



DEPARTMENT OF
ECOLOGY
State of Washington

DRAFT STATUS REPORT

2013 Rulemaking for Chapter 197-11 WAC, SEPA Rules

Review and Update of Exemptions

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Introduction

The Department of Ecology is preparing this draft status report to aid in discussion with the SEPA Rule Advisory Committee. In 2012, Legislature passed 2ESSB 6406. For 2013, 2ESSB 6406 directed Ecology to review and update all exemptions listed in WAC 197-11-800 (among other activities). In response, Ecology staff have reviewed comments made to date by Advisory Committee members, past meeting notes, and conducted its own review of each exemption. The goal of this document is to summarize that review and provide a useful document for the Advisory Committee to use in its role of advising the agency. The document lists each exemption and includes a narrative discussion, amendment options and status of Ecology's preliminary approach.

WAC 197-11-800 (1) Minor New Construction

Flexible Thresholds

Topic: Flexible Thresholds

Rule Section: 197-11-800 (1)

Discussion: The statute required Ecology to increase flexible thresholds during the phase 1 (2012) rule amendment process, including differentiating between GMA and non-GMA jurisdictions as well as between Urban Growth Areas (UGA) and non-UGA areas. Many of the flexible thresholds were increased as a result of those amendments. The statute also authorized Ecology to review and update any of those phase 1 thresholds during the 2013 rule-making effort.

As of this date, very few local governments have updated their SEPA procedures to take advantage of the new levels of flexible thresholds. For those that have increased the levels, there has been very little time to determine if there are any lessons learned for the recent increases. In addition, no specific request or information has been submitted requesting an increase. The agency believes it is premature to amend those levels until more experience is obtained.

Status: No additional changes are proposed to WAC 197-11-800(1) related to flexible thresholds.

Air and water discharge permits exception

Topic: Non-exemption when there are licenses governing emissions to the air or discharges to water

Rule section: 197-11-800 (1) and (2)

Discussion: Current language in WAC 197-11-800(1) and (2) states that the exemptions do not apply when “any license governing emissions to the air or discharges to water is required” (see also discussion on industrial uses). Some have suggested that the language excluding the exemption when additional environmental permits are required does not make sense given that the environmental permits should address the impacts associated with each type of permit. Ecology has put forward the idea that the air and water permit language is one way of describing attributes of more intensive land uses.

It may be possible to distinguish between different types of permits that fall within the current language. For water discharge permits, SEPA exemption or non-exemption is already resolved in SEPA. RCW 43.21C.0383 states that for existing discharges, the issuance, reissuance, or modification of a waste discharge permit is exempt. New discharges would be subject to SEPA. Additionally, RCW 43.21C.0383 states that construction stormwater general permits for sites less than 5 acres are exempt. Permits for sites 5 acres and larger are subject to SEPA. Prior to the statutory exemption for stormwater permits for sites under 5 acres in 2008, there was concern that some minor new construction projects previously

exempt under 800 (1) or (2) would be made non-exempt by the new stormwater permits for sites less than 5 acres. Given that the water discharge permits are resolved in the statute, it would seem that the language in 800 (1) and (2) can be removed. Without removing the language, the current language could compel a project to undergo SEPA review due a stormwater permit, yet the permit itself would be exempt from SEPA.

For permits governing air emissions, the existing statutory and rule language does not address all types of air permits. RCW 43.21C.0381 states that decisions pertaining to the issuance, renewal, reopening, or revision of an air operating permit are exempt. The SEPA rules state that granting of variances under the state clean air act for air pollution control requirements for one year or less are exempt. The rules are silent on any other air permits. A local clean air agency has requested that Ecology retain the non-exemption language covering air permits. The clean air agency finds value in the SEPA review of sources covered in permits issue by the agency.

Status: Ecology suggests treating the air and water permit non-exemptions separately. Ecology would remove the water permit non-exemption due to the issue being resolved in statute. For the air permit non-exemption, Ecology recommends more discussion. Ecology would like more detail on the types of air permits issued by local air agencies and the opinion of other air agencies on the air permit non-exemption issues.

Industrial Uses

Topic: Industrial Uses

Rule section: New section, also 800 (1) and (2)

Discussion: In the May 2013 discussion draft of rule language, Ecology suggested an industrial definition that would be used as part of exemption exclusion for industrial uses. The industrial definition would affect the applicability to exemptions in 800 (1) and (2). The purpose of the language was as an alternative to the current language in 197-11-800(1) and (2) stating that the exemptions do not apply when “any license governing emissions to the air or discharges to water is required” (see also discussion on permits for air emission/water discharge). Ecology’s intent was not to eliminate any exemptions, but to simplify the exemption by describing the project actions instead of the permits required.

Status: Based on comments received, it appears this suggested approach would have too many unintended consequences. Ecology will instead find an alternative approach to addressing the exemption exclusion when air/water permits are required (see also discussion on permits for air emission/water discharge).

Address Mixed Use

Topic: Add specific exemption threshold for mixed use projects (residential and commercial in one building or cluster of buildings)

Rule section: 179-11-800 (1) Minor New Construction New Section for Mixed Use

Discussion: Ecology suggested a new project type of “mixed use” buildings to add to the list of minor new construction exemptions. Mixed use is not addressed currently in the SEPA Rules, although it does appear in RCW 43.21c.229, Infill Development Exemption. Many new multi-family residential projects include some commercial space, but section 800(1) does not establish a clear threshold for determining what size of mixed-use building is exempt from SEPA review.

Ecology interprets the current rule language to authorize lead agencies to determine that SEPA is exempt for mixed-use projects with the residential unit numbers below the residential threshold and the commercial square footage and parking component below that applicable threshold. We suggested a new project type that reflects this interpretation –and combines both the residential exemption level and the commercial threshold. The minimum or default exempt mixed-use project size includes up to 4 dwelling units, 4,000 square feet and 20 parking spaces. Cities and Counties may increase those thresholds pursuant to 800(1)(c) and (d).

Options:

1. Add the provision as proposed above regarding a new project type for mixed-use construction.
2. Do not add the previously proposed language but instead specify that local government sets the mixed-use threshold up to a combined maximum flexible level using the residential units and commercial building sizes in 800(d).
3. Add a new mixed use exemption with a lower threshold than the combination of both residential and commercial thresholds.

Status: Ecology is still considering option #1

Modify fill and excavations project type

Topic: Modify fill and excavation exemption to clarify applicability

Rule section: 800 (1) Minor New Construction

Discussion: The 2012 rulemaking attempted to clarify that clearing and grading associated with an exempt minor new construction project (or any other exempt project type) is also exempt regardless of quantity of fill or excavation. Ecology has heard from lead agencies and other stakeholders that there is still confusion about how to apply the excavation/fill exemption because it is listed alongside with minor new construction buildings. However, there is still a need to include a specific exemption for dirt

moving activities (i.e. clearing, grading, excavation, fill) that are not connected to an existing or planned building or other facility.

Options:

1. Keep this exemption in 800(1) and replace the phrase “associated with” to “necessary for”.
2. Move this exemption to 800(2) and apply the 1000 cu yd threshold for all agencies. This should further clarify that this is not intended to be combined with other new construction project types, nor should it be used for land-clearing for landscaping or other connected activities associated with an existing facility/structure.

Status: Ecology is considering both options keeping in mind the goal to clarify and avoid SEPA review for exempt projects.

Lands covered by water

Topic: Lands covered by water - definition

Rule section: 197-11-756

Discussion: The definition of “lands covered by water” is outdated. WAC 197-11-756 defines “lands covered by water” as “lands underlying the water areas of the state below the ordinary high water mark, including salt waters, tidal waters, estuarine waters, natural water courses, lakes, ponds, artificially impounded waters, marshes, and swamps.” Ecology proposes to update the definition to include a modern definition of wetlands. See also Ecology’s earlier write up of the definition issue in the [2001 status report](#) on categorical exemptions review. Ecology has also received input regarding artificially created waters.

Status: Ecology plans to update rule language regarding wetlands. More discussion is needed regarding artificially created waters. Other issues connected with lands covered by water are addressed separately (see below).

Topic: Lands covered by water – clarifications regarding applicability

Rule section: 800 (1), (2), (3), (6), and (23)

Discussion: Several of the categorical exemptions [WAC 197-11-800(1), (2), (3), (6), and (23)] require otherwise exempt proposals to undergo SEPA review if located “wholly or partly on lands covered by water.” There are a number of potential clarifications with regard to proximity that could be made.

Proposals adjacent to lands covered by water – Ecology could clarify that proposals adjacent to lands covered by water are not included in the definition of lands covered by water. The total proposal would need to be clearly defined to determine if adjacent proposals include are partly on lands covered by water.

Proposals affecting buffers - Ecology could clarify that proposals in buffers are not on lands covered by water. The determination of whether a project is subject to SEPA review would depend on the local government decision regarding review in critical areas (see [WAC 197-11-908](#)).

Proposals on parcels containing lands covered by water - Ecology could clarify that proposals on parcels containing lands covered by water are not subject to review unless the proposal itself actually is wholly or partly on lands covered by water. The total proposal would need to be clearly defined to determine if proposals include pieces that are wholly or partly on lands covered by water (for example, a project site may be at a distance from lands covered by water, but new access to the site is proposed to be constructed partly on lands covered by water.)

Proposals over water, but not including any in-water work - Ecology could clarify that proposals over water, but not including any in-water work are not subject to review.

Proposals under lands covered by water, but not including any in-water work - Ecology could clarify that proposals under lands covered by water, but not including any in-water work are not subject to review. Need to consider whether the siting of a proposal under lands covered by water would create a requirement for future in-water maintenance work.

Status: Ecology is open to some clarifications, but more discussion needed. Each separate clarification may have associated issues for advisory committee members to discuss.

Topic: Lands covered by water – eliminating or reducing non-exemption

Rule section: 800 (1), (2), (3), (6), and (23)

Discussion: Several of the categorical exemptions [WAC 197-11-800(1), (2), (3), (6), and (23)] require otherwise exempt proposals to undergo SEPA review if located “wholly or partly on lands covered by water.” A number of advisory committee members have suggested removing the non-exemption for lands covered by water with the explanation being that there are many other laws and regulations in place that were not in place in 1984 when the current rule was adopted. 2ESSB 6406 requires Ecology to consider updating exemptions in light of increased protection in the GMA and SMA. Critical areas updates and shoreline master program updates do provide added protections that were not in place in 1984. Additionally, regulatory programs for in-water work have progressed to provide additional protections that once did not exist (HPA, 404, 401,

stormwater permits, ESA, etc) . On the other hand, new issues associated with the sensitive aquatic environment have emerged since 1984 (e.g., endangered salmon, stormwater, invasive species).

One issue associated with the multiple permits and approvals is how the agencies coordinate their respective reviews. SEPA may play a coordinating role in some cases. One mechanism for coordinating multiple agency review is the joint aquatic resource permit application (JARPA) used by Ecology, the Corps, and other agencies.

Another connected issue is whether the agencies use SEPA for getting the information they need for making their permitting decisions regarding lands covered by water. And if that mechanism were eliminated, is another mechanism available to agencies for getting that information?

One option for consideration instead of an outright removal of the lands covered by water non-exemption would be a conditional removal of the non-exemption. It was suggested at a previous advisory committee meeting that an updated shoreline master program could be a prerequisite for eliminating the non-exemption. Another option would be conditional removal of the non-exemption if an applicant used a JARPA to apply to the multiple agencies require permit application for in-water work.

Status: This topic requires more discussion from advisory committee members before Ecology can move forward with a suggested approach. There are many sub-issues associated with the topic and this take considerable time to discuss and resolve.

Other Minor New Construction

Air and water discharge permits exception

Please see the topic discussion under 800 (1)

Updating minor new construction language

Topic: Modify Other Minor New Construction

Rule section: 800(2)(c) Other Minor New Construction

Discussion: The City of Seattle proposed amendments to the transportation-related exemptions in 800(2)(c) to clarify the applicability of existing exemptions.

- (i) installation of catch basins and culverts for the purpose of road and street improvements;
- (ii) and reconstruction of existing roadbed (existing curb-to-curb in urban locations), including adding or widening of shoulders where capacity is not increased and no new right of way is required;

Concerns about this proposal include the following:

1. Additional right of way may be necessary to maintain a roadbed and the mere addition of right of way should not remove exemption when no capacity is added.
2. Clarify whether culverts installed for stream crossings as part of a road project are exempt or excluded from the exemption because they are constructed on land covered by water.
3. Explain why the installation of culverts are exempt only for the purpose of street improvements

Additions to this proposal include a new subsection for the exemption of new boatlifts by **adding a new subsection for the** “installation of freestanding, floating, or suspended boatlifts”. The rationale provided is that WDFW does not require an HPA for the installation of boatlifts.

Status: More discussion is needed on this topic – to help answer questions and resolve concerns. Additional information is needed on the boat lift proposal.

Installation and removal of tanks

Topic: Exemption for Installation and Removal of Tanks

Rule Section: 197-11-800(2)(g)

Discussion:

Many commenters have suggested that above-ground tanks and the removal of above and below-ground tanks be included in the SEPA exemption. Ecology suggested preliminary draft language to add these with the same size threshold, at 10,000 gallons.

Comments also included concern that tanks with explosive or flammable contents should have smaller exemption size limit require because these are dangerous and other regulations don't provide enough protection in many locations. Ecology notes that the installation or removal of tanks that are accessory to exempt structures (like individual homes and small commercial buildings) are exempt under 800(2)(d), although these tanks would likely be smaller.

In some non-residential settings (agricultural and industrial) larger tanks are commonplace. One option would be to provide different tank-size exemptions depending on whether the location is residential or nonresidential. Agricultural or industrial sites could have a larger threshold, e.g., 30,000 gallons.

Options:

1. Amend to include “installation or removal of impervious underground or above-ground tanks,” and include the same 10,000 gallon threshold for both types of tanks.

2. Create separate residential and non-residential exemptions for tanks with larger threshold for agricultural or industrial sites (e.g., 30,000 gallons).

Status: Ecology intends to include above ground tanks. More discussion needed regarding tank size and location and whether separate residential/non-residential tank exemptions would be feasible.

Exemption for demolition of buildings

Topic: Exemption for demolition of buildings

Rule Section: 197-11-800(2)(f)

Discussion: Currently, the rules provide an exemption for the demolition of a structure or facility that is within the construction exemption in 800(1) and (2) except for those structures or facilities listed a national, state or local register. A suggested amendment to include “eligible for listing” was included in the May 2013 discussion draft of the rule. The “eligible for listing” language (as well as actually being listed in a register) intends to make this language consistent with the generally accepted definitions/practices for determining a historical resource that may need some protection or other mitigation prior to demolition.

Concerns were made about this amendment related to the “eligibility” determination –with the assumption that age alone determines eligibility. The Dept. of Archeology and Historic Preservation has a list of criteria that lead agencies and project applicants can consult upfront to determine the eligibility of structures proposed for demolition.

The City of Seattle proposed additional exemption language for this subsection similar with the existing provision that exempts demolition activities for structures that are under the minor construction size and type. One suggestion that could clarify the exemption is to add “demolition and removal” language instead of just “demolition”.

Options:

1. Amend this provision to add the eligibility language to the “exception” provision for demolition exemption.
2. Amend to include “demolition and removal” to clarify this type of exempt activity
3. Do not make an amendment to this provision.

Status: More discussion needed.

Repair, remodeling and maintenance activities

Clarify in-water maintenance work, dredging, bulkheads

Topic: Clarify and expand exemptions for in-water maintenance

Rule section: 197-11-800(3)

Discussion: Currently the exemption for maintenance projects specifically excludes dredging activities and “reconstruction/maintenance of groins and similar shoreline protection”. Ecology heard from lead agencies who conduct activities in water that involve minor dredging such as culvert maintenance. They recommend an expansion of the exemption to include more in-water maintenance work.

Ecology initially proposed a limit of 50 cubic yards -meaning that maintenance dredging projects of 50 cubic yards or less would be exempt from SEPA (instead of requiring SEPA review for all maintenance dredging). Comments on this proposed change included concerns that this amount was large enough to result in significant impacts –particularly if there was toxic contamination in the dredged material. An alternative quantity of 20 cubic yards was proposed along with a condition that the material be free from toxic contamination. A brief scan of the SEPA review documents for “maintenance dredging” projects seemed to confirm that most all projects involve many hundreds and thousands of cubic yards of materials. The proposed change will not affect the major dredging projects but will help facilitate the maintenance of fish passages and other structures.

Ecology also proposes clarifying language related to the maintenance of “shoreline protection structures”. Ecology considers bulkheads to be a type of “shoreline protection” but the language in the rule only lists “groins” as an example. We have proposed a clarification that adds bulkheads in addition to groins as examples of the type of maintenance projects that are not exempt under 800(3)(b). Ecology does not interpret this clarification as adding a new requirement. Ecology received a suggestion that the term “shoreline stabilization” is a more consistent term with the Shoreline Management Act. Other commenters were opposed to explicitly including bulkheads to the exception language.

The current language also includes “replacement of pilings” as an example of in-water maintenance projects that are exempt. One comment suggested that this be more specific and include a quantity to improve consistency across lead agencies. Ecology could include a percentage of the structure to be replaced. Ecology notes that the rule articulates that “minor repair or replacement of structures may be exempt (examples include repair or replacement of piling, ramps, floats, or mooring buoys, or minor repair, alteration, or maintenance of docks). Ecology could include a percentage of the structure to be replaced. In trying to add clarity, Ecology may inadvertently limit room for lead agency interpretation on this issue.

Options:

1. Qualify the dredging exception to allow up to 50 cubic yards of non toxic sediment under the exemption
2. Qualify the dredging exception to allow up to 20 cubic yards of non toxic sediment
3. Add clarification that reconstruction/maintenance of bulkheads and other “shoreline stabilization” structures are not exempt

4. Include a specific percentage of the structure to be replaced as a threshold for the maintenance exemption

Status: More discussion needed regarding the size of the maintenance dredging exception and other maintenance exemption options.

Clarification and addition – not including in-water work

Topic: Clarify and expand maintenance exemptions –not including in-water work

Rule section: 197-11-800 (3)

Discussion: The current language in this section is fairly broad as long as there is no work in-water and there is no expansion. The City of Seattle requests clarity on the “intent and scope” of this exemption and proposes an additional exemption for facility expansion and building additions. WSDOT proposes to add “transportation facilities” to clarify that their maintenance activities are covered under this exemption.

The existing language of the exemption reads:

(3) Repair, remodeling and maintenance activities. The following activities shall be categorically exempt: The repair, remodeling, maintenance, or minor alteration of existing private or public structures, facilities or equipment, including utilities, involving no material expansions or changes in use beyond that previously existing . . .

The term “minor alteration” is broad and can include most any kind of work except material or functional changes or expansion. This includes the projects related to landscaping maintenance (as the City mentions) and some historical restoration projects.

Seattle’s proposal broadens the exemption to include facility expansions –provided the addition does not exceed 50 percent of the floor area up to a maximum of 10,000 sq feet as long as the project is not in a critical area and is in an area where public services are available (in that case the limit is 2500 sq ft).

Technically the exemption language for facility expansions or additions is located in 800(2)(e). In that subsection, the expansion is limited to structures under the size limits of the minor new construction exemptions. Ecology notes that the current maximum flexible threshold for commercial and other buildings is 30,000 sq ft. Consequently, 800(2)(e) already authorizes fully planning cities and counties to exempt building additions up to 10,000 sq ft if the original building is 20,000 sq ft (pursuant to the City’s 50 percent increase maximum).

The City proposal to exempt larger additions on non-exempt structures was based on a different exemption (i.e. California’s CEQA).

Options:

1. Modify 800(3) to include additions and expansions pursuant to City of Seattle’s proposal plus add “transportation facilities” in addition to the “existing public and private facilities” language.
2. Modify 800(2)(e) to exempt additions and expansion pursuant to City of Seattle’s proposal

3. Add the “transportation facilities” language only
4. Retain current language in 800(3) and 800(2)(e)

Status: Ecology is considering option #3 unless there is additional information to review.

Water Rights

Rule Section: 197-11-800 (4)

Discussion: No comments were received from Advisory Committee members or others on this section. Ecology is not aware of any issues.

Status: No change is proposed.

Purchase or sale of real property

Define “Authorized Public Use”

Topic: Clarify Exemption for sale of public property

Rule section: 800(5)

Discussion: This section currently provides an exemption for the agency actions involving the purchase or sale of public property unless there is an “authorized public use” on the property. There is not a definition of public use and some agencies have applied this differently. Ecology has suggested a definition to help lead agencies apply this exemption more effectively and consistently. The initial proposal added the qualifier that “authorized” includes a “specifically designated preexisting, and documented” public use.

Concern was voiced that the added exception language is not necessary –possibly because SEPA review is not necessary for this types of property changes. SEPA review is required for real property transactions that may result in change of public use because of the related impacts to recreation, transportation, cultural and historic resources, housing etc.

Options:

1. Amend this subsection to define “authorized public use” with the proposed language above
2. Amend this subsection to add a different definition for “authorized public use”.
3. Do not amend this subsection
4. Remove the exception for “authorized public use” resulting in all public property transactions to be exempt.

Status: Ecology is still considering option #1 to clarify and limit the exemption.

Minor land use decisions

Restructure sub-section and other changes

Topic: Minor Land decisions

Rule Section: 197-11-800 (6) (a-c)

Discussion: These subsections list several specific types of land use decisions that are categorically exempt from SEPA:

- The first time property is divided by a short plat/subdivision¹ (using the procedures outlined in RCW 58.17), unless on lands covered by water;
- Granting of variances (the SEPA Rules list the specific criteria in state law under which variances may be granted); and
- Classification of lands for current use taxation

It has been suggested by some Advisory Committee members that using the type of land use permit as the determinant of whether a project is exempt is the wrong approach. This position holds that the type of permit has no bearing on the environmental impacts of a project. Rather, the determinant of whether a project is exempt or not should be made by reviewing the project itself. An additional argument for this position is local land use permits may be called different names by different jurisdictions, e.g. conditional use permits/special use permits, and thus it is difficult to list all the different names for land use actions potentially in use.

One proposal² has been forwarded by counties that would re-structure these subsections and exempt all land use decisions except:

- (a) Any land use decision where the underlying action is not exempt from SEPA
- (b) Rezones that require an amendment to the Comprehensive Plan Future Land Use Map
- (c) Subdivisions or binding site plans [except as provided in a following subsection (2)]

The proposed subsection 2 provides as follows:

Cities, towns, and counties may raise the exemption levels for the land use decisions listed below by following the procedures in WAC 197-11-800(1)(c):

- (a) Divisions of land, such as subdivisions and binding site plans under RCW 58.17*.

	Fully planning GMA counties		All other counties
Project types	Incorporated and unincorporated UGA	Other unincorporated areas	Incorporated and unincorporated areas
Subdivisions/Binding Site Plans	?? [numbers to be assigned]	?? [numbers to be assigned]	?? [numbers to be assigned]

¹ Under RCW 58.17.020, a short subdivision is defined as the process for dividing; a short plat is the actual map representing the subdivision

² One version of the county proposal contained references to rezones being part of the subsection 2 exceptions; a conversation with county representative Jeff Wilson clarified that these were not intended to be excepted.

Several other specific proposals include:

- Adding Boundary Line Adjustments (BLAs) to the list of exempt decisions, as they don't create new lots but rather are an approval of moving an existing lot line. Concerns were expressed that some jurisdictions do approve BLAs that create new lots; other opinions were that this is an illegal use of the statute allowing BLAs and should be addressed outside of SEPA.
- Having rezones listed as exempt if they do not require an amendment to the Comprehensive Plan Future Land Use Map. The notion here is that the required review would already have been conducted at the time the Comprehensive Plan received its SEPA review; a subsequent rezone that complies with the plan/map would just be an implementing action for the plan/map. This might be most appropriate for GMA jurisdictions with the extra requirements under state law for comprehensive plan preparation.
- Removing the limitation on re-platting, as long as original exempt level is not exceeded. The thinking behind the existing language seems to be that the first short subdivision would not have significant adverse environmental impacts, but subsequent short subdivisions might. If the first short subdivision creates fewer lots than allowed under the exemption, it seems reasonable to allow subsequent short plats as long as the total number of lots created by all subdivisions remains below the exemption level.
- Clarifying uncertainty about the relationship between exemption for minor new construction of single family residences and the 197-11-800 (6) exemption for only short plats.

800(1)(b): "The construction or location of four detached single family residential units" is listed as exempt. Additionally, the flexible thresholds table allows increasing that number to a different maximum, depending on the status of that particular jurisdiction.

800(6)(a) states the following actions are exempt: "Except upon lands covered by water, the approval of short plats or short subdivisions pursuant to the procedures required by RCW 58.17.060, but not including further short subdivisions or short platting within a plat or subdivision previously exempted under this subsection."

The current rules distinguish between projects based on construction activities and those based primarily on land-use decisions. The maximum flexible residential construction thresholds are intentionally not consistent with the "minor land use decision" exemptions because the creation of subdivisions is one of the earliest land use decisions. It is one of the best opportunities to assess consistency with comprehensive plans as well as consider and address additional environmental impacts of site-specific residential development.

Ecology recognizes that land-use decisions are often a necessary type of permit for proposed construction activities. Those decisions (such as a conditional use permit) that are necessary for otherwise exempt construction projects (under thresholds in 800(1) and 800(2) –note that 800(2) includes the remodeling exemption) should not necessarily make the entire proposal subject to SEPA.

Status: Ecology suggests the following changes be made to these sub-sections:

1. Re-structure this section to focus on the type of project being proposed rather than the type of land use permit. The model would be the first half of the counties' proposal (a) through (c). This would also address several specific issues that have been raised, including clarifying that

Boundary Line Adjustments are exempt and clarifying when rezones are exempt (as discussed above, when rezones complying with a comprehensive land use map are initiated; this would apply only to fully planning GMA jurisdictions). A new definition of “land use decision” would be added to the SEPA Rules.

2. Additional feedback is needed on the proposed subsection 2 of the counties’ proposal, wherein the threshold levels may be raised on subdivisions and binding site plans. Ecology believes the original exemption levels (“short subdivisions pursuant to the procedures required by RCW 58.17.060”), at a minimum, should be retained. The issue is whether this proposed flexible threshold increase in exemption levels should be provided, and if so, what should those levels be?
3. Allow subsequent short subdivision of lands, as long as the original exempt level (tied to RCW 58.17.060) is not exceeded.
4. Clarify the relationship between 800(1)(b) and 800(6)(a) to affirm that all land use decisions as needed are exempt except as specified. Land use decisions (such as a conditional use permit) that are necessary for otherwise exempt construction projects should not make the entire proposal subject to SEPA.

No changes are proposed to the section on classification of lands for current use taxation.

Open burning

Rule Section: 197-11-800 (7)

Discussion: No comments were received from Advisory Committee members or others on this section. Ecology is not aware of any issues.

Status: No change is proposed.

Clean Air Act

Rule Section: 197-11-800 (8)

Discussion: No comments were received from Advisory Committee members or others on this section. Ecology is not aware of any issues.

Status: No change is proposed.

Water Quality Certifications

Rule Section: 197-11-800 (9)

Discussion: No comments were received from Advisory Committee members or others on this section. Ecology is not aware of any issues.

Status: No change is proposed.

Activities of the state legislature

Rule Section: 197-11-800 (10)

Discussion: No comments were received from Advisory Committee members or others on this section. Ecology is not aware of any issues.

Status: No change is proposed.

Judicial Activity

Rule Section: 197-11-800 (11)(a-b)

Discussion: No comments were received from Advisory Committee members or others on this section. Ecology is not aware of any issues.

Status: No change is proposed.

Enforcement and inspections

Rule Section: 197-11-800 (12)(a-e)

Discussion: No comments were received from Advisory Committee members or others on this section. Ecology is not aware of any issues.

Status: No change is proposed.

Business and other regulatory licenses

Rule Section: 197-11-800 (13) (a-i)

Discussion: No comments were received from Advisory Committee members or others on this section. Ecology is not aware of any issues.

Status: No change is proposed.

Activities of Agencies

Rule Section: 197-11-800 (14) (a-j)

Discussion: No comments were received from Advisory Committee members or others on this section. Ecology is not aware of any issues.

Status: No change is proposed.

Financial Assistance Grants

Rule Section: 197-11-800 (15)

Discussion: No comments were received from Advisory Committee members or others on this section. Ecology is not aware of any issues.

Status: No change is proposed.

Local improvement Districts

Consider expanding to all special purpose districts

Topic: Update and expand exemption for establishing special districts

Rule section: 800 (16)

Discussion Expand exemption to include formation of all special districts or special purpose districts –that are a local government entity designated by the Revised Code of Washington (RCW) and not a city, town, township, or county. Establishing districts is procedural, but planning and project development is still subject to SEPA. There were no concerns voiced about this proposal by the Committee.

Status: Ecology plans to add (but still include LID's) special purpose districts to the exemption language in 800(16).

Information collection and research

Rule Section: 197-11-800 (17)

Discussion: No comments were received from Advisory Committee members or others on this section. Ecology is not aware of any issues.

Status: No change is proposed.

Acceptance of filings

Rule Section: 197-11-800 (18)

Discussion: No comments were received from Advisory Committee members or others on this section. Ecology is not aware of any issues.

Status: No change is proposed.

Procedural Actions

Building Codes

Adoption of Noise Ordinances

Topic: Minor code amendments

Rule section: 197-11-800 (19), (20), and (21)

Discussion: Some advisory committee members have suggested there are many minor code amendments that undergo SEPA review where SEPA does not add value. Given that every local government must make amendments to their own code and development regulations, and that many of those changes have no impact on the environment, it would appear there is merit to creating additional exemptions for this category.

Section 301 of 2ESSB 6406 directs Ecology in the 2013 rulemaking to “(iii) Create categorical exemptions for minor code amendments for which review under chapter 43.21C RCW would not be required because they do not lessen environmental protection”. Yet the topic was also addressed in Section 307 of SB 6406 (now RCW 43.21c.450 – see below) possibly creating a limitation on the rulemaking that can be accomplished without being in conflict with the statute.

In looking at the statutory language, Section 307 contained four subsections. The first two address amendment of development regulations where SEPA has already been done on a comprehensive plan or shoreline master program update. Subsection 3 addresses amendment of development regulations that provide increased environmental protection. Subsection 3 includes the clause “limited to the following”. Taken together, subsections 1 through 3 may limit whether any additional development regulation amendments can be made exempt by the SEPA Rules. Subsection 4 addresses amendments to technical codes and includes the permissive clause “including the following”.

Taken as a whole, Section 307 affected three subsections of WAC 197-11-800: (19) Procedural Actions, (20) Building Codes, and (21) Adoption of Noise Ordinances (see below). In WAC 197-11-800 (19) procedural actions of government including adoption of regulations and ordinances are exempt if they contain no standards regarding the environment. Changes are needed to (19) to make it consistent with Section 307 to acknowledge that certain amendments of development regs containing standards regarding the environment are now exempt. Additionally, (19) makes adoption of SEPA Procedures exempt. It is not clear that amendments to SEPA procedures are consistent with the Sec 307 exemptions. WAC 197-11-800 (20) currently exempts the adoption of building codes (but does not mention energy or electrical code amendment as did Section 307). Section 307 makes this subsection unnecessary (see separate discussion of statutory exemptions). And WAC 197-11-800 (21) addresses adoption of noise ordinances. Because noise ordinances can be considered “development regulations”, this subsection of rule may now be in conflict with the statute. However, the exemption does reference noise standards adopted by Ecology. We need to explore whether this is similar to 307 Subsection 4 amendments to technical codes.

Nonproject actions exempt from requirements of chapter.

The following nonproject actions are categorically exempt from the requirements of this chapter:

(1) Amendments to development regulations that are required to ensure consistency with an adopted comprehensive plan pursuant to RCW 36.70A.040, where the comprehensive plan was previously subjected to environmental review pursuant to this chapter and the impacts associated with the proposed regulation were specifically addressed in the prior environmental review;

(2) Amendments to development regulations that are required to ensure consistency with a shoreline master program approved pursuant to RCW 90.58.090, where the shoreline master program was previously subjected to environmental review pursuant to this chapter and the impacts associated with the proposed regulation were specifically addressed in the prior environmental review;

(3) **Amendments to development regulations** that, upon implementation of a project action, will provide increased environmental protection, **limited to the following:**

(a) Increased protections for critical areas, such as enhanced buffers or setbacks;

(b) Increased vegetation retention or decreased impervious surface areas in shoreline jurisdiction; and

(c) Increased vegetation retention or decreased impervious surface areas in critical areas;

(4) **Amendments to technical codes** adopted by a county, city, or town to ensure consistency with minimum standards contained in state law, **including the following:**

(a) Building codes required by chapter 19.27 RCW;

(b) Energy codes required by chapter 19.27A RCW; and

(c) Electrical codes required by chapter 19.28 RCW.

WAC 197-11-800

(19) Procedural actions. The proposal or adoption of legislation, rules, regulations, resolutions or ordinances, or of any plan or program relating solely to governmental procedures, and containing no substantive standards respecting use or modification of the environment shall be exempt. Agency SEPA procedures shall be exempt.

(20) Building codes. The adoption by ordinance of all codes as required by the state Building Code Act (chapter [19.27](#) RCW).

(21) Adoption of noise ordinances. The adoption by counties/cities of resolutions, ordinances, rules or regulations concerned with the control of noise which do not differ from regulations adopted by the department of ecology under chapter [70.107](#) RCW. When a county/city proposes a noise resolution, ordinance, rule or regulation, a portion of which differs from the applicable state regulations (and thus requires approval of the department of ecology under RCW [70.107.060\(4\)](#)), SEPA compliance may be limited to those items which differ from state regulations.

Status: Ecology would like to hear from the advisory committee regarding what development regulation exemptions might be adopted beyond what was contained in Section 307. A possible interpretation of 2ESSB 6406 would result in amending 800 (19) to include provisions of Section 307, would make WAC 197-11-800 (20) unnecessary, and could result in the need to withdraw (21). Ecology recognizes that many minor code and development regulations amendments are not major actions. One approach

would be for committee members to reach agreement on changes to the statutory language in Section 307 and then report back to the legislature.

Review and comment activities

Rule Section: 197-11-800 (22)

Discussion: No comments were received from Advisory Committee members or others on this section. Ecology is not aware of any issues.

Status: No change is proposed.

Utilities

Increase pipe size

Topic: Increase and modify water utility exemption

Rule section: 197-11-800(23) Utilities

Discussion:

Utility and other stakeholder proposed an expansion of the water pipe size from 8 to 12 inches under this exemption. The City of Seattle also proposed an amendment to expand exemptions for utility work done in existing facilities. “All ~~developments~~ activities within the confines of any existing electric substation, reservoir, pump station, vault, pipe, or well: Provided, that additional appropriations of water are not exempted by this subsection, but that any changes in water flow volumes, rates, and destinations resulting from those activities are exempted.”

Another proposal involves the further expansion the exemption by also including the replacement of any size pipe within the limits of developed right-of-way because there is newer installation technology can effectively limit adverse impacts. Existing pipelines and conduits located in streets/rights-of-way are usually located in environments that have already been disturbed and permanently modified.

There is support for pipe size increases but one comment suggests limiting this to UGAs, cities, and master-planned resorts, major industrial developments and fully-contained communities. Pipe size increases in non-urban areas can promote growth outside urban areas and therefore should have SEPA review.

Options:

1. Revise rule to increase pipe size and activities within existing facilities as listed above.
2. Revise rule to also exempt replacement pipe installation within existing streets and right of ways.
3. Also add the condition that limits one or both of the above amendments to within UGA, cities etc.

Status: Ecology is considering all of these options but more discussion is needed.

Natural resource management

Topic: Modify and expand Natural Resource Projects Exemption

Rule section: 197-11-800(24)

DNR proposed an amendment to add minor repair, maintenance, and re-routing of motorized recreational trails in scope where there is not material change (i.e.net increase in length or change in use) and not on lands covered by water.

Comments voiced concern that re-routing could cause significant impacts to other recreation activities and adjacent properties. Another comment suggested that the language limit the net increase in total “trail coverage” instead of just trail length.

Options:

1. Amend this subsection to include minor repair, maintenance and re-routing of motorized trails limited to the same net total trail coverage.
2. Continue to discuss this proposal and review additional information

Status: Ecology would like additional information about the details and background on this proposal.

Personal wireless service facilities

Topic: Wireless service facilities – 2013 Legislation

Rule section: 197-11-800 (25)

Discussion: During the 2013 session, the legislature amended RCW 43.21C.0384 updating the statutory exemption for wireless service facilities (see [SHB 1183](#)). The statutory exemption contains unique language not found for other statutory exemptions - the language directs Ecology to adopt a parallel rule exemption. The original requirement for a parallel rule exemption comes from a 1996 amendment to SEPA. At that time, most of the statutory exemptions were also in rule. Ecology subsequently adopted the current language in 800 (25) to be consistent with the 1996 statutory exemption for wireless service facilities. Ecology must now update the language in 800 (25) to be consistent with SHB 1183. If Ecology were to include a separate section of rule for statutory exemptions, this exemption could be included in such a section. However, Ecology has suggested a statutory exemption section is a lower priority (see issue discussion for statutory exemptions).

Status: Ecology will update language to be consistent with SHB 1183. Due to the requirement for Ecology to adopt language consistent with SHB 1183, there is little room for debate about policy choices for rulemaking. Ecology seeks input as to whether draft rule language is consistent with SHB 1183.

Habitat Restoration

Topic: Habitat Restoration

Rule Section: 197-11-800 – proposed new section (26)

Discussion: This topic was originally proposed by city of Seattle and AWC (see their separate suggestions for 2013 rulemaking submitted for the January 2013 meeting; Seattle proposed specific language and AWC included the general category of habitat restoration on their list of topics for consideration). The general idea is that habitat restoration results in a positive gain for the environment, and therefore the permitting and environmental review of these projects should be streamlined. There are several existing statutory exemptions:

1. RCW 77.55.181 (Hydraulic code) exempts some projects from SEPA, with some requirements about process and meeting “size and scale” guidance to be adopted by WDFW. The guidance has not yet been adopted so WDFW administers it using their professional judgment about whether the criteria have been met. The projects exempted under this statute are:
 - (1) In order to receive the permit review and approval process created in this section, a fish habitat enhancement project must meet the criteria under (a) and (b) of this subsection:
 - (a) A fish habitat enhancement project must be a project to accomplish one or more of the following tasks:
 - (i) Elimination of human-made fish passage barriers, including culvert repair and replacement;
 - (ii) Restoration of an eroded or unstable streambank employing the principle of bioengineering, including limited use of rock as a stabilization only at the toe of the bank, and with primary emphasis on using native vegetation to control the erosive forces of flowing water; or
 - (iii) Placement of woody debris or other instream structures that benefit naturally reproducing fish stocks.
2. In SEPA, RCW 43.21C.0382 states:

“Decisions pertaining to watershed restoration projects as defined in RCW 89.08.460 (Conservation Districts) are not subject to the requirements of RCW 43.21C.030(2)(c). Decisions pertaining to fish habitat enhancement projects meeting the criteria of *RCW 77.55.290(1) and being reviewed and approved according to the provisions of *RCW 77.55.290 are not subject to the requirements of RCW 43.21C.030 (2)(c).”

The effect of this provision is that habitat restoration projects as defined in RCW 89.08.460 are not subject to SEPA. Such projects must implement a watershed restoration plan, as defined in the same statute and section and for which SEPA review has been conducted, and include:

- (a) A project that involves less than ten miles of streamreach, in which less than twenty-five cubic yards of sand, gravel, or soil is removed, imported, disturbed, or discharged, and in which no existing vegetation is removed except as minimally necessary to facilitate additional plantings;
- (b) A project for the restoration of an eroded or unstable stream bank that employs the principles of bioengineering, including limited use of rock as a stabilization only at the toe of the bank, and with primary emphasis on using native vegetation to control the erosive forces of flowing water; or
- (c) A project primarily designed to improve fish and wildlife habitat, remove or reduce impediments to migration of fish, or enhance the fishery resource available for use by all of the citizens of the state, provided that any structure other than a bridge or culvert or instream habitat enhancement structure associated with the project is less than two hundred square feet in floor area and is located above the ordinary high water mark of the stream.

Both of these types of reduced-review projects must qualify by either meeting criteria contained in a watershed restoration plan, or in the case of the WDFW category (item 1 above) meet one of several specified criteria.

Seattle proposed an expansion of exemptions for habitat restoration projects. Under their proposal (submitted for the January 2013 Advisory Committee meeting), projects could be exempted if they were less than five acres in size and “designed to assure the maintenance, restoration, enhancement, or protection of habitat for fish, plants, or wildlife.” The language proposed contained provisions that required a re-examination of exemption, within the exemption itself. The Seattle language is:

WAC 197-11-800 (26) (Watershed restoration projects).

Actions pertaining to watershed restoration projects as defined in RCW 89.08.460(2) are exempt, provided, they implement a watershed restoration plan which has been reviewed under SEPA (RCW 89.08.460(1)). In addition, projects not exceeding five acres in size and designed to assure the maintenance, restoration, enhancement, or protection of habitat for fish, plants, or wildlife are exempt, provided that:

(a) There would be no significant adverse impact on endangered, rare or threatened species or their habitat pursuant to federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.);

(b) There are no hazardous materials at or around the project site that may be disturbed or removed; and

(c) The project will not result in impacts that are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.

(d) Examples of small restoration projects may include, but are not limited to:

(1) revegetation of disturbed areas with native plant species;

(2) wetland restoration, the primary purpose of which is to improve conditions for waterfowl or other species that rely on wetland habitat;

(3) stream or river bank revegetation, the primary purpose of which is to improve habitat for amphibians or native fish;

- (4) projects to restore or enhance habitat that are carried out principally with hand labor and not mechanized equipment;*
- (5) stream or river bank stabilization with native vegetation or other bioengineering techniques, the primary purpose of which is to reduce or eliminate erosion and sedimentation; and*
- (6) culvert replacement conducted in accordance with published guidelines of the Washington Department of Fish and Wildlife or NOAA Fisheries*

The outstanding question is what impacts related to the construction of habitat restoration projects are addressed by existing laws and regulations, and what holes still exist. Another issue is whether there should be a distinction between project occurring in fresh water and those occurring in salt water.

Status: At this point, no additional exemptions related to habitat restoration projects are being considered. It is not clear to Ecology how to expand the existing exemptions that are already provided, as discussed above. However, Ecology would like more input from the Advisory Committee. If Advisory Committee members recommend that additional exemptions be developed, questions include:

- Are there specific types of habitat restoration projects that undergo unnecessary environmental review?
- What is an appropriate way of deciding which projects could be exempted from environmental review?
- Should there be a distinction between projects proposed for fresh water and salt water?
- Should there be a size limit imposed? (Seattle has proposed 5 acres as the upper limit.) If so, what size limits should be considered?

Small energy projects

Topic: New exemption for solar energy projects

Rule section: 197-11-800 (2) or new subsection

Discussion: Local government committee members proposed a new exemption for solar energy projects that are associated with a structure – “installation of a solar energy system on the roof of an existing building, at an existing parking lot, or on a closed sanitary landfill.” The goal is to facilitate the replacement or supplement of gas and purchased electricity with local solar arrays on existing facilities. This contributes to reducing greenhouse gas emissions as well as other pollutants associated with fossil fuel and large-scale hydroelectric energy production.

Many small energy projects are currently exempt under 800(2)(d) if they are considered a “small structure” or “minor facility” that is an accessory to an exempt building/project. Ecology considers energy generation as “accessory” to a building or facility if its purpose is to provide energy for that site only. Ecology also notes that the determination of significant effects cannot include a comparison or weighing of benefits of renewable energy production against the probable adverse impacts (see WAC 197-11-330(5)).

Nevertheless, the installation of solar energy panels on existing structures (as opposed to construction of new structures to house the arrays and associated equipment) results in relatively minor and temporary impacts unless there is associated land-clearing and installation of additional impervious surface.

Options:

1. Add a new subsection to 800(2)(d) or an entirely new subsection in 800 to include accessory solar energy generation equipment for existing structures –even those structures that are above the minor new construction size threshold. This exemption would be limited by not increasing the existing footprint of the existing structure or facility.
2. Add a new subsection that exempts solar energy systems plus additional structures and equipment on the same parcel (perhaps limited to 500 sq/ft per City of Seattle’s proposal).
3. Continue to research this proposal and further define the impacts associated with the type, size and location of these projects.
4. Do not make any rule changes based on this proposal.

Status: Ecology is currently considering option #1.

General Organizational Approach to Part 9

Topic: General Organizational Approach to Part Nine

Rule Section: WAC Part Nine -General

Discussion

Ecology has been considering the following general comments and suggestions about how to approach the exemption review and revisions:

- Exemption sections should be reorganized and entirely re-written in plain English. There are many areas in which the statutes language is confusing, unclear, unspecific or archaic.
- Exemption thresholds should relate to the potential for impacts rather than the type of activity. Instead of indentifying level of development, identify level of impact (use traffic impacts and likely impacts to cultural resources as the model.
- Organization of exemptions – Divide exemptions into those that relate to activities and those that relate to permits or approvals to aid in clarity of applicability.

Status: Ecology agrees with these comments and has used this advice to extent practicable. We initially believed there was insufficient time to completely rewrite Part Nine given the other rulemaking tasks. We also suggested a thorough review of the state agency exemptions (which are all decision-based and were not established with consideration of the level of impacts) using the above framework –but state agencies were not initially receptive to this type of re-evaluation.

Update names of agencies and clarification or exemption applying only to names agencies

Topic: Update names of state agencies

Rule Section: WAC 197-11-81-855

Discussion: There is a need to update the names of state agencies and clarify that exemptions in each section are limited to those named agencies. Ecology's initial draft of proposed exemption changes was relatively straightforward and only a comment to address minor errors was received.

Status: Ecology is still considering the proposed change.

Expand timber sales exemption to permits for rock sales.

Topic: Adding Rock Sales to DNR Exemptions

Rule Section: WAC 197-11-830

Discussion: DNR proposes to add rock sales to their agency-specific exemptions. Concern was raised about the potential sale of cultural resources in the form of "rock art" and request was made to distinguish rocks from 'rock art', the latter of which would not be allowed.

Status: More information is needed about the proposal and the rationale for the additional exemption.

Critical Areas

Topic: Revisit and clarify critical area provision for "opt-out" of exemptions

Rule Section: 197-11-908

Discussion:

The existing rule language authorizes local jurisdictions to un-exempt projects (via SEPA procedures) that are proposed in designated critical areas. It also limits the scope of the SEPA review to address only the resources for which the critical area is designated. Ecology suggested an amendment to this section that changes its section number and moves it into Part Nine of the rule (to move it into the exemption section –perhaps as 197-11- 805) and removes the limitation on the scope of the review. The rationale for the latter is that it makes this SEPA review consistent with the standard scope of review and content of environmental review for all other proposals. This is particularly confusing for public and interagency review of SEPA documents when comments are solicited but then disregarded because of the narrow

scope. It can also be confusing when the lead agency is different than the local jurisdiction that created to SEPA trigger under the critical area provision. There are efficiencies gained from applying the same SEPA process to similar projects across the state.

Options:

1. Move 197-11-908 to a new section 197-11-805 (or other number in Part Nine)
2. Revise the exemption language to remove the limitation on the scope of review for projects located in critical areas that require SEPA review
3. Do not make any changes to this section of the rule

Status: Ecology is not currently considering making a rule change on this topic (option #3).

New – Exception to exemptions - Agriculture lands of long term significance

Topic: Exception to exemption for Agricultural lands of long term significance.

Rule Section: 197-11-800 (1)

Discussion: A February, 2013 presentation before the Advisory Committee had suggested revising the environmental checklist to add clarity to questions about agricultural lands. The basic thrust of this presentation was a suggestion to update the checklist to reflect GMA changes and change old references (e.g. change “prime farmland” to “agricultural lands of long-term commercial significance).

Based on this presentation and discussion, Ecology decided to seek input from the Advisory Committee on whether an exception to the exemptions for agricultural lands would also be helpful in protecting agricultural lands. This idea was introduced in the May 2013 rule discussion draft for the May Advisory Committee meeting.

A number of Advisory Committee members provided comments on this topic. These included:

- The Growth Management Act requires local government to protect agricultural lands; what data exist showing a gap that needs to be addressed?
- This exception is broadly written and eliminates exemptions for a wide number of projects
- Adjacent uses can also impact the continuance of agricultural uses, so this exception makes sense
- The use of exceptions is not desirable

It appears to Ecology that adding an exception to exemptions for agricultural lands is not warranted at this point. The Growth Management Act requires all jurisdictions, fully planning and those not fully planning, to identify and protect agricultural lands. The suggestion to revise the environmental checklist will be considered separately.

Status: No change is proposed to WAC 197-11-800(1) related to this topic.

New – Exception to exemptions Cultural Resources

Topic: New Cultural/historic resource requirements

Rule section: 197-11-800

Discussion: Notice provisions for cultural/historic resources have been discussed by the Advisory Committee. During the spring of 2013, a separate Cultural Resources Workgroup was created to discuss these issues and try to develop ways to address them, either within SEPA or in other statutes. The workgroup is still meeting on these topics.

Status: The separate workgroup has one more meeting to discuss these topics. We intend to bring any recommendations or report from the workgroup back to the Advisory Committee at its August 15, 2013 meeting.

Topic: New Exception to Exemptions for Cultural Resource Impacts

Rule Section: Part Nine -general

Discussion:

The cultural and historic resource interests and DAHP have continued to propose an “exception” to categorical exemptions since the 2012 rulemaking round. The suggested language is not focused on public notice provisions and is specific to the list of proposed exemption topics. They request an exception to all project-level SEPA exemptions for proposals involving the following:

1. Ground disturbing activities without a prior “negative” cultural survey available
2. Use of imported fill material that is not culturally sterile.
3. Use of structures that are eligible or listed on a historic register or survey

This exception would not apply if the project is located in a jurisdiction or proposed by an agency with a Cultural Resource Management Plan or development regulations that address pre-project review and standard inadvertent discovery language (SIDL), *plus* a DAHP Data-sharing agreement.

The rationale for this proposal includes the following:

- SEPA exemptions increased based on 2012 rulemaking and proposals are being considered for additional increases.
- This adds to the existing number of projects that are *not* reviewed for impacts to cultural resources
- SEPA exemptions based on size are not appropriate in terms of cultural resources
- Location-specific criteria are more appropriate for evaluating a project type for possible exemption.

Status: Ecology has convened a separate workgroup to address cultural resource issues and is still considering potential rule amendments based on those discussions.

Criteria for Exemptions

Topic: Criteria for Changing Exemptions

Rule Section:

Discussion: Commenters have mentioned the value of having written criteria for evaluating proposals for exemption changes. The SEPA statute includes the following procedure for Ecology's SEPA rulemaking:

RCW 43.21C.110 Content of state environmental policy act rules.

It shall be the duty and function of the department of ecology:

(1) . . . Suggestions for modifications of the proposed rules shall be considered on their merits, and the department shall have the authority and responsibility for full and appropriate independent adoption of rules, assuring consistency with this chapter as amended and with the preservation of protections afforded by this chapter. The rule-making powers authorized in this section shall include, but shall not be limited to, the following phases of interpretation and implementation of this chapter:

(a) Categories of governmental actions which are not to be considered as potential major actions significantly affecting the quality of the environment, including categories pertaining to applications for water right permits pursuant to chapters [90.03](#) and [90.44](#) RCW. The types of actions included as categorical exemptions in the rules shall be limited to those types which are not major actions significantly affecting the quality of the environment. The rules shall provide for certain circumstances where actions which potentially are categorically exempt require environmental review. An action that is categorically exempt under the rules adopted by the department may not be conditioned or denied under this chapter.

Additionally, 2ESSB 6046 Sec 301 included direction for Ecology:

- (1) ...exemption thresholds... should be reviewed in light of increased environmental protections in place under chapters 36.70A and 90.58 RCW, and other laws.

The SEPA rules include additional criteria for submittal when agencies petition Ecology to change the exemptions - WAC 197-11-890, Petitioning DOE to change exemptions. Agencies should submit a "the language of the requested amendment, the petitioning agency's views on the environmental impacts of the activities covered by the proposed amendment, and the approximate number of actions of this type which have come before the petitioning agency over a particular period of time".

Further, Ecology must then consider the significance of the activity in making the decision regarding exemption. The process for determining significance is specified in the SEPA Rules, with the definition of "significant" as follows:

WAC 197-11-794 - Significant.

(1) "Significant" as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality.

(2) Significance involves context and intensity (WAC 197-11-330) and does not lend itself to a formula or quantifiable test. The context may vary with the physical setting. Intensity depends on the magnitude and duration of an impact.

The severity of an impact should be weighed along with the likelihood of its occurrence. An impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred.

(3) WAC 197-11-330 specifies a process, including criteria and procedures, for determining whether a proposal is likely to have a significant adverse environmental impact.

Based on the above, Ecology has been considering each exemption separately. Each exemption reviewed requires a mix of policy review (e.g., what are the other protections in place to address impacts?) and impact assessment (what are the impacts that result from the category of activities), and then what is the significance of the exempting a particular activity.

Status: Ecology has been applying these criteria to each exemption.

Statutory exemptions

Topic: Statutory exemptions

Rule section: New section after 800

Discussion: In addition to the exemptions in Part 9 of the SEPA Rules, many activities or governmental actions are exempted within the SEPA statute itself. In response to a previous rule challenge regarding statutory exemptions within the SEPA rules, Ecology previously removed all statutory exemptions from the rule (see [2003 SEPA rule amendments relating to the SEPA Statutory Exemptions in RCW 43.21C](#)). It was requested that for the current rulemaking, Ecology should include all statutory exemptions within the rule for readability purposes. In order to reintroduce the statutory exemptions in rule, Ecology would need to create a new section and specify that the new section is not subject to the requirements of section 305 of the rule (the basis for the previous challenge regarding statutory exemptions). A new section on statutory exemptions would not create or expand any exemptions, but would simply catalog the numerous exemptions from the statute. The section would need to be updated regularly if exemptions are added or modified in the statute.

Status: While Ecology agrees that readability is a worthy goal, this is a lower priority given other areas of the categorical exemptions that need extensive work. Additionally, work on statutory exemptions cannot result in any different exemptions than now exist in the statute, so there would be no substantive changes from the work. Ecology proposes instead to update the exemptions section of the SEPA handbook to provide a useful guide to all the exemptions both in rule and statute. The SEPA handbook update would occur sometime after the rulemaking completed.