

***State Government Committee***

***HB 1609***

***Brief Description:*** *Reforming regulatory procedures.*

***Sponsors:*** *Representatives McMorris and Mulliken.*

***Brief Summary of Bill***

- *Expands normal rule making procedures.*
- *Requires the development of local government economic impact statements.*
- *Delays the effective dates of agency rules.*
- *Expires agency rules after five years.*
- *Re-authorizes the expedited rule making process.*
- *Requires the Governor to sign and approve of certain emergency rules.*
- *Imposes new requirements for significant legislative rules.*
- *Requires agencies to notify affected businesses of technical assistance programs.*
- *Prohibits agencies from issuing civil penalties during follow-up visits under certain circumstances.*
- *Adds the Lieutenant Governor to the Joint Administrative Rules Review Committee.*
- *Prohibits state agencies from imposing unfunded mandates on local governments.*
- *Shifts burdens of proof in court actions challenging agency rules.*
- *Allows prevailing parties in agency actions to be awarded attorney's fees and expenses.*

**Hearing Date:** 2/19/01

**Staff:** Jim Morishima (786-7191).

**Background:**

**I. Rule Making**

*There are basically four sets of procedures for adopting rules: Normal rule making procedures, expedited rule making procedures, emergency rule making procedures, and significant legislative rule making procedures.*

**A. Normal Rule Making**

**1) Pre-Notice**

*For most rules, an agency must solicit comments from the public on the subject of possible rule making before filing an official notice of proposed rule making. Also, before filing an official notice of proposed rule making, the agency must prepare a statement of inquiry and file it with the Code Reviser. The statement of inquiry must:*

- Identify the statute authorizing the agency to adopt the rules;*
- Discuss the reason the rules are necessary;*
- Identify other federal and state agencies that regulate the subject, and describe how the agency would coordinate the rule with the other agencies;*
- Discuss the process by which the rule will be developed, including negotiated rule making, pilot rule making, or agency studies; and*
- Specify the process by which interested parties can participate in the rule making process.*

**2) Notice of Proposed Rule Making**

*At least 20 days before a public hearing on a rule, the agency must file notice of the public hearing in the State Register. The notice constitutes the proposal of the rule and must contain a variety of information including:*

- A description of the rule's purpose;*
- A summary of the rule;*
- When, where, and how the public may present their views on the rule; and*
- A small business economic impact statement (SBEIS), or an explanation of why a SBEIS is not required.*

**3) Economic Impact Statements**

*As part of the rule-making process, an agency must prepare a small business economic impact statement (SBEIS) if 1) the rule would impose more than minor costs on businesses in an industry, or 2) the Joint Administrative Rules Review Committee requests the agency to do so.*

*The SBEIS must analyze the compliance costs of the rule including lost revenue or sales,*

*and increased labor, equipment, supply, or administrative costs. The SBEIS must determine whether the rule has a disproportionate impact on small businesses. If the rule has such an impact, the agency must, where legal and feasible, reduce the costs on small businesses. The steps the agency has taken to reduce such costs must be listed in the SBEIS.*

#### **4) Public Comment and Adoption**

*The agency must hold a public hearing on the rule, and receive both written and oral comments from the public. The agency then publishes the rule with the Code Reviser. Most agency rules take effect 30 days after they are filed with the Code Reviser, unless a later date is specified by statute or in the order of adoption. Rules can become effective at an earlier date under the following circumstances:*

- If the rule is an emergency rule (emergency rules take effect upon filing);*
- If the rule is required by the state or federal Constitution, a statute, or a court order;*
- If the rule only delays the effective date of another rule; or*
- If the earlier effective date is necessary to prevent imminent peril to the public health, safety, or welfare.*

#### **B. Expedited Rule Making**

*The expedited rule making process is an abbreviated rule making process applicable to certain types of rules including rules relating to internal governmental operations, rules that correct typographical errors or make other non-substantive changes, and rules that are being amended after the significant legislative rule making process.*

*The expedited rule making process is identical to the regular rule making process except: 1) Preparation of the SBEIS is not necessary, 2) the significant legislative analysis is not necessary, 3) the pre-notice inquiry is not required, and 4) a hearing is not required. An agency using the expedited rule making process must publish its intention to do so. If any person objects within 45 days of this publication, the agency must switch to the regular rule making process.*

*The expedited rule making process expired December 31, 2000.*

#### **C. Emergency Rule Making**

*If an agency finds that a rule must be adopted immediately 1) for the preservation of the public health, safety, or general welfare, or 2) to preserve the state's ability to receive federal funds, the agency may forego the notice and public comment requirements and adopt the rule immediately. Emergency rules may not last for more than 120 days. Within seven days of the rule's enactment, a person may petition the Governor to repeal the rule.*

#### **D. Significant Legislative Rules**

*Significant legislative rules are rules that:*

- Adopt substantive provisions of law the violation of which results in penalties or sanctions;*

- *Affect the issuance, suspension, or revocation of a license or permit; or*
- *Make significant changes to regulatory programs.*

*The significant legislative rules of certain agencies are subject to additional procedural requirements in their adoption. Other agencies may also voluntarily subject their rules to these requirements, or may have the requirements imposed on them by the Joint Administrative Rules Review Committee. The additional requirements include making certain determinations before adopting the rule, including:*

- *A determination that the rule is needed to achieve the goals of the statute the rule purports to implement;*
- *A determination that the rule would not force persons to violate other state or federal laws;*
- *A determination that the rule does not require more stringent requirements on private entities than are imposed on public entities;*
- *A determination that the rule is the least burdensome alternative available;*
- *A determination of whether the rule differs from any federal requirements on the subject; and*
- *A determination of whether the benefits of the rule are greater than the costs.*

*Before adopting significant legislative rules, the agency must file an implementation plan. The plan must detail how the agency plans to implement and enforce the rule, inform the public about the rule, promote and assist voluntary compliance, and evaluate the effectiveness of the rule.*

## **II. Technical Assistance Programs**

*All regulatory agencies must develop technical assistance programs to encourage voluntary compliance with statutory requirements. The programs must include printed information, information and assistance by telephone, training meetings, technical assistance visits, and other methods to provide technical assistance. Agencies must also provide lists of organizations, including private companies, that provide technical assistance.*

*An owner/operator may request a technical assistance visit, and in all cases, technical assistance visits must be voluntary. During a technical assistance visit, a regulatory agency must inform the owner operator of:*

- *Any violations of law or agency rules the agency observes;*
- *What is required to achieve compliance;*
- *The date by which the agency requires compliance to be achieved, along with information on how to extend this date; and*
- *Information on how to contact technical assistance providers.*

*An agency may not impose a civil penalty during a technical assistance program unless:*

- *The owner/operator has been subject to an enforcement action for, or has been given previous notice of, the same or similar violations in the past;*
- *The violation involves the remittance of sales tax due to the state; or*
- *The violation has the probability of causing harm to people, the environment, or property.*

*After a technical assistance visit where violations have been identified, the regulatory agency must give the owner/operator a reasonable amount of time to correct the violations. A regulatory agency may conduct a follow-up visit after this amount of time has expired and issue civil penalties for uncorrected violations.*

### **III. The Joint Administrative Rules Review Committee**

*In 1981 the Legislature created the Joint Administrative Rules Review Committee (JARRC). The committee consists of eight members, four from the House and four from the Senate. The purpose of the committee is to exercise legislative oversight over executive agency rulemaking. The JARRC exercises this oversight in three ways:*

- By ensuring that proposed and existing rules are within the intent of the Legislature;*
- By ensuring that proposed and existing agency rules are adopted in accordance with all applicable provisions of law; and*
- By ensuring that agencies do not use policy or interpretive statements in place of rules.*

*JARRC review of agency rules is purely selective. If the JARRC makes an adverse finding regarding an agency rule, it must notify the affected agency of its findings. The agency must then schedule a hearing within 30 days (however, there is no requirement as to when the hearing must be held). Within seven days of the hearing, the agency must notify the JARRC of its intended actions.*

*If the JARRC finds that the agency response does not address its concerns, it may, within 30 days of the agency's notification, file notice of its objections with the Code Reviser to be published in the State Register. The committee may also recommend to the Governor that the rule be suspended or recommend to the Legislature that the rule's enacting legislation be amended or repealed.*

*Adverse JARRC findings do not create presumptions in judicial proceedings interpreting agency rules.*

### **IV. I-601**

*In 1993, Washington voters approved Initiative 601 which, among other things, prohibited the state from imposing responsibility for new programs or increased levels of service on local governments without full reimbursement from the state. The Legislature can make this reimbursement by specific appropriation or increases in state distributions of revenue to political subdivisions.*

### **V. Judicial Review**

*A person may challenge the validity of an agency action in court (the term "agency actions" includes both the rule making and adjudicatory functions of the agency). A person making such a challenge bears the burden of proving the action's validity. A person challenging the validity of a rule in court may file a petition for declaratory judgment in Thurston County Superior Court.*

### **VI. Equal Access to Justice**

*Under the Equal Access to Justice Act (EAJA), qualified parties who prevail in court challenges of agency actions are entitled attorney's fees and expenses not exceeding \$25,000 unless the court finds that the agency action was substantially justified or that circumstances would make such an award unjust. Whether a party is qualified depends on the party's net worth, although certain non-profit corporations and agricultural cooperatives are eligible regardless of their net worth.*

*An agency must pay the attorney's fees and expenses within 60 days.*

***Summary of Bill:***

***I. Rule Making***

***A. Normal Rule Making***

***1) Pre-Notice***

*A statement of inquiry expires if agency has not proposed a rule within 180 days after the publication of the statement in the State Register.*

***2) Notice of Proposed Rule Making***

*The notice of proposed rule making must contain an explanation of the difference between the rule and any federal or state law dealing with the same activity or subject matter. The notice must also contain a copy of the local government economic impact statement (discussed below).*

***3) Economic Impact Statements***

*As part of the rule-making process, an agency must prepare a Local Government Economic Impact Statement (LGEIS) if the rule would impose more than minor costs on local governments. The LGEIS must analyze the compliance costs of the rule in the same manner as a SBEIS. If the rule has a disproportionate impact on local governments, the agency must, where legal and feasible, reduce the impact. The steps the agency has taken to reduce the impact must be listed in the LGEIS.*

***4) Public Comment and Adoption***

*Agency rules take effect after the adjournment of the regular legislative session following their adoption, unless a later date is specified by statute or in the order of adoption. The circumstances under which a rule can become effective at an earlier date remain unchanged.*

*All rules adopted before the effective date of the act expire five years after the effective date of the act. A rule adopted after the effective date of the act expires five years after the date the rule was adopted, unless the rule is later amended, which establishes a new expiration date.*

## **B. Expedited Rule Making**

*The expedited rule making process is re-authorized beginning January 1, 2002 and expiring July 1, 2005.*

## **C. Emergency Rule Making**

*If an agency adopts an emergency rule to preserve the general welfare, the Governor must approve the rule with his or her signature. The Governor must also include a concise statement indicating why the rule was necessary to preserve the general welfare. For all other emergency rules, the order of adoption must contain the agency's findings and a concise statement of the reasons therefor.*

## **D. Significant Legislative Rules**

*For significant legislative rules that are subject to the additional procedural requirements, the agency must make the required determinations before the rule is proposed.*

*The Department of Ecology and the Department of Labor and Industries may only adopt rules or policy statements specifically required by federal law, or as specifically authorized by the Legislature.*

## **II. Technical Assistance Programs**

*Within 200 days of the effective date of a rule that imposes additional requirements and possible penalties on businesses, the agency adopting the rule must make a good faith effort to notify businesses affected by the rule of the requirements of the rule and how to obtain technical assistance. An agency has made a good faith effort if it: 1) Has at least notified all businesses in the class affected by the rule registered with the Department of Revenue, or 2) has at least notified persons holding a license, registration, or permit, if the rule only affects holders of a license, registration or permit. The notification must announce and summarize the rule change, and include contact information for more information.*

*During a follow-up visit, the regulatory agency may not issue a civil penalty for violations not previously identified in a preceding technical assistance visit, or if the owner has made a good faith effort to comply with the law since the preceding technical assistance visit.*

*When issuing a citation or other written finding that a person has violated a statute, rule, or order, the agency must include the text of the specific statute or statutes granting the agency the authority to regulate the subject matter of the citation or other written finding.*

## **III. The Joint Administrative Rules Review Committee**

*The Lieutenant Governor is added to the JARRC. The Lieutenant Governor is a non-voting member of the committee except to break ties.*

*Agency hearings must be conducted within 90 days of an adverse JARRC finding, and the*

*period within which the JARRC must respond to the agency's response is increased from 30 to 120 days.*

*An adverse JARRC finding on a rule shifts the burden of proof in an action questioning the validity of the rule from the person making the challenge to the agency. An adverse JARRC finding also establishes a rebuttable presumption that the rule is invalid.*

#### **IV. I-601**

*The restrictions of Initiative 601 with respect to unfunded mandates are extended to state agencies. State agencies through the rule making process may not impose responsibility for new programs or increased levels of service over \$50,000 on local governments without full reimbursement. The sources of the reimbursement are expanded to include funding from the state agency.*

#### **V. Judicial Review**

*The burden of proving that an agency's action was authorized by law is shifted from the petitioner to the agency. When a person challenges the validity of a rule, after the petitioner has identified the defects in the rule, the burden of going forward with the evidence is on the agency.*

*The reasons for which a court is allowed to invalidate an agency order or action are expanded to include actions based on de facto rules.*

#### **VI. Equal Access to Justice**

*The class of persons and entities entitled to attorney's fees and expenses is expanded to include persons who prevail in administrative hearings. Qualified parties prevailing in administrative proceedings are entitled to attorney fees and expenses up to \$25,000. Whether a party is entitled to reimbursement depends on the party's net worth, although certain non-profit corporations and agricultural cooperatives are eligible regardless of their net worth.*

*The amounts a qualified party may receive for prevailing in judicial proceedings is increased to \$50,000 in superior court, and \$50,000 in each court of appeal. However, the total award for judicial proceedings may not exceed \$75,000.*

*An agency must pay the attorney's fees and expenses within 30 days, and must pay the fees out of its administrative budget.*

**Rulemaking Authority:** *Agencies that conduct their own adjudicative proceedings are authorized to adopt rules to implement the provisions of the act relating to the Equal Access to Justice Act.*

**Appropriation:** *None.*

**Fiscal Note:** *Not Requested.*



***Effective Date:*** Sections 1 through 4 take effect January 1, 2002. The remainder of the bill, ninety days after adjournment of session in which bill is passed.