

Rulemaking Analysis


CONSIDERATIONS REGARDING AGENCY DECISIONS DURING THE RULEMAKING PROCESS¹

Docket number TR-981102

Date: 03/29/99

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Division/Section: Regulatory Services Division/ Railroad Section

Exempt manager authorizing this review: Paul Curl, Deputy Director 

Approved for Rulemaking Proceeding: (mgr's Init/date) 3/29/99

Subject of rule: Regulations for Railroad Company Operations

Rule title: Railroad companies - Operations

Expected schedule () Firm (X) Target () Expected

CR 101 public meeting: 03/31/99

CR 102 public meeting: 09/08/99

Adoption hearing: 11/15/99

Filing with code reviser (effective 30 days later): 12/31/99

- 1. What persons or industries will be affected by this proposal? What agency rulemaking lists identify such persons? Who are significant interests not on these lists?**

The proposed rules will affect all railroad companies under Commission jurisdiction including Class 1 railroads, short lines, commuter rails, excursion lines and industrial rail lines. Other groups that possibly may be affected include counties and cities, other state

¹NOTE: Most of the information in this form is required to be contained in the agency's rulemaking file or in one or more of the rulemaking notices (CR-101 and CR-102) for permanent rules. The information is encouraged (in one case required) for emergency rules. *Some of the information called for in this form may not be available when the topic of a rule is first discussed. That information is generally required no later than the time a CR-102 is filed. Please provide all information now available, indicate when other information will be available, and update the information as it becomes available.* This form can be made available on a shared drive and then printed at the conclusion of a proceeding for inclusion in the file.



agencies, hazardous materials shippers, and railroad employees.

The Commission maintains rulemaking lists which include the affected parties. Lists the Commission will use for an initial mailing includes:

RULERA - Railroad Companies interested in rulemakings
Docket# TR-981101 - Interested parties of the Railroad Sanitation Rulemaking
TRANATYS - Transportation Attorneys
RULEA - Agency General

In addition, there are a number of "significant interests" not represented by the rulemaking lists. The Commission has identified many of these interests through staff knowledge of the industry and other mailing lists which the Commission will use to publicize this rulemaking. They include:

Railroad Company Address List - Current names and addresses maintained by rail staff
Railroad Employee Labor Unions Lists
Cities, Counties, and Public Works Lists
Year 2000 Compliance Lists
Police and Fire Departments Lists
Washington State Department of Transportation - the Rail, Engineering and Standards, and TransAid sections.
Washington State Military Department
U.S. Federal Railroad Administration
Washington State Department of Labor and Industries
Hazardous Materials Shippers List
Port Authorities
Tribal Governments

2. Why is this rulemaking being proposed?

Executive Order 97-02 requires agencies to review significant rules with attention to the rules' need; effectiveness and efficiency; clarity ; intent and statutory authority; coordination; cost; and fairness. Provisions currently codified in Chapter 480-62 WAC to determine if rules should be modified or repealed. In addition, the Commission will consider the need for additional rules concerning the following:

- * Administrative clarifications such as definitions, a compliance policies and the Commission's process for considering rule waivers.
- * Blocking of Crossings - The Commission has an interest in ensuring that blocked railroad crossings do not hinder emergency response vehicles or unreasonably disrupt traffic pattern flows.
- * Standards and Maintenance requirements for Crossing Surfaces - Failure to properly maintain railroad crossing surfaces have caused unsafe circumstances such as tire blow outs or getting stuck on the railroad tracks.

- * Notification rules regarding railroad company responsibility to provide advance public notice to public officials when a railroad company action will affect surrounding communities. For example, closing a crossing for maintenance, or increasing train speeds will affect traffic flow and may affect access to emergency facilities.
- * Signal Maintenance Standards - Federal standards apply to all railroads which operate in the state except for industrial railroads. State standards are needed to fill this gap to provide guidance and help ensure safety at crossings.
- * Standards for Crossing Signal Circuitry - the Commission needs to consider whether to set minimum standards for circuitry at crossings where active warning systems exist or proposed. Standards for preempt signals should also be included in this discussion.
- * Commuter Rail - The Commission will explore the need for safety and operating rules for commuter rail through the rulemaking process.
- * Whistle Ban Procedures - Federal Law requires the Federal Railroad Administration to adopt rules for whistle bans. However, this has not been done. State law allows cities and counties to enact whistle bans with advance notice to the Commission for comment. Rules are needed to implement this state law until federal rules are adopted.
- * Remote Control Trains - This is relatively new technology and the Commission will explore the need to have these operations reported to the Commission. The team believes reporting is needed so the Commission can monitor these activities to ensure public safety is adequate at crossings.
- * Consider Adopting the railroad General Code's of Operating Rules (GCOR) - The Commission will consider adopting the GCOR as a basis for monitoring train operations.
- * Additional railroad reporting requirements - The Commission will consider adding requirements that railroad companies report their timetables, bulletins, and notices to the Commission. The team believes the Commission needs this information to monitor and research trends, respond to public inquiries, and identify potential problem areas.
- * Track Motor Cars - Track motor cars are both industrial and recreational vehicles that may operate on both highways and railroad lines. The Commission's concern is that track motor car operators and on-track equipment are in compliance with crossing safety regulations.
- * Petitions for certain grade crossing improvements - Existing processes may be more cumbersome than necessary. Some changes in surfaces, road widening, certain signal circuitry improvements and other changes may be handled by rule or by abbreviated procedures, which would save processing time and staff time for petitioners and the commission.
- * Post-accident drug and alcohol testing - Railroad accident reports do not include drug and

alcohol testing that may have been performed on railroad personnel. The GCOR's have drug and alcohol testing standards. While FDA rules preempt post accident testing at accidents occurring at railroad grade crossings, RCW 81.48.060 discusses the criminal penalties that may be imposed against a railroad employee if he or she is found to be willfully endangers human life or safety. Staff believes rules should be explored that specifically prohibit operating a train or equipment while under the influence of drugs or alcohol. In the interest of public safety, staff believes, law enforcement personnel should be obligated to conduct drug and alcohol testing if there is reasonable suspicion to do so.

- * Railroad police officer reporting requirements - The Governor may appoint railroad personnel into commissioned police officer positions. The Commission has a need to know who holds the railroad police officer positions and how to contact them in order to facilitate communications and coordinate law enforcement operations.

The following information is required for a statement to be included in the rulemaking file no later than the CR-102 filing date; it must be updated based on additional information received by the agency during the rule making process.

3. **What is the objective of this rule?**
To comply with EO 97-02 and to provide readable, objective standards for railroad operations.
4. **Would changes to other rules or statutes achieve the same objective? [What rules? statutes? Why is this approach preferable?]**
No other agency has jurisdiction to adopt rules in this area. Rules are preferable to statutes as they provide the Commission with the ability to more easily respond to changing environments.
5. **What are the anticipated environmental and financial consequences of adopting and not adopting the proposal, recognizing the difficulty of quantifying some consequences?**
 - A. **Environmental consequences.** None
 - B. **Financial consequences.**
Unknown at this time. Commission railroad rules protect the safety of the public and railroad industry employees. Failure to have adequate safety rules in place puts the public and railroad employees at risk for loss of life or limb.
6. **Why is this a reasonable, cost-effective manner to achieve the regulatory objective, in light of available alternatives including no rulemaking?**
Standards are needed to ensure compliance with safe practices and to provide for public safety. The ability to require compliance is needed if voluntary compliance fails.
7. **Will the proposed changes overlap or conflict with local, state, or federal law or the**

rules of this or any other state or federal agency? How will the proposal be coordinated with other governments? *Is an Agency Rules Coordinating Committee needed under EO 93-06?*

Rules could overlap with L& I rules and with OSHA rules. Even though they are not applicable, consistency is appropriate. Research and input from rail employees and management should allow consistency to be achieved. Since the major railroads travel through many states, coordination among at least the states in FRA region 8 may be helpful. The Commission is pre-empted in some issue areas where the FRA has jurisdiction and those subjects need to be identified.

8. (a) **Could alternative forms of regulation achieve the same goals?** No. Rules are needed to achieve compliance in those instances when a railroad company is unable to or refuses to comply with safety standards. Further, rules set out processes and standards that provide guidance to railroad companies.
- (b) **Does the proposed rule include performance standards? Could performance standards be used in lieu of behavior standards or manner of compliance?**
No.
9. **Is this proposal made only to comply with federal law? No If so, does it contain significant differences from comparable federal rules or standards, or does it propose differences in application to public and private entities? _____ If so, provide a written analysis explaining the differences, evaluating their consequences, and stating the reasons for adopting the rule as drafted as opposed to a rule consistent with federal regulation.**

Is a CR-101 required? Yes [See, RCW 34.05.010(3)(c) --exemptions for emergency rules; Internal rules not submitting an outsider to sanctions; rules merely adopting or incorporating federal laws or rules or Washington law or rules; rules whose content is required by statute; rules setting fees that are explicitly and specifically dictated by statute; and rules that adopt, amend or repeal practices or procedures for agency hearings or a process for applying to an agency for a license or permit]. NOTE: to assure constituent involvement and support it may often be better to file a CR-101 and engage in prerulemaking discussions even if not required.

The following information is required for a statement to be included in the preproposal notice (CR-101):

10. **What is the specific statutory authority for the rule?**

General statutory authority is granted by RCW's 80.01.040, 81.01.010 and 81.04.160 and specific statutory authority is granted by RCW's 81.53.420 and 81.61.020.

11. **List specific reasons why the rule is needed:**

Executive Order 97-02 requires agencies to review significant rules with attention to the rules' need; effectiveness and efficiency; clarity ; intent and statutory authority; coordination; cost; and fairness. Other rules under consideration listed in #2 above are needed to clarify the authority, responsibilities, and processes of the commission and to clarify the responsibilities of the railroad companies. See item 2 above.

12. What are the goals of the proposal? Why are rules on the topic needed and what might they accomplish?

See item 2 above.

13. (a) What process will be used for developing the rule?

- Negotiated rulemaking Pilot rulemaking
- Agency study, consisting of [check as many as apply]:
 - Workshops and dialogue Public meetings
 - Written comment Other _____
- Other _____

(b) What is the process by which interested persons can participate in developing the rule? NOTE: If the selected process fails to provide an opportunity for interested persons to "participate" in the rulemaking process prior to publication in the CR-102, the agency must place a written justification for failing to do so in the rulemaking file. "Participate" means the opportunity to do more than the statutory minimum of offering written and oral comments. State the justification here and in your staff support memorandum for the request for Commissioner authorization to file the CR-102

Interested persons can participate in developing rules through stakeholder meetings, and public comment opportunities. The first meeting will be a public forum, intended to gather as much information as possible from the railroad companies and any other interested persons. Notice of the public forum will be sent to all regulated companies and other entities who may be interested in the rulemaking as expressed through response to the preproposal statement of inquiry (CR 101) or directly requested through the secretary. This meeting will also be used to identify specific stakeholder issues.

Throughout this process, any interested person may join the stakeholder group; may comment to Commission staff in writing, by fax, by phone or by electronic mail (e-mail); and may suggest rule language or revisions.

(c) What other federal and state agencies have jurisdiction over this subject? What process will be used to coordinate with that/those agencies?

Federal Railroad Administration
Washington State Department of Transportation

Washington Department of Labor and Industries
Washington Military Department

The above public agencies have parallel or overlapping jurisdiction. The Commission will work with these agencies directly through conversations and workshops and in writing through rulemaking mailings.

The following information will guide rule drafting and approach and help assure that the rulemaking file contains sufficient evidence to support the eventual decision:

14. Does the rule promote voluntary compliance through technical assistance?

The Commission promotes voluntary compliance through technical assistance at the policy level. The Railroad section management philosophy relies heavily on providing technical assistance and education in working with the industry, using penalties and other enforcement action only where necessary. The rules will be designed to promote voluntary compliance, but will be flexible enough to allow enforcement actions for those carriers who have proven to be either unwilling or unable to comply on a voluntary basis.

15. List specific evidence (facts) that supports the reasons why the rule is needed:

The rule is scheduled for 1998/1999 agency review in compliance with Governor Locke's Executive Order 97-02.

RCW 81.53.420 (Traffic Control Devices) and RCW 81.60.020 (Passenger Carrying Vehicles) require the Commission to write rules on these issues and the existing rules on these issues need to be updated.

For an emergency rule --

16. Answer either (a) or (b): N/A

- a. Why is the immediate adoption, amendment or repeal necessary for the preservation of the public health, safety, or general welfare, to the extent that observing the time requirements for notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest?**
- b. What state or federal law, or federal rule, or federal deadline for receipt of federal funds, requires the immediate adoption of this rule?**

**Preliminary Small Business Economic Impact Statement (SBEIS)
analysis:**

17. What industry is (industries are) affected by the proposal (4-digit Standard Industrial Classification[s]): 4011 and 4013

[Does the rule affect more than 20% of all businesses or more than 10% of any one (4-digit) industry? If not, an SBEIS is not required.]

18. **What elements of the rule may impose a cost on business?**
Unknown at this time, many of the proposed changes will adopt federal standards, restate existing laws, clarify existing Commission policy, or adopt existing railroad policies.
19. **What are the costs of compliance?**
As each issue is explored with stakeholders, the cost of compliance will be considered.
20. **Are the costs more than minor as established by the Business Assistance Center? *[If not, an SBEIS is not required].***

NOTE: If an SBEIS is required, special notice requirements exist under RCW 19.85.070 and the following steps are to be taken: obtain detailed information from businesses regarding the economic impact of the proposed rule; Conduct a detailed economic analysis of costs to determine the economic impact on business and to develop cost ratios; Does the rule impose a proportionately higher economic burden on small business? If so, the agency should modify the proposal to mitigate the impact on small business. Does the rule impose an equal burden on large and small businesses? If so, the agency should take steps to mitigate the costs. In either event, document the ratios and how they were derived; and list all mitigation measures the agency has used, in the SBEIS.

SEPA Requirements:

21. Consult SEPA rules to determine whether the proposed action is exempt from SEPA. With minor exceptions, *programs* administered by the agency in 1978 are exempt. If the proposal is not exempt, prepare a SEPA checklist and, as needed, an environmental impact statement.

Under WAC 197-11-865 and WAC 197-11-800(20), this rulemaking is exempt from SEPA rules.

POST-ADOPTION Requirements:

22. List the commenters at the adoption meeting, state the suggestions they made, identify those that were rejected by the Commission, and state the Commission's reasons for rejecting the suggestions.
23. List any changes that were made in the text of the rule between filing the CR-102 and adopting the rule, and state the Commission's reasons for making those changes.