

GERALD STEEL, PE

ATTORNEY-AT-LAW

7303 YOUNG ROAD NW

OLYMPIA, WA 98502

Tel/fax (360) 867-1166

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Fran Sant
Tom Clingman
Department of Ecology HQ
300 Desmond Drive
Olympia, WA 98504

Re: Comments on WAC 197-11 Revised Draft Revisions 10-8-12

Dear Fran and Tom,

The Environmental Caucus has submitted comments today and I am in support of its comment letter. However, on behalf of Washington GrowthWatch and myself, I propose some additional changes to the Ecology 10-8-12 draft that will make the draft better insulated from judicial appeal. Our additional comments are attached hereto.

We have used track changes for our attached comments with deletions to the DOE WAC 197-11 Revised Draft Revisions 10-8-12 (“Draft”) shown with double strikeout and additions underlined. All of our proposed changes are highlighted as well and comments are provided to support the changes.

We would like to further support some of the changes in the attached document by additional comments in this letter. We propose changes to WAC 197-11-800(1)(c)(i) as follows:

Documentation that mitigation for impacts to elements of the environment (listed in WAC 197-11-444) have been adequately addressed so that the exempt levels do not allow project types which are major actions significantly affecting the quality of the environment. These can be addressed in specific adopted development regulations, comprehensive plans that are made regulatory by law or regulation, and applicable state and federal regulations.

There are three changes here. First, we remove the language “the requirements for environmental analysis, protection and.” When there is an exemption there are no requirements for environmental analysis and protection. Therefore unless the requirements are defined, this language is meaningless. Second, we add language “so that the exempt levels do not allow project types which are major actions significantly affecting the quality of the environment.” We believe that this is the only relevant requirement that a local jurisdictions must address. RCW 43.21C.110 mandates that the DOE rule meet this requirement and we believe that the only way DOE can meet this requirement is if it places the same requirement on the local jurisdiction’s adoption of increased levels of exemptions. Otherwise, there is nothing in the DOE rule that ensures that the requirements of RCW 43.21C.110 are met and a court is likely to find the rule violates RCW 43.21C.110. I realize that the ad hoc caucus proposed the current language but I was not personally involved with that proposal and I believe DOE needs to bring the language of the proposed rule into compliance with RCW 43.21C.110 to avoid having the rule being found invalid by the courts. Third, the language proposes that comprehensive plans that are not made regulatory by law or regulation may be used to justify increases in exemption levels. It is common for local jurisdictions to use comprehensive and other land use plans for substantive authority under SEPA. This is allowed by specific provisions of Chapter 43.21C RCW. However, if a local jurisdiction relies upon a plan policy to justify increased exempt levels and that plan policy is not specifically implemented by a law or regulation, that plan policy will be ineffective in providing any mitigation for project actions that rely upon the increased exempt levels. This is why it is important if specific policies in land use (including comprehensive) plans are used to justify exemptions, those policies must actually be implemented by law or regulation. We favor eliminating reference to comprehensive plans and land use plans but if that is not accepted, we request the language proposed above, “that are made regulatory by law or regulation.”

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The City Caucus and the County Caucus agreed with other caucuses that the increased exemption levels for single family and multifamily residential do not include subdivision. We have proposed that this be reflected in new Table 1.

We thank you for the opportunity to comment of the 10-8-12 draft DOE proposed SEPA rules.

Respectfully,

Gerald Steel