Rep. Brian Blake

HOUSE OF REPRESENTATIVES
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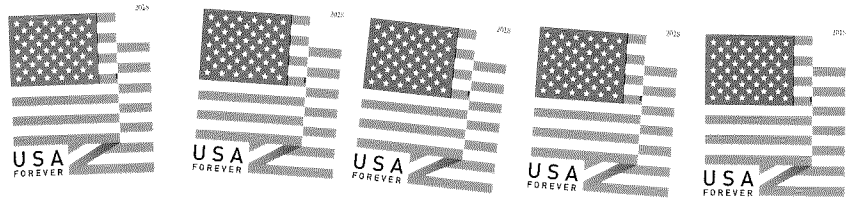

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Washington State Legislature

July 28, 2020

If you have any questions I can relay to Rep. Blake
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Re: Request for informal opinion

Attorney General Ferguson:

I am requesting your *informal opinion* on the following question:

Is a cost-benefit analysis conducted to satisfy the requirements of RCW 34.05.328(1)(d) required to consider the costs and benefits of a new rule as compared to the no-action alternative of a current statute, rule, or other identifiable, legally-binding regulation or does an agency have the discretion to compare costs against an observed common practice that is different than the current regulations?

The Administrative Procedures Act (Chapter 34.05 RCW) creates two requirements during the adoption process of a significant agency rule for the lead agency to consider the costs of a proposed regulation. The first requirement appears in RCW 34.05.328(1)(c). This subsection requires a preliminary cost-benefit analysis to accompany a notice of proposed rulemaking. This preliminary analysis may be revised during the rulemaking process; however, a final analysis must be provided upon final rule adoption. The second requirement for a cost-benefit analysis appears in RCW 34.05.328(1)(d). This subsection requires a determination by the lead agency that the probable qualitative and quantitative benefits of the rule are greater than the probable qualitative and quantitative costs.

A properly produced cost-benefit analysis is critical because of the requirement in RCW 34.05.328(1)(e). This subsection requires the lead agency to adopt the least burdensome alternative that will achieve the general goals and specific objectives of the rulemaking. This analysis includes the consideration of a no action alternative as one of the alternatives (RCW 34.05.328(1)(b)). This subsection can only be faithfully enacted after the development of a valid cost-benefit analysis.

The value of the analyses required in the rulemaking process varies depending on where the lead agency establishes the no-action baseline from which costs and benefits of the proposed new rules are to be analyzed. The Legislature offers little guidance on this topic, other than to offer a finding that agency decision making be based, ultimately, on the "common sense criteria established by the Legislature" (section 2(b), chapter 403, Laws of 1995).

That common sense standard would seem to apply to a cost-benefit analysis and the selection of a no-action alternative regulatory baseline. A high degree of discretion in that exercise of common sense would seem appropriate for an agency when a proposed regulation is being created for the first time. That is, when the rulemaking proposal is creating a new regulation where one does not already exist. However, that discretion may not be as broad when the proposed rulemaking is simply amending an existing regulation that has already been adopted. In this case, it seems that the commonsense approach is to set the cost-benefit analysis baseline at the existing regulation, which would result in comparing the proposed changes to the existing regulation to the actual regulation being changed.

There are instances when an existing rule has not been recently or historically enforced as written or where individual permitting processes have, with the consent of the permitted, included standards more protective than the actual language of the rule on which the permit was based. This latter outcome can occur when a regulated party finds efficiency in agreeing to a greater protective standard than outlined in the rule in order to more expeditiously obtain a permit or when a regulatory party went along with enhanced protections beyond current rule in order to show good faith in a temporary solution while work continued finding a permanent regulatory solution. In these cases, is the baseline of the cost-benefit analysis set at the existing rule language or does the agency have the discretion to establish a different baseline based on perceived current practices?

If that discretion exists, what standards apply for the establishment of a baseline different from existing regulations? Does the new baseline have to be based on an objective, measurable standard memorialized in an official agency document, or is choosing a baseline based on a variable, negotiated, and subjective determination of common practices adequate? Does it matter if the current practice is not a single definable process with a measurable and reproducible outcome?

Finally, if an agency has the discretion to set a cost-benefit analysis baseline on observed, undefined subjective common practice and not the standards memorialized in existing regulations adopted consistent with existing administrative procedures, do any expectations exist for an agency to choose a standard that is applicable to all potential parties subject to the existing regulation or can that standard be set at a baseline reflective of instances where only some of the potentially regulated parties have, in the past, voluntarily agreed to, or have been persuaded to agree to, a provision more restrictive than the associated rule as part of a permitting process?

It is critical to understand if this sort of discretion exists in the cost-benefit analysis process given the weight of that process in the implementation of RCW 34.05.328(1)(b) and, ultimately, RCW 34.05.375, which sets the validity standard for all new significant legislative rules. If a cost-benefit no-action baseline option can exist that is other than the existing rule that is proposed for

amendment, then it is critical to understand the limits of that discretion if legislation in this arena is to be considered.

Thank you for your consideration of this request.

Sincerely,

Representative Brian Blake

19th Legislative District