



October 3, 2013

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Subject: 2013 Rulemaking for Chapter 197-11 WAC , SEPA Rules

The Confederated Tribes and Bands of the Yakama Nation is a federally recognized Indian tribe under the Treaty of June 9, 1855 (12 Stat. 951). Under Article III of the Treaty, the Yakama Nation reserved rights to fish at all usual and accustomed places, together with the privilege of hunting and gathering roots and berries, both within and outside of its reservation. The Yakama Nation has a vested interest in any state rulemaking that has the potential for probable significant, adverse environmental impacts to cultural resources and Treaty-reserved rights. Treaties are the Supreme law of the land (Article VI, U.S. Constitution).

The State Environmental Policy Act (SEPA) requires the preservation of important historic, cultural, and natural aspects of our national heritage [43.21C.020(d)]. In determining an impact's significance, the responsible official shall take into account the adverse effect on environmentally sensitive or special areas, such as loss or destruction of historic, scientific, and cultural resources, and endangered or threatened species or their habitat [197-11-330 (3)(e)(i)(ii)]. Section 301(1) of SB 6406 justifies the increase of categorical exemption thresholds in light of the increased environmental protections in place under chapters 36.70A RCW (Growth Management Act) and 90.58 RCW (Shoreline Management Act). While a Shoreline Master Program comprehensively updated under the new guidelines (WAC 173-26) plans for and protects cultural resources, The GMA does not require planning for or protection of cultural resources, providing for probable significant, adverse environmental impacts to cultural resources and treaty-reserved rights. **Both known and still unrecognized archaeological resources are vulnerable under the new SEPA categorical exemptions.**

SB 6406 requires Ecology to ensure that federally recognized tribes receive notice about projects that impact tribal interests through notice under SEPA **and** other means. Tribal interests include all varieties of cultural resources across the landscape.

For millennia the Yakama People have had an intimate knowledge of our environment. We understand the variety and utility of the resources across the diverse landscapes of the ceded and traditional use lands. We expect the resources of cultural value to be preserved and protected for future generations. Some of the sacred foods of the Yakama People include *chiish* (water), *núsux* (salmon), *pyáxi* (bitterroot), *lúksh* (biscuitroot), *sawítk* (wild carrots), *xmáash* (camas), and *wíwnu* (huckleberries). Some sacred animals include *pnít* (elk), *yáamash* (deer), *anahuy* (bear), and *xwayamá* (eagle).

Archaeological resources are a kind of cultural resource. They are important to the Yakama Nation for their cultural value. Archaeological resources are physical manifestations of our ancestors in the landscape. Archaeological sites contain value to the Yakama People. They demonstrate the variety of activities by our ancestors across the diverse landscapes of Washington. The landscape contains archaeological resources, whether previously recorded or still unrecognized (RCW 27.53.040).

To facilitate the preservation and protection of resources of cultural value across the ceded and traditional use areas of the Yakama Nation, we expect the Department of Ecology to require the utilization of a systematic interdisciplinary approach that integrates natural and social sciences [RCW 43.21C.030(a)], including archaeological field investigations when any lead agency reviews the permitting of any ground disturbing activity. Systematic archaeological field investigations are necessary to insure that still unrecognized archaeological resources are not disturbed (RCW 27.53.040).

The Department of Archaeology and Historic Preservation (DAHP) has a confidential database with known archaeological sites. All sub-divisions of Washington State that permit ground disturbing activities should be required to have a data-sharing agreement with DAHP and should screen every project they review, both potentially SEPA exempt and non-exempt, as part of their review process to insure that archaeological sites are not disturbed (RCW 27.53.060). Any project with a known archaeological site must be assessed by a professional archaeologist to determine site boundaries and protection plans. All projects with known archaeological sites should not be categorically exempt from SEPA. Failure to use available state-wide information is irresponsible and inconsistent with RCW 43.21C.030(a).

DAHP has created an archaeological predictive model for Washington State. DAHP's model should be used to trigger archaeological surveys whenever any portion of a proposed project, both potentially SEPA exempt and non-exempt, includes "high risk" and/or "very high risk" for archaeological resources. If the archaeological surveys discover archaeological resources, the project should not be exempt from SEPA. Every permit needs to include an archaeological resource incidental discovery clause so the proponent knows what measures must be taken if archaeological resources are discovered during the project.

For the protection of endangered plants, the Washington Department of Natural Resources, Natural Heritage Program should be utilized, consistent with RCW 43.21C.030(a).

The Yakama Nation has reviewed draft rule language for WAC 197-11 and offers the following comments;

The Yakama Nation concurs with draft language, dated September 17, 2013, for WAC 197-11-800 (c)(iv) if **all** of the bullets are required and the provisions apply statewide, for both GMA and non-GMA planning jurisdictions. . Additionally, “Cultural Resources Management Plan”, “pre-project cultural resources review” and “standard inadvertent discovery plan” need to be defined. Language for “Cultural Resource Management Plan” could be defined as a Plan that integrates cultural resource identification and management into land use planning and permitting processing. “Pre-project cultural resources review” should have a requirement that this is done by DAHP or an affected Federally recognized Tribe. Local governments that do not have an archeologist will not have the knowledge or expertise to do these reviews.

We suggest that the language proposed by the Association of Cities for WAC 197-11-800 (c)(iv) also be added to WAC 197-11-800 (c): Before adopting the ordinance or resolution containing the proposed new exemption levels, the local government shall provide a minimum of twenty-one days notice to affected Tribes, agencies with expertise, affected jurisdictions, the department of ecology and the public, and provide opportunity for comment. The process must document how specific adopted development regulations and applicable state and federal laws provide adequate protections for cultural and historic resources when exemption levels are raised. The requirements for notice and opportunity to comment and the requirements for protection and mitigation must be specifically documented.

For question 13 of the SEPA checklist the Yakama Nation suggests:

13. Historic and cultural preservation

- a. Generally describe any landmarks or evidence of historic, archaeological, scientific or cultural features or objects that are known to be on or within 1000 feet of the project.
- b. Describe the methods used to assess the potential impacts to cultural resources on or within 1000 feet of the project. What tribe(s) was consulted? Was the Department of Archaeology and Historic Preservation consulted? What historic maps and records were reviewed? Was an archaeological survey conducted? Were additional methods used to identify cultural resources?
- c. Are there any places or objects listed on or proposed for listing on, or eligible for listing on the national, state or local preservation registers known to be on or within 1000 feet of the project? If so, generally describe them.
- d. What measures are proposed to reduce or control impacts to cultural resources, if any?

The Yakama Nation is opposed to any new exemptions for projects on or near lands covered by water. There are too many variables with the potential to provide significant,

adverse environmental impacts to Treaty reserved rights for support of new exemptions. The proposal of an exemption for dredging under fifty cubic yards in WAC 197-11-800(3) is unacceptable and should be removed.

SB 6406 requires Ecology to ensure that federally recognized tribes receive notice about projects that impact tribal interests through notice under SEPA **and** other means. The proposed rulemaking ignores SB 6406 and is in opposition to legislative requirements. With the increased threshold exemptions adopted in 2012, the Yakama Nation will receive fewer notices, with the potential for significant, adverse environmental impacts to Treaty reserved rights.

Thank you for considering these comments. I anticipate they will be discussed and incorporated into future drafts of this Rule.

Sincerely,



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