

Rule Making

**Forest Practices Board Meeting
November 13, 2024**

Terry Pruit, Senior Counsel

This presentation is based solely on the views of the author. It is not an official opinion of the Attorney General's Office and does not provide policy positions of the Forest Practices Board.

ADMINISTRATIVE PROCEDURE ACT

Chapter 34.05 RCW

- ▶ Adopted in 1988 to provide clarity and consistency to rulemaking and other procedures used by administrative agencies
 - ▶ 1995 Regulatory Reform - additional procedures complicate process, particularly for “significant legislative rules.”
- ▶ Rulemaking procedures, RCW 34.05.310-.395

Agency rule making authority

- ▶ Agencies carry out the authority expressly granted in statute, and any additional authority necessarily implied
- ▶ Agencies can engage in rulemaking when authorized by statute, WACs (rules) can further clarify or fill in the gaps of RCWs
- ▶ WACs (rules) cannot contradict RCWs (statutes)
- ▶ Rules carry the force of law

Rule Making Procedures - an Overview

1. Notice to public:

- ▶ Preproposal inquiry (Code Reviser Form CR-101)
- ▶ Proposed rule (Code Reviser Form CR-102)

2. Public comment on proposed rule:

- ▶ Written comment
- ▶ Oral public comment at hearing

3. Agency considers comments and whether to adopt rule

- ▶ Potential for limited variation from proposed rule
- ▶ Final rule adoption
- ▶ CR-103P filing and response to comments (Concise Explanatory Statement)

Note: Procedures vary for emergency and expedited rules



Preproposal notice - CR-101

RCW 34.05.310

Must solicit early public comments on a subject of possible rule making *before* filing a notice of proposed rule making under RCW 34.05.320

- ▶ Timing - At least 30 days before CR-102 filed
- ▶ Purpose of preproposal notice - Promote consensus and early access to rule making process

Proposed Rule - CR-102

RCW 34.05.320

- ▶ Notice of proposed rule with *numerous* notice requirements, including:
 - ▶ Information on how to provide public comment,
 - ▶ A short explanation of the rule, its purpose, and anticipated effects,
 - ▶ *If proposing amendments*, a short description of the changes the proposal would make,
 - ▶ A statement of the reasons supporting the proposed action.
- ▶ Timing - at least 20 days before rule-making hearing for public oral comment

Public Participation, RCW 34.05.325

- ▶ Rule making hearings
 - ▶ Must provide opportunity for oral comments
 - ▶ Other requirements on how the rule making hearing is conducted (e.g., recording the meeting, etc.)
- ▶ Also... if a rule is adopted, before the order of adoption is filed, the agency must (1) respond to public comments, (2) explain why the rule is being adopted, and (3) describe any differences from the proposal to the final rule (Concise Explanatory Statement)

Changes from proposal to final?

RCW 34.05.340

- ▶ Yes, changes can be made from proposal to final rule, but it may require more rulemaking . . .
 - ▶ Typographical corrections are fine
 - ▶ Risk of rule challenge if substantive differences btwn proposed rule and final rule
 - ▶ Option to file supplemental CR 102

ORDER OF ADOPTION (CR-103)

RCW 34.05.360

- ▶ If a final rule is adopted, the agency will file an order adopting the rule that contains all of the following:
 - ▶ (1) The date the agency adopted the rule;
 - ▶ (2) A concise statement of the purpose of the rule;
 - ▶ (3) A reference to all rules repealed, amended, or suspended by the rule;
 - ▶ (4) A reference to the specific statutory or other authority authorizing adoption of the rule;
 - ▶ (5) Any findings required by any provision of law as a precondition to adoption or effectiveness of the rule; and
- ▶ Rule becomes effective 30 days after it is filed with the Code Reviser, unless a later date is specified by statute or the Order of Adoption

Concise Explanatory Statement, RCW 34.05.325(6)

- ▶ Before the CR 103 is filed, the Board must compile the Concise Explanatory Statement which will—
 - ▶ (i) Identify the agency's reasons for adopting the rule;
 - ▶ (ii) Describe differences between the text of the proposed rule and the text of the rule as adopted, other than editing changes,
 - ▶ (iii) stating the reasons for any differences; and
 - ▶ (iv) Summarize all comments received regarding the proposed rule, and
 - ▶ (v) respond to the comments by category or subject matter.

The CES is a crucial document that lays out the agency's "story" of why and how the rule has been adopted.

Rulemaking File, RCW 34.05.370



Why the “file” is important:

Transparency to public, RCW 34.05.370(1)
Basis for review if final rule challenged, RCW 34.05.370(4)

When to start compiling the “file”:

CR-102

When is the “file” complete?

CR-103 filed/CES added to file; or, CR-102 withdrawn

What goes in the “file”:

Everything listed in RCW 34.05.370(2)

Some Agency Rules Are “Significant Legislative Rules” RCW 34.05.328

- ▶ A rule is a significant legislative rule if—
 - ▶ there is a penalty or sanction for violating the rule
 - ▶ the rule creates standards for issuing a permit or license, or
 - ▶ the rule amends a policy or regulatory program significantly
- ▶ Most Board rules are significant legislative rules
- ▶ Exceptions set forth in RCW 34.05.328(5).

Significant Legislative Rules - Require Certain Determinations

- ▶ Before adopting a significant legislative rule the Board must—
 - ▶ State the goals and objectives of the statutes the rule will implement;
 - ▶ Determine the rule is necessary to meet the statutes' goals;
 - ▶ Determine the probable benefits of the rule are greater than its probable costs;
 - ▶ Determine that the rule is *the least burdensome alternative* for those required to comply with it, that will achieve the statutory goals and objectives that the rule will implement.

Other procedural laws to consider in rule making:

- ▶ State Environmental Policy Act (SEPA)
- ▶ Regulatory Fairness Act (RFA)

STATE ENVIRONMENTAL POLICY ACT (SEPA)

Chapter 43.21C RCW

SEPA RULES, Chapter 197-11 WAC

- ▶ Rule making is usually an “action” requiring threshold determination to evaluate need for Environmental Impact Statement .
- ▶ But SEPA analysis is not required for procedural rules that do not contain substantive standards respecting the use or modification of the environment.

REGULATORY FAIRNESS ACT

Chapter 19.85 RCW

- ▶ Purpose - Inform agency decisions about potential costs to small businesses, and where legal and feasible, reduce costs on small businesses
- ▶ If rule would impose more than “minor costs” on small businesses, the agency will prepare a “small business economic impact statement”(SBEIS) with the proposed rule (CR-102)
 - ▶ “Small business” - 50 or fewer employees
 - ▶ “Minor costs” - a cost per business that is less than three-tenths of one percent of annual revenue or income, or one hundred dollars, whichever is greater, or one percent of annual payroll
- ▶ This is not a “cost-benefit analysis”

Other Rule making Processes

- ▶ Emergency rules, RCW 34.05.350
- ▶ Expedited rules, RCW 34.05.353

- ▶ Pilot, RCW 34.05.310 and 34.05.313
- ▶ Negotiated, RCW 34.05.310

The image features a classic hypnotic spiral background, alternating between red and black concentric rings that create a strong sense of depth and motion. In the center of the spiral, the phrase "That's all Folks!" is written in a white, elegant cursive script. The text is positioned across the middle of the frame, with the word "Folks!" ending in a prominent, upward-pointing exclamation mark. The overall aesthetic is reminiscent of the iconic closing sequence of the cartoon "Tom and Jerry".

That's all Folks!