

DATE: August 12, 2009

TO: Washington State Board of Health Members

FROM: Environmental Health Committee, State Board of Health—Keith Higman, Karen VanDusen, John Austin

SUBJECT: PROPOSED REVISION OF SCHOOL ENVIRONMENTAL HEALTH AND SAFETY RULES: CHAPTER 246-366A WAC

Background and Summary:

The Washington State Board of Health, under authority of RCW 43.20.050(2), has promulgated environmental health and safety standards for schools since at least the 1950s. It directed staff in 2003 to update the existing school rule, chapter 246-366 WAC. At its October 8, 2008 meeting, it agreed on language for a new rule, but deferred a vote on adoption until no later than June 2009. The deferral was so the Legislature could consider funding issues during the 2009 session.

The final 2009-11 state operating budget included proviso language prohibiting the Department of Health and the Board from implementing new or amended school rules without the Legislature funding implementation for public schools. At its June 10, 2009 meeting, the Board approved a substitute motion directing this committee to work with staff to revise the rule proposal to reflect the legislative restriction and to file a supplemental CR-102 in time for a public hearing this month.

Board staff developed a revised rule draft in June. As the filing deadline approached, staff learned of an alternative rule making process. The CR-102 filed on July 1, 2009 included both alternatives. Staff updated the Board at its July 8 meeting. Since then, staff has worked with the Board's Environmental Health (EH) Committee to develop a single proposal for consideration by the Board—one that blends Alternatives A and B and can be recommended by staff and this committee.

Specifically, this committee recommends the Board adopt Alternative B with the amendments listed in Attachment 1. These amendments would retain the intent, implementation, and notice provisions of Alternative B but allow the Board to respond to legislative actions and phase-in the rule as necessary using the method proposed in Alternative A. After adoption, Board staff would file a rule making order (a CR-103 form), with an effective date for the new rule of July 1, 2010. Annually, after each legislative session but before July 1, the Board would review any legislative actions relevant to the school rule and direct staff to amend the rule making order as necessary to implement the rule in a manner consistent with legislative direction. The amended rule order would extend the implementation date for any sections that cannot be implemented. To help Board members understand what a CR-103 that phases in a rule using staggered effective dates would look like, your packets include the CR-103 from the last major onsite rule revision.

Attachment 1 lists the specific revisions to Alternative B that are being proposed. Attachment 2 contains the full text of the revised rule if the Board were to adopt the proposed amendments. These amendments fall into a few categories:

- Those intended to tighten the language and remove potentially confusing wording.
- Those meant to remove any perception that the Board would have significant latitude to interpret, as opposed to simply implement, legislative actions.
- Those such as converting the words “implementation date” to “effective date” throughout that reflect the Board’s intent to manage implementation using the amended CR-103 process proposed in Alternative A, as opposed to the process proposed in Alternative B, which was to build contingent effective dates into the rule that would be triggered by legislative action and by subsequent interpretive statements issued by the Board.
- Those that clarify that although additional legislative action is necessary before the revised rule can be implemented, formal legislative approval of the rule is not necessary.

Ned Therien, SBOH staff, will summarize these committee recommendations and public comments received about the supplemental proposal filed on July 1, 2009. Please refer to materials behind Tab 3.

Recommended Board Action:

The Board may wish to consider the following motion:

The Board adopts Alternative B of the rule making proposal WSR 09-14-136, with amendments considered and approved by the Board today. The Board directs staff to file an order of rule making with an effective date of July 1, 2010. The Board further directs staff to develop rule filing orders and amended orders, as necessary, to allow provisions of proposed chapter 246-366A WAC to become effective and provisions of chapter 246-366 to be repealed when superseded, according to potential actions of the Legislature that could allow implementation of new and amended provisions.

Discussion:

The Washington State Board of Health directed staff in 2003 to begin an update to its school environmental health and safety rule, chapter 246-366 WAC. The Board set the following goals in 2003 for updating these rules:

- Proactively protect children’s health;
- Be based on the best available science;
- Ensure accountability between school districts, their communities, and local health jurisdictions;
- Support and promote current school health and safety programs that work;
- Present the least burdensome regulatory structure;
- Be compatible and consistent with existing related regulations (such as building codes);
- Be realistic about resource limitations of schools and local health jurisdictions.

After extensive stakeholder work by the Department of Health and the Board, staff filed a rule proposal (CR-102 form) on July 23, 2008 to adopt a replacement chapter 246-366A WAC. The Board held a public hearing on August 27, 2008 in Spokane. It continued the hearing on September 10 in Tumwater. The official comment period closed at midnight on September 10. The Board continued its deliberations on the proposal October 8 in Yakima. At that meeting, it adopted some amendments to the proposal, expressed unanimous support for the proposal as amended, and voted to defer a decision on the rule until a later meeting, but no later than June 2009. The deferral was meant to allow the 2009 Legislature to consider the costs of the rule and whether to provide state funds to promote more effective implementation.

The Legislature considered several bills and held some committee hearings during 2009 that touched on the funding implications of the rule proposal, without specifically providing funding for implementation. The final 2009-11 state operating budget, passed April 2009 as ESHB 1244, included language in section 222(1) prohibiting the Department of Health and the Board of Health from implementing any new or amended school facility rules without the Legislature funding implementation for public schools.

At the end of January 2009, the Board's Executive Director submitted a continuance for WSR 08-15-174 that kept the rule making open for another 180 days. The Board had until July 17, 2009 to adopt the rule proposal, withdraw it, file another continuance, or make additional revisions; file a supplemental CR-102; and schedule another public hearing. On June 10, 2009, the Board directed staff to develop and file a supplemental rule proposal to allow a hearing in August of this year. The Board filed a supplemental CR-102 on July 1, 2009 as WSR 09-14-136. The Board intends the proposal would repeal chapter 246-366 WAC and replace it with a new chapter 246-366A WAC in a time and manner allowed by the Legislature.

The supplemental CR-102 filed by staff on July 1, 2009 contains two alternatives. Both alternatives remove the repealers for chapter 246-366 WAC that were in the original proposal from July 2008. Both alternatives could add a section to chapter 246-366 WAC that explains the Board's intent to have it superseded by chapter 246-366A WAC and another section about severability. Alternative A would adopt language for proposed chapter 246-366A as amended by the Board at its October 8, 2008 meeting, with the addition of a severability section. Alternative B would add language to proposed chapter 246-366A WAC to clarify that the Board is acting in accordance with the budget proviso in Section 222, chapter 564, laws of 2009, and that the new rule would not be implemented without full or partial legislative funding or another form of legislative action. The current rule would remain active until superseded.

The procedures for implementing provisions of chapter 246-366A WAC are different in the two alternatives. Alternative A would use the rule-making order (CR-103 form) and amendments to establish effective dates for new provisions in accordance with legislative actions. Alternative B would build contingent effective dates into the rule and use interpretive statements filed with the Code Reviser to provide notice of rule implementation when triggered by legislative actions.

The EH Committee recommends the Board adopt a rule that blends Alternatives A and B. It recommends using the CR-103 form filing and amendment process, as proposed for Alternative A, as the technique to establish effective dates for new provisions. This could allow a phase in of rule provisions according to effective dates formally adopted through the rule making process instead of implementation dates based on interpreting legislative actions. As the old rule is superseded by the new rule, the old rule would be repealed, possibly incrementally, by a streamlined rule process called the exempt process. Because the old rule language is not in conflict with new rule language, any overlap of the old and new rules for a few months would not be problematic.

The EH Committee recommends that the Board adopt the rule language closest to that proposed for Alternative B. It recommends that the language be amended to reflect the approach of using effective dates established through the CR-103 form process. It recommends including the language explaining the existing and potentially continuing legislative restrictions on implementation to narrow the perception of the Board's latitude in implementing the rules.

Because the Board has published and solicited comment on both proposals, there should be no legal issues with adopting a rule that blends the two. Changing how the administrative paper work is handled to manage a delayed, phased-in implementation would not be considered a substantive change to Alternative B and, therefore, would not require republishing the rule proposal before considering adoption.