

October 3, 2013

Dear Department of Ecology:

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On behalf of the environmental representatives on the SEPA Rules Advisory Committee (Committee), thank you for the opportunity to comment on your revised pre-draft rule. As you know, we are committed to preserving the integrity of the State Environmental Policy Act by supporting transparency, ensuring accountability, and protecting our diverse environment from any significant impacts that may result from development projects and other actions.

We appreciate the work of your agency and that of the other participants on the Committee. By and large, we support the updates to the SEPA rules as an important step to update best practices for ensuring that SEPA still fills in the gaps but does not duplicate other environmental laws. We have seven important changes that we believe are critical for the Agency to make to your pre-draft rule so that all Washingtonians will benefit from greater certainty and a healthy environment.

1. Definition of “land use decision” in proposed WAC 197-11-755

The proposed rules add a definition “land use decision” in WAC 197-11-755. We recommend that Ecology not adopt this definition for several reasons. First, there is no need for a definition of “land use decision” in the rules. The term “land use decision” is used only twice in the SEPA rules and neither is substantive. First, the term is in the proposed title of WAC 197-11-800(6). That subsection, which is currently titled “minor land use decisions,” is proposed now to be titled “land use decisions.” This change in the title is unnecessary. The term is also used in the first phrase of WAC 197-11-800(6) to introduce the list of specific exemptions, all of which are specific types of permits and none of which use the term “land use decision” or rely on the definition of “land use decision.” There is no substantive exemption for a “land use decision” either in WAC 197-11-800(6) or elsewhere in the rules. The rules do not need to have a definition for a term that is not mentioned in the rules in a substantive way.

Second, the definition is very broad and will create confusion and uncertainty. The proposed definition of “land use decision” is “a discretionary or administrative permit that is used to approve, with or without conditions, a proposal to use a specific site for a particular purpose.” Permit is not defined in the SEPA rules, so its dictionary definition is used.¹ The most applicable definition is “a written warrant or license granted by one having authority.”² Many written warrants or licenses, that is “permits,” are discretionary or administrative and would fall into this definition including a comprehensive plan amendment for a specific site, site specific rezones, long subdivisions, and air and water discharge permits. Including such a broad definition, even without an explicit exemption, will just further the confusion about what is or is not exempt. Including this definition will further add fuel to the debate, for example, as to whether long subdivisions are exempt or not. Indeed at the last Advisory Committee meeting several members argued that long subdivisions already are SEPA

¹ *State of Washington Dept. of Labor & Industries v. Tyson Foods, Inc.*, 143 Wn. App. 576, 582, 178 P.3d 1070, 1073 (2008).

² *Merriam-Webster Dictionary* iPhone app version.

exempt, an argument that is contrary to the SEPA case law.³ Amending the SEPA regulations in a way that increases uncertainty is contrary to the legislative direction to increase certainty.

We also note that “land use decision” is a defined term under the Land Use Petition Act (LUPA), RCW 36.70C.020. The definition of “land use decision” in LUPA is very different from and far narrower than the definition in the proposed SEPA rules. Because SEPA threshold determinations and EIS’s are subject to appeal under LUPA, the two conflicting definitions may cause problems and confusion. Furthermore, because “land use decision” is a term of art in land use law, it is a risky proposition to introduce a new and different definition into the mix. Considering that it isn’t even necessary to have a definition of “land use decision” in the SEPA rules for the reasons explained above, we urge you to remove this definition from the proposed rule.

Finally, many of the discretionary permits, such as rezones and conditional uses permits, have the potential for significant environment impacts and should not be exempt. We address this in more detail below.

2. Minor new construction, WAC 197-11-800(1)

We urge the Department to clarify that “minor new construction” applies only to permits for construction, not planning decisions. We object to the proposal to add exemptions for rezones and conditional uses permits to WAC 197-11-800(1). These permits can have significant adverse effects requiring SEPA review. When adopting a rule that defines categorical exemptions, Ecology has a statutory obligation to include only those actions that are not major actions significantly affecting the quality of the environment: See RCW 43.21C.110(1)(a).

The original intent of the existing language in WAC 197-11-800(1) was to exempt traditional construction permits (building and grading permits and incidental permits such as electrical, mechanical, plumbing, septic, and access permits), and not planning permits (such as rezones, subdivisions, binding site plans, and conditional and special use permits). The current language explicitly states that rezones are not exempted by WAC 197-11-800(1) and the exemption only applies to certain listed types of “construction.”⁴ It implicitly requires environmental review for most subdivision and binding site plan planning permits and WAC 197-11-800(6) explicitly exempts only limited short subdivision planning permits. The Washington State Supreme Court has explicitly held that subdivisions are not exempt from SEPA.⁵ The short subdivision exemption language in 800(6) would become superfluous if the construction permit language in 800(1) exempts four lot short subdivisions. The current regulatory language is silent regarding conditional and special use permits and should stay that way.

Because rezones are a planning permit and not a traditional construction permit, we strongly oppose allowing otherwise exempt 800(1) construction permits to continue to be exempt when any

³ *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn.2d 267, 278 fn.8, 552 P.2d 674, 681 fn.8 (1976) “We [the Washington State Supreme Court] note that it is not disputed, and there is no question, that approval of the Norway Vista preliminary plat constituted a ‘major action’ within the language of RCW 43.21C.030(2)(c).” The Norway Vista subdivision was not particularly large consisting of 198 single-family dwellings proposed on 52.3-acres and the Washington State Supreme Court concluded an EIS was required for this subdivision.

⁴ WAC 197-11-800(1).

⁵ *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn.2d 267, 278 fn.8, 552 P.2d 674, 681 fn.8 (1976).

rezone planning permit is required. Normally, area-wide rezones require SEPA review as do site-specific rezones. A site-specific rezone may be consistent with a comprehensive plan or subarea plan, but it always still has site-specific impacts that haven't been reviewed and need to be reviewed under SEPA. A site-specific rezone is, by definition, a change in the allowed use on a site and this can create impacts in a neighborhood that has already developed under prior zoning. These impacts should continue to be subject to SEPA review.

The proposed exemption requires only that the potential impacts have been previously analyzed in an environmental review for a comprehensive plan or sub-area plan. This proposed exemption does not require that an EIS be prepared for the comprehensive plan or sub-area plan. Nor are there standards for the type or level of analysis required. The analysis could be purely qualitative with no analysis of the number of trips generated or the gallons of water required for the proposal. This new exemption requires no previous analysis of whether existing facilities can adequately address the impacts of the rezone. The problems created by this lack of analysis is compounded by the nature of comprehensive plans which are general, apply to large areas, and often authorize a board range of uses. Unless the planned action procedure is used, the SEPA analysis for a comprehensive plan or sub-area plan is typically very general and qualitative.

Under the current language in 800(1), all rezones require SEPA review. Under the proposed language, a much more amorphous standard is created regarding whether all potential impacts of the site-specific rezone were previously analyzed in environmental review that could not have possibly analyzed all impacts that the specific change on the specific site would have on subsequent development on neighboring properties. For area-wide rezones the test is even more unclear. This proposed new standard is a legal quagmire that creates more problems than it solves.

Ecology proposes "to add a specific exemption for conditional or special uses under section 800(1)." We believe that the issue before Ecology should be whether conditional or special use permits are more like planning permits where SEPA has traditionally been required or construction permits where under 800(1) SEPA permits are exempt. We believe these permits are planning permits and not construction permits. We agree that clarification is needed regarding the scope of 800(1) construction permits but we believe that clarification should state that projects that require planning licenses such as long subdivisions, binding site plans, rezones, conditional use or special use permits are not exempt under 800(1).

Another reason that conditional use or special use permits should not be exempt is that they are, by their nature, uses that can have significant adverse environmental impacts. As Professor Settle explains: Conditional uses and special uses are:

... based on recognition that the capability of some uses may be impractical to determine without knowing their precise location and other qualities. In other words, some uses may or may not be compatible within a given district – or indeed anywhere in the municipality – depending upon where they are located and how they actually are developed. Thus, churches, private clubs and schools and professional offices may be conditional uses in single-family residential districts and permitted outright in some other districts. Uses which are potentially very obnoxious or dangerous, such as airports or gasoline stations, may not be permitted

outright in any districts and permitted only as conditional or special uses in some districts.⁶

Environmental impacts, such as the potential of gas stations to pollute ground water, are an important aspect of compatibility and many conditional uses have significant environmental impacts. Given this need for site specific review to determine if a conditional use is compatible and will protect the environment, conditional uses and special uses should not be exempt from SEPA review.

3. Minor land use decisions

We urge the Department to clarify that “land use decision” or minor land use decisions do not apply to rezones for the reasons explained in 2 above. Please see the proposed amendment in WAC 197-11-800(6).

4. Lands covered by water

We support the proposed new Minor Land Use Decision exemption to allow a bridge across Np or Ns waters meeting the criteria set out in the July 19, 2013, document entitled “Discussion on Minor Land Use Decisions & Lands Covered By Water Proposals.” We believe this proposal will both protect the environment and not require a SEPA review where it is not needed. We also support the recommendation in the same document providing that short subdivisions or short plats are that have lands covered by water within the land being subdivided are exempt from SEPA provided the proposed development is outside the standard buffers required for the lands covered by waters. We do recommend that proposed WAC 197-11-800(6)(a)(ii) read as follows because short subdivisions are used to create non-residential lots as well as residential lots. The recommended deletion is double struck through:

~~(ii)((but not including)) Further short subdivisions or short platting within ((a)) the original short plat or short subdivision boundaries that would cause the cumulative division to exceed the total ((residential)) ((unit)) lot exemptions allowed to be created under a short subdivision ((by this subsection previously exempted under this subsection)) are not exempt.~~

In final form this is:

(ii) Further short subdivisions or short platting within the original short plat or short subdivision boundaries that would cause the cumulative division to exceed the total lot exemptions allowed to be created under a short subdivision are not exempt.

5. Categorical Exemptions - Mixed Use

We urge the Department to define how the new “mixed-use” categorical exemption in WAC 197-11-800(1)(c) is to be applied. As written in WAC 197-11-800(1)(c), it is unclear how a jurisdiction will interpret what the new mixed-use threshold can be. We strongly urge you to include language that defines the mixed-use threshold as a lower threshold than the combination of both residential and commercial thresholds. For example, a city could exempt a mixed-use project that was 75% of the commercial threshold and 25% of the residential threshold, but not one that

⁶ Richard L. Settle, WASHINGTON LAND USE AND ENVIRONMENTAL LAW AND PRACTICE pp. 52 – 53 (Butterworth Legal Publishers, Seattle WA: 1983).

was 100% of both commercial and residential thresholds. We strongly oppose a proposal which would allow a project to be exempt with 100% of the residential exemption plus 100% of the commercial exemption (or other like combinations). Such a project would have twice the impact of either the residential exemption or the commercial exemption. If the residential exemption and the commercial exemption each represent the maximum level of development that is still unlikely to have a significant adverse environmental impact, then a proposed coupling of the two exemptions must be likely to have significant adverse environmental impact. Some argue that a building meeting the residential maximum and another building meeting the commercial maximum can be sited on opposite corners of an intersection, so why not allow the same amount of development on the same lot or corner. However, as proposed in the Draft Status Report, buildings that have both the residential and commercial maximums could be built on all four corners in four independent projects and without SEPA review with significant adverse environmental impacts caused by each of the four projects. As mentioned above, when adopting a rule that defines categorical exemptions, Ecology has a statutory obligation to include only those actions that are not major actions significantly affecting the quality of the environment: See RCW 43.21C.110(1)(a).

6. Storage tanks. Please see the proposed amendment in WAC 197-11-800(2)(g).

We urge the Department to limit the new above-ground storage tanks exemption size based on what is being stored in the tanks. We oppose the new exemption created to install above ground tanks. Above-ground tanks should be limited in size to 1,000 gallons if they hold explosive, flammable or hazardous materials. Larger tanks in agricultural and industrial locations should only be exempt for non-hazardous, non-explosive, and non-flammable materials and only when there is no residential or commercial lands or uses within 1000 feet for 30,000 gallon tanks and 2000 feet for 60,000 gallon tanks. As the April 17th West Fertilizer Plant explosion showed, storing hazardous materials near residences, schools, and nursing homes is dangerous.⁷ While Washington's zoning for these hazardous materials is not as bad as it is in Texas, schools, residences, and other sensitive uses are still located near dangerous uses. Large above ground flammable or hazardous materials tanks should not be exempt from SEPA.

7. Public notice/cultural resources

When the SEPA flexible thresholds were raised last year, it was widely recognized that for state agencies, tribes and Indian nations, federal agencies, and some members of the public the only effective notices and opportunities for comment those persons and organizations were given were the notices of SEPA determinations. It was widely agreed that, at least for the newly exempted actions if not all actions, another form of notice and an opportunity to comment is required. We urge Ecology not to proceed to formal rulemaking until satisfactory notice and comment provisions are included in the amended SEPA rules.

Thank you for consideration of our comments. If you have any questions, please contact Claudia Newman at newman@bnd-law.com or 206-790-5249 or April Putney at april@futurewise.org or 206-343-0681, Ext. 120.

⁷ Ken Steif, *Lessons from West: Do Texas Land Use Laws Put Residents at Risk?* Planetizen (Aug. 29, 2013) accessed on Sept. 30, 2013 at: <http://www.planetizen.com/node/64869>

Sincerely,

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