complete minutes of its meetings. It is authorized to establish ad hoc advisory boards and to hire staff as needed. JARRC 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 JARRC 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 JARRC. State employees who identify rules warranting review or provide information to JARRC are protected from retaliation under state employee whistle blower provisions.

Before the 1996 legislative session, the appropriate standing committees are directed to study alternative means to providing rule-making oversight, and to make a recommendation as to whether JARRC should be continued or replaced.

TECHNICAL ASSISTANCE: All regulatory agencies are required to develop technical assistance programs that include technical assistance visits. A technical assistant visit is defined and the terms of such a visit are established. Except for specified violations, agencies are required to provide those being visited a reasonable period of time to correct violations identified during the visit. If identified violations are not corrected within the specified time, the penalty otherwise provided may be imposed. Agencies are not obligated to conduct a technical assistance visit.

Except in the case of specified violations, the Department of Ecology, in the course of a site inspection that is not a technical assistance visit, is allowed to issue a notice of correction instead of immediately imposing a civil penalty. The civil penalty may be imposed if compliance with the notice of correction is not achieved by the date provided.

The notice of correction process may also be utilized by the departments of Agriculture, Fish and Wildlife, Health, Licensing, and Natural Resources. However, for these agencies, the violations excluded from the notice of correction process

include those committed by a business employing 50 or more employees, and those related to fish and wildlife rules dealing with seasons, catch limits, gear types, and geographical areas.

Following a compliance inspection, the Department of Labor and Industries is required to issue citations for violations of industrial safety and health standards, but the citation cannot assess a penalty if the violations are determined not to be of a serious nature, have not been previously cited, are not willful, and do not have a mandatory penalty under the Industrial Safety and Health Act.

The departments of Revenue, Labor and Industries, and Employment Security are required to undertake an educational program directed at those who have the most difficulty in determining their tax or premium liability. These agencies must also develop and administer a pilot voluntary audit program, and review the penalties they issue related to taxes or premiums to determine if the penalties are consistent and provide for waivers in appropriate circumstances.

Any of the technical assistance provisions that conflict with federal requirements are inoperative. The Governor and the Legislature are to be notified regarding any such conflict.

Every two years until the year 2000, OFM is required to study the effects of the technical assistance provisions on the regulatory system of the state.

FEES AND EXPENSES: Qualified parties who successfully challenge an agency action may be awarded fees and expenses not exceeding $25,000. Qualified parties include an individual whose net worth does not exceed $1 million, and a sole owner of an unincorporated business or organization whose net worth does not exceed $5 million. Certain nonprofit organizations and agricultural cooperatives are eligible regardless of net worth. 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. A court may reduce or deny an award if it finds the agency action was substantially justified or that the qualified party unduly protracted final resolution of the dispute.

Awarded fees and expenses will be paid by the agency over which the qualified party prevailed. Payments will be reported to OFM. OFM is required to report annually to the Legislature on the amount of fees and expenses awarded.

BUSINESS LICENSE INFORMATION: By December 31, 1995, the Department of Licensing is to develop a plan for a statewide license information management system and for a combined licensing program.

By December 31, 1996, the Department of Licensing is to expand the license information management system in order to provide on-line local, state, and federal business registration and licensing requirements.

By June 30, 1997, the Department of Licensing is to have a combined licensing project fully operational in at least two cities within the state.

A $5 fee currently charged to receive a license information packet from the Department of Licensing is removed.

These provisions related to business license information are null and void unless funded in the omnibus appropriations act.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Bill: Ninety days after adjournment of session in which bill is passed.

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.