



Association  
of Washington  
Business

Washington State's Chamber of Commerce

Monday, May 20, 2013

Washington State Department of Ecology  
SEPA  
Brenden McFarland  
C/O Fran Sant  
PO Box 47703  
Olympia, Washington 98504-7703

RE: 2013 SEPA Rulemaking – Exemptions draft-proposal, May 3, 2013

Mr. McFarland:

On behalf of the Association of Washington Business (AWB) and the broader business community, thank you for the opportunity to comment on the draft-proposed rule language provided to the SEPA Advisory Committee on May 3, 2013.

Before providing our comments on specific language provided by Ecology we first wanted to reinforce some of our previous comments regarding the overall process and Ecology's responsibilities during the current rulemaking process. As you know, business community participants have expressed concern over the process during the 2013 SEPA meetings, the lack of substantive conversation and review of SEPA Exemptions, GMA/SEPA integration and streamlining, as well as the general lack of progress being made during 2013 rulemaking. We appreciate Ecology's concerns that everyone be fully heard. However, given the tight time constraints for this phase of rule-making, there simply is not the luxury of time to let everyone speak as long or as often as they wish on issues that are tangential to the rule-making mandate under 2ESSB 6406.

To date, Ecology has not clearly defined its responsibilities, as directed by the Legislature through 2ESSB 6406. As a result, the Advisory Committee discussions have meandered, without clear direction from Ecology. The first four meetings of this year, January through April, focused largely on notice issues, which is only one element we believe Ecology is required to consider in the 2013 process. Previously Ecology has asked stakeholders to provide a list of subjects to cover in 2013. In addition, Ecology

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asked stakeholders to provide data or other information to support increases to thresholds and exemptions. In fact, most recently Ecology staff sent an email, dated Wednesday, May 15, 2013, suggesting it is the responsibility of Advisory Committee members to provide information to support changes to exemptions<sup>1</sup>. The 2013 rulemaking process, unfortunately, has not facilitated a meaningful discussion on the issues stakeholders addressed.

In order to achieve success through this rule process, we believe Ecology must take a step back and better define its role and the goals of E2SSB 6406. We offer a few suggestions as to how Ecology could achieve a better process.

First, Ecology should identify the increased environmental protections that exist since the last time rule-based categorical exemption thresholds were reviewed. The Legislature noted these exemptions haven't been updated in recent years, and that they:

“should be reviewed in light of the increased environmental protections in place under chapters 36.70A and 90.58 RCW, and other laws.”

With the intent to:

“direct the department of ecology to conduct two phases of rulemaking over the next two years to increase the thresholds for these categorical exemptions.”

Has Ecology identified the “increased” environmental protection laws, as directed by the Legislature? In order to have an objective conversation about exemptions, and how they can be increased Ecology must provide a clear understanding of what laws, rules, protections, notice provisions, etc., exist and make appropriate increases to specific exemptions.

Second, although the legislation directs Ecology to convene an Advisory Committee, it is clear the responsibility to increase exemptions lies with Ecology. While the stakeholder groups can help collect data, answer questions and advocate for specific changes, the lack of an objective overview of the current regulatory regime frustrates the discussions and keeps Ecology from achieving real progress. Ecology should lead any conversations for, or against, increasing thresholds based on an objective review of overlapping rules and regulations, not conjecture or subjective disagreements over value judgments made within the context of the law.

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<sup>1</sup> Additional Information Related to Comments from SEPA Advisory Group; Szvetcz, Annie; Dept. of Ecology, Wednesday, May 15<sup>th</sup>, 2013; See attachment A.

Finally, we understand Ecology is bound by the timelines established in 2ESSB 6406, requiring adoption of a rule by December 31, 2013. We would suggest that completing the job assigned by the Legislature is more important than finishing an incomplete rule on time. In order to complete the legislative directives, consistent with the goals of the legislation, Ecology should ask the Legislature for additional time. Based on conversation during the Senate Energy, Environment and Telecommunications Committee Work Session on May 14<sup>th</sup>, 2013, members of the Committee seemed receptive to considering such an extension.

Following is a brief overview of the comments previously provided during the May Advisory Committee meeting, as well as additional feedback we've received on the draft-proposed rule.

**197-11-800(B)** – New definition for Industrial Use.

**Comment:** The new definition for Industrial Use is not clear. The last paragraph of the definition seems to allow for “minor new construction” of facilities –but the proposed legislation as quoted above specifically excludes industrial uses from the minor new construction exemption. That proposed definition of Industrial Use is problematic because it lacks clarity.

**197-11-800(C)(1)(a) / 197-11-800(G)(6)(d)** – New language abolishes most exemptions for most minor new construction projects undertaken on agricultural lands of long term significance.

**Comment:** Why should all projects, except exempt agricultural structures proposed on designated Ag resource lands lose their exemptions? Such projects may be permitted as a matter of right by zoning, such as single-family housing on sufficiently sized lots. The GMA has extensive provisions to conserve Ag land, and if a project is consistent with valid development regulations adopted under GMA there is no reason to eliminate the exemption.

**197-11-800(C)(1)(b)(i)** – the construction or location of residential units.

**Comment:** Ecology needs to clarify how this exemption is applied. As to single-family homes, does this exemption cover subdivision of lots to accommodate the maximum exempt number of single-family homes or only building permits and other permits for single-family homes on existing lots?

**197-11-800(C)(1)(b)(iv)** – minor constructions for industrial uses.

**Comment:** The new language now excludes industrial uses. Therefore, no project that previously was considered minor new construction may be exempt in an industrial zone. The only exemptions remaining for industrial zoned land would be the repair, remodeling and maintenance exemption or the Utilities exemption. For example, an industrial site wishes to install a restroom on the site for their workers. Under the existing language, this new small structure on the site would be exempt under Minor new construction. Under the new language, the project is not eligible for that exemption anymore and it would not fit under repair, remodeling or maintenance. The proponent would be required to go through a whole SEPA checklist, determination and notice process for the small building. Similar examples which would be defined as "industrial use": minor new construction under the new restriction - a very small structure such as a shed for storage/coverage of fuels/chemicals (a stormwater BMP), a treatment pad or awning (again, for water treatment or stormwater isolation), and any and all sorts of minor buildings for marine or other industrial uses which may have very minimal impacts.

**197-11-800(C)(1)(b)(v)** – removes landfill or excavation exemption.

**Comment:** Why is the exemption for “freestanding” grading or filling deleted? It is appropriate that grading and fill for exempt minor construction also should be exempt regardless of size, but what about grading or fill not directly associated with minor new construction? Actions such as landscaping, agriculture, providing vehicular access or other non-project purposes are reasonable activities. This exemption should be retained. In addition, the loss of this exemption is not consistent with statutory requirements to increase exemptions.

**197-11-800(D)(2) – Other minor new construction.**

**Comment:** I would like to see an addition to this section to cover new boatlifts. WDFW does not require an HPA for boatlifts.

Many agencies do not require SEPA for new boatlifts, however, others do. It would solve this discrepancy by adding: (k) – The installation of freestanding, floating, or suspended boatlifts

**197-11-800(D)(2)(c)(viii)** – expands the exception to the exemption for reconstruction of existing roadbeds and shoulders where new right of way is needed.

**Comment:** 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. This also seems to limit an exemption that already existed, and is not consistent with the statutory requirement to “increase” the level of categorical exemption.

**197-11-800(D)(f)** – expands the exception to the exemption for demolition, adding new language.

**Comment:** Notice should be required, but not result in the loss of SEPA exemptions for otherwise exempt demolition proposals simply because they involve a listed structure or one eligible for listing. “Eligible” for historic designation is a mighty broad sword. In Seattle, every building over 25 years old may be “eligible.” We aren’t opposed to notifying interested parties, but the draft-language eliminates the existing exemption. We support the notice proposals by the Cities and Counties as a better way to address this issue.

**197-11-800(E)(3) – Repair, remodeling and maintenance activities** The following activities shall be categorically exempt except; 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; except that, where undertaken wholly or in part on lands covered by water, only minor repair or replacement of structures may be exempt (examples include repair or replacement of piling, ramps, floats, or mooring piles, or minor repair, alteration, or maintenance of docks).

**Comment:** This section is too vague, especially in regards to docks and piling. They should quantify how much repair or replacement can be allowed. Right now, most agencies allow up to 50% of existing piles to be replaced under the exemption, however, some agencies only allow two or three piles to be replaced under the exemption. The section should state up to 50% is allowed under the exemption.

**197-11-800(G)(6)(b)** – adds boundary line adjustments to land use exemptions.

**Comment:** Ecology’s proposed rule modification would read: “Boundary line adjustments and the granting of variances based on special circumstances, . . . .” Our concern is making sure that Ecology’s revised language is not intended or construed to exempt a BLA only where “special circumstances” exist. Ecology should add a comma after the addition of BLA.

**197-11-800(L)** – New section adding habitat restoration projects.

**Comment:** The criteria of the new language defeats the entire purpose of having an exemption for habitat restoration projects in the SEPA rules. The whole point of a SEPA exemption is that either the Legislature (through statutory exemptions set forth in SEPA itself) or Ecology (through the SEPA rules) has determined that certain activities are exempt from SEPA. If an activity is determined to be exempt (either by statute or under the SEPA Rules), a local jurisdiction reviewing a permit for such an action need not conduct a “threshold determination” under SEPA to determine whether the proposed action would likely have a significant adverse impact. So it seems odd to write into the rule an exemption for habitat restoration projects -- which exemption would supposedly obviate the need for a threshold determination – where the exemption itself requires a local jurisdiction (or agency) to make a determination as to whether there would be a significant adverse impact on endangered species. This is like requiring a threshold determination to determine if a habitat restoration project is exempt from a threshold determination under SEPA.

This is a place where Ecology needs to make clear how other regulations and rules govern the areas of concern. Another question is the removal of invasive species; sometimes, and in some locations, mechanical equipment is necessary. There is experience and protocols already established for these issues. Also, we question whether this is an increase or decrease of existing exemptions. Statute doesn't allow for Ecology to decrease exemptions in this rulemaking.

*Conclusion:*

We previously noted that the email from Ecology on Wednesday, May 15, 2013, expressly stated it was the responsibility of the stakeholders to provide additional details to justify further consideration of exemption increases. Above, we have noted our disagreement with this notion, as it is Ecology's responsibility to adequately review existing exemptions and environmental protection requirements adopted since the exemptions were established, and to propose increases in the levels of existing exemptions based on the proliferation of environmental protection laws adopted since the exemptions were established. We additionally note that this request came from Ecology with only a few business days left in the specified comment period.

So we hope that Ecology will be receptive to the submission of additional comments from stakeholders as the rule-making process continues. We look forward to working effectively with Ecology, to provide additional information to better inform the process.

Thank you again for the opportunity to comment. If you have any questions regarding our comments, or if we can be of any other assistance in the SEPA rule-making process, please let us know.

Sincerely,

SEPA Advisory Committee, Business Community Representatives

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Pat Schneider  
Andrew S. Lane  
Brandon Houskeeper