



DEPARTMENT OF
ECOLOGY
State of Washington

DRAFT STATUS REPORT

2013 Rulemaking for Chapter 197-11 WAC, SEPA Rules

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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 the public, 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 rule topic (such as the specific exemption section or subsection) 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 from 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 is possible to distinguish between different types of permits that fall within the current language. For water discharge permits, SEPA exemption is already resolved in the statute. 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 water discharge permit exemption/non-exemption is resolved in the statute, it would seem that there is little room for discretion in rule about which water discharge permits are exempt. The language in 800 (1) and (2) can be amended to reflect the statute. Without the change the current rule 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 a simple language change to address the air and water permit non-exemptions. Rule language would be modified so that only “non-exempt” licenses would trigger review for projects types in 800 (1) and (2). The update would make the water permit non-exemption to be consistent with the statute. For example, a minor new construction project involving over 5 acres of clearing/grading would still require SEPA review for the entire project due to the NPDES construction stormwater permit. The air permit would also be consistent with the rule and statute.

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: 197-11-800 (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 proposes option 2, where local governments will set mixed use thresholds.

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 proposing option 1 with additional clarification of the applicability of this exemption.

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 is proposing to update the definition of lands covered by water regarding wetlands to be more consistent with GMA. The change will also clarify that artificially created wetlands are not considered lands covered by water for the purposes of SEPA review.

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](#)).

Status: Ecology is proposing to retain the provision regarding the boundary determined by the “ordinary high water” in the definition of “lands covered by water”. This does not include buffers and adjacent lands.

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 proposing no further changes to the definition of “lands covered by water”. Ecology believes that the current definition as proposed for amendment adequately addresses these topics. Further guidance will be provided on this topic by Ecology.

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: Ecology is not moving forward with the concept of eliminating or reducing the non-exemption for lands covered by water. There was no cohesive agreement or recommendation from the Advisory Committee on removing the non-exemption for proposals on lands covered by water. Ecology will instead focus on the proposed updated definition and providing clarification in guidance (SEPA Handbook) regarding scenarios where the lands covered by water definition may be applied too broadly.

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
4. 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: Ecology is proposing amendments to this section as suggested by the City of Seattle. The current exemption language in this section includes culvert installation and the proposed amendment clarifies that it is limited to road improvements. Ecology is not proposing to add boatlifts as an additional exemption.

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., 60,000 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. Add above-ground tanks as in # 1 and create separate residential and non-residential exemptions for tanks with larger threshold for agricultural or industrial sites (e.g., 60,000 gallons).

Status: Ecology is considering option 2 in order to both provide an above-ground tank exemption and to allow for larger tanks in appropriate industrial and agricultural locations.

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: Ecology is not proposing any amendments to this section.

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 previously proposed clarifying language related to the maintenance of “shoreline protection structures”. Ecology and some other lead agencies have long interpreted bulkheads to be a type of “shoreline protection”, but the language in the rule only lists “groins” as an example. Ecology previously 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). Some lead agencies (Ports) objected to the interpretation and rule clarification. Ecology does not interpret this clarification as adding a new requirement; however, Ecology is considering leaving the section unchanged unless more discussion resolves the disagreement.

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 sediment under the exemption
2. Qualify the dredging exception to allow up to 20 cubic yards of 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: Ecology proposes to amend this section to exempt maintenance dredging of up to 50 cubic yards of sediment. Ecology proposes leaving the existing language regarding “groins and similar shoreline protection structures” unchanged. No changes are proposed to specify a percentage-based approach to the minor repair or replacement exemption language.

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 proposes option #3 to clarify that transportation facilities are included in the maintenance exemptions.

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 proposes to clarify this term and add the proposed language above (Option 1).

Minor land use decisions

Restructure sub-section and other changes

Topic: Minor Land Use decisions

Rule Section: 197-11-800 (6) (a-c); 197-11-800 (1)(a)

Discussion: Two subsections of the WAC address whether land use decisions are categorically exempt from SEPA. The first, 197-11-800(1) (a), addresses minor new construction undertaken under the flexible thresholds. This subsection states: “The exemptions in this subsection apply to all licenses required to undertake the construction in question, except when a rezone or any license governing emissions to the air or discharges to water is required.” Thus, this provides that land use decisions (which are considered “licenses”) necessary to construct these construction types are exempt from SEPA review. This section is often overlooked when a lead agency evaluates whether a project is categorically exempt.

The second, WAC 197-11-800(6) (a-c), lists 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

The Advisory Committee has discussed several aspects of land use decisions:

- whether a conditional or special use permit should undergo SEPA review when the action being considered by the permit is otherwise exempt;
- whether SEPA review for further short subdivisions should remain a requirement;

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

- whether boundary line adjustments should be specifically exempted from SEPA review (state law does not allow BLAs to create new lots but some concerns were raised that this occurs)
- whether some rezones should not be required to undergo SEPA review

Status: Ecology is proposing to revise the two subsections as follows:

1. Ecology is swayed by the argument that a conditional or special use permit should not by itself trigger review, but rather it should be based on the action being proposed. After considering several ways of addressing this, the proposal is to add a specific exemption for conditional or special uses under section 800(1).
2. Ecology is proposing to revise 800(6) in several ways:
 - a. Allow subsequent short subdivision of lands, as long as the original exempt level (tied to RCW 58.17.060) is not exceeded.
 - b. Confirm that boundary line adjustments are exempt from SEPA review.
 - c. Provide that rezones which were anticipated and addressed in previous environmental review for a comprehensive or sub-area plan are exempt
 - d. One clarifying change is proposed to the subsection 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.

Status: Ecology proposes to add special purpose districts to the exemption language in 800(16), but still include LIDs.

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 potentially affects 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. Amendments to SEPA procedures do not appear 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 could be covered by Section 307. However, the exemption does reference noise standards adopted by Ecology.

RCW 43.21c.450 (current law)

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 (current rule)

(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 proposes changes to make the portion of WAC 197-11-800 (19) on agency SEPA procedures consistent with RCW 43.21c.450. Ecology proposes to withdraw WAC 197-11-800 (20) because a broader exemption now exists in RCW 43.21c.450 covering building codes as well as all other “Amendments to technical codes adopted by a county, city, or town to ensure consistency with minimum standards contained in state law.” Ecology will label the subsection as “reserved” so as not to

renumber the remaining exemptions. Ecology considers WAC 197-11-800 (21) on noise ordinances consistent with RCW 43.21c.450, but Ecology proposes eliminating unnecessary language regarding ordinance submittal to Ecology.

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 promotes 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 proposes option #1 in order to update the exemption to current industry standards for routine and relatively minor pipe installation projects.

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 needs additional information about the proposed exemption for motorized trails and is not moving forward with this proposal because of the concerns listed above.

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: Ecology is not proposing additional exemptions related to habitat restoration projects. The Advisory Committee did not provide any clear advice at the July 25 meeting.

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 proposes option 1 to create a new exemption for accessory solar energy installations on existing structures.

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 identifying 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 believe 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 197-11-855

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 moving forward with this update.

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: Ecology needs additional information about this proposal and is not moving forward with an amendment to this section at this time.

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: It appears to Ecology that adding an exception to exemptions for agricultural lands is not warranted at this point. No change is proposed to WAC 197-11-800(1) related to this topic. The suggestion to revise the environmental checklist will be considered separately.

New – Exception to exemptions Cultural Resources

Topic: New Cultural/historic resource requirements

Rule section: 197-11-800

The cultural and historic resource members of the Advisory Committee and DAHP proposed an “exception” to categorical exemptions. The suggested language is 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.

These same Advisory Committee members have also proposed a “planning-level” process to the Advisory Committee. Under this scenario, projects would be exempt for archaeology and the built environment if:

- Cultural resource management plan is incorporated into the GMA comprehensive plan; or
- Local ordinance or development regulations address pre-project review and standard inadvertent discovery language (SIDL); and
- A data-sharing agreement with DAHP is in place

In response to specific legislation regarding cultural and historic resources that was introduced during the 2013 legislative session, a separate workgroup was convened by Ecology, under an agreement between Ecology Director Maia Bellon and Rep. John McCoy. This workgroup was directed to explore possible solutions for cultural/historic resources within the SEPA Rules and in other laws and regulations. That workgroup recently concluded, and a report for Director Bellon and Representative McCoy is being prepared. The recommendations from that report are likely to be that a solution outside the SEPA Rules is needed to adequately address cultural/historic resources, and a legislative approach is likely to be part of those recommendations.

Status: There does not seem to be adequate support at this time for the exception to exemptions approach within the SEPA Rules. A solution outside of the SEPA rules may ultimately be needed to address the cultural/historic preservation issues, which will take further work by stakeholders. However, Ecology believes that the planning-level approach has some merit for inclusion in the current round of rule amendments. Ecology is proposing that, for SEPA ordinances revised or adopted after the effective date of this current round of rule amendments, a jurisdiction fully planning under the GMA will have to document within their local ordinance consideration of the provisions of that planning-level approach.

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.

Public Notice

Improving Public Notice for Proposals

Topic: Improving Public Notice for Proposals

Rule section: 197-11-508 & 510

Discussion: The 2013 rulemaking includes the topic of improving public notice (in SEPA or by other means). The goal is to improve processes to ensure timely notice, provide open and accessible documents, and adequate comment periods. This notice is important for:

- Affected citizens, neighbors, interested parties
- Agencies with jurisdiction, affected jurisdictions, agencies with expertise
- Tribes

The Advisory Committee discussed public notice issues and Ecology received a couple of proposals for rule amendments. There were two themes related to improving public notice processes and modernizing the outreach tools.

- a. Expanding the on-line SEPA Register to include non-SEPA documents
- b. Requiring cities and counties to submit Notice of Applications for projects exempt from SEPA, the SEPA Register.

Ecology is considering several options rule amendments related to public notice and would like more discussion from the advisory committee on:

1. Revise WAC 197-11-508 (SEPA Register) to provide that the register is web-based and updated daily;
2. Revise WAC 197-11-510 (Public Notice) to specify that any postings on property must be visible to the general public, perhaps from the nearest public road), and that agencies are required to maintain an interested parties list for SEPA notices; and
3. Requiring cities and counties to submit all Notices of Application under RCW 36.70B (or equivalent notice) to the SEPA Register (or some other statewide listing).

Status: Ecology is considering options 1 and 2 above. While expanded notice for non-SEPA documents is a worthy goal, Ecology is unable provide the data entry staffing and IT infrastructure necessary for such an effort. Additionally, Ecology believes the SEPA Rules are not the place to write a requirement for expanded non-SEPA notice. As part our continuing work, Ecology's goals for the SEPA Register include:

- i. A website submittal format for uploading documents to be added to the SEPA Register.
- ii. Public access using the Register to a downloadable version of the electronic documents that are submitted to the Register

GMA-SEPA Integration and Misc. Topics

DNS Comment Period Change

Topic: DNS Comment Period Change

Rule section: 197-11-340 and 355

Discussion: At least half of all SEPA reviews for project proposals involve a comment period prior to the issuance of the DNS using the optional DNS process (or “ODNS”) specified in WAC 197-11-355. Process efficiencies and consistencies can be improved by creating more uniformity for public review of all DNSs. One idea that was discussed earlier in the year by the Advisory Committee (as part of the February 14 discussion on the county proposal for SEPA/GMA integration) is to modify the requirements for agency distribution and public notice of all DNSs to resemble the ODNS process. This means that the comment period for DNSs would occur prior to the formal issuance of the threshold determination. It could also mean that all DNSs would require a comment period –instead of only those that meet the criteria in 197-11-340(2)(a).

Option 1: The comment period for all DNS’s would occur prior to making the threshold determination as with the ODNS process. Distribution of documents to other agencies and tribes would occur then, instead of after the threshold determination. After the close of the comment period, the agency would make its threshold determination, and another comment period would not be required.

Option 2: Similar to option 1, but on an optional basis, make the ODNS process available to non-GMA lead agencies (non-GMA cities and counties, state agencies and special districts). The comment period for would occur prior to making the threshold determination.

Status: Ecology is considering option 2 as this time and would like feedback from the Advisory Committee. Discussion draft language rule language is not yet proposed.

Consolidated Project Permit Application

Topic: Consolidated Project Permit Application

Rule section: 197-11-355

Discussion: The County members of the Advisory Committee submitted a proposed concept related to a “consolidated project permit application” that combines the SEPA checklist with the master permit application and follows the optional DNS process (more or less) with more streamlining.

"Consolidated project permit application." Formal SEPA documents may be prepared as companion documents to a project review application or may be integrated into the project permit application. This section clarifies how WAC 197-11-640 (all SEPA documents) and WAC 197-11-425 through 197-11-442 (EISs) apply to integrated SEPA/GMA documents. The overriding consideration is the quality of information and analysis at the appropriate scope and level of detail for the proposed project, and not the format, length or bulk of the document.

Status: After some initial discussion with the Advisory Committee and internally here at Ecology, it seems like that idea has great potential, but it has a fair amount of issues to work through and may not be ready for rulemaking this year. However, Ecology would like feedback on whether a smaller scale “pilot” trial could be useful to generate some idea of how this could work for jurisdictions to voluntarily opt-in.

General SEPA/GMA Integration

Topic: General SEPA/GMA Integration

Rule section: 197-11-158, 210, 220, 228, 230, 232, 235, 238

Discussion: These sections of the SEPA Rule were adopted in the mid-1990s and addressed SEPA/GMA integration envisioned by the regulatory reform legislation from 1995.

Status: Ecology has reviewed these sections and has not identified issues or proposed amendments except for clarification of some of the section titles.

Proposed Amendments to Rule Section Headers

197-11-158 SEPA/GMA project review -- Reliance on existing plans, laws, and regulations.

197-11-235 SEPA/GMA integration -- Documents.

197-11-238 SEPA/GMA integration -- Monitoring.

Planned Actions – Definition and criteria, Ordinances or resolutions

Topic: Planned Actions – Definition and criteria, Ordinances or resolutions

Rule section: 197-11-164 and 168

Discussion: ESHB 1717, adopted by the 2013 legislature, allows recovery of costs for preparing a non-project EIS. In addition, the reference to the statute needs to be corrected. No other issues noted.

Status: Ecology will change statutory reference in 197-11-164 (1) from 43.21C.031 to 43.21C.440. We have, however, decided not to amend these sections to include the cost recovery provisions in ESHB 1717. There are other statutory provisions affecting provisions of the SEPA Rules that are not presently addressed. We have decided that, rather than set an expectation that the Rules reflect all statutory provisions the rule language here would be unchanged.

Environmental Checklist

Topic: Environmental Checklist

Rule section: 197-11-960

Discussion: 2ESSB 6406 directed Ecology to, among other things, update the environmental checklist as part of the Phase 1 changes. Phase 1 changes were to be adopted by December 31, 2012. The specific direction for the environmental checklist was to:

- “(i) Improve efficiency of the environmental checklist; and
- (ii) Not include any new subjects into the scope of the checklist, including climate change and greenhouse gases.”

The Phase 1 rule amendments, adopted on December 28, 2012, included some changes to improve efficiency:

- For nonproject actions, part B does not have to be filled out if those questions do not contributed meaningfully to information;
- The lead agency may identify questions where the impacts are already adequately covered by existing regulatory provisions;
- Lead agencies are authorized to accept electronic submittals.

Additionally, SB 6082 in 2012 directed Ecology to update the checklist to address agricultural lands to “ensure consideration of potential impacts to agricultural lands of long-term commercial significance ... the review and update shall ensure that the checklist is adequate to allow for consideration of impacts on adjacent agricultural properties, drainage patterns, agricultural soils, and normal agricultural operations.”

Discussions during the Phase 2 rulemaking have suggested several additional changes to the checklist:

- Update language in the checklist regarding agricultural lands (change the existing reference from “prime farmland” to the GMA terminology (“agricultural lands of long-term commercial significance”))
- DOH has requested that clarifying language be added to section 3 (water) regarding proposed ground water withdrawals and onsite sewage disposal systems, and to section 7 (environmental health) regarding hazardous materials and contamination
- Add language to section 9 (housing) regarding farmworker housing
- Revise the language in section 13 (historic and cultural preservation) to better address identification of potential historic and cultural resources that may be on a site
- Add language in section 14 (transportation) that addresses impacts to transportation of agricultural goods, non-motorized transportation, and other information

Status: Ecology is proposing making the changes regarding agricultural lands, and the changes regarding historic and cultural resources.