



August 16, 2013

Washington State Department of Ecology
Attn.: Fran Sant, SEPA Rulemaking Coordinator
300 Desmond Drive
Lacey, WA 98503-1274

Sent electronically to: fran.sant@ecy.wa.gov

Dear Ms. Sant:

It is with a sense of rising concern that the Washington Public Ports Association (“Washington Ports”) submits these comments concerning the Department of Ecology’s (“Ecology”) recent document entitled *Draft Status Report: 2013 Rulemaking for Chapter 197-11 WAC, SEPA Rules, July 19, 2013* (the “*Status Report*”), which is intended to aid discussions within the SEPA Rules Advisory Committee. Although ports were not included as members of the advisory committee, several of the provisions outlined in the *Status Report* could have severe consequences at port terminals and related facilities if enacted.

Many of the issues discussed in this letter expand on previous concerns Washington Ports has expressed to Ecology in various communications including the following: in a letter submitted to Ecology May 13, 2013; during a personal meeting with Ecology staff May 29, 2013; and, at a recent advisory committee meeting on July 25, 2013. While we appreciate the opportunities to comment on Ecology’s proposal, we are growing increasingly frustrated with the process as it appears it may be deviating from the Legislature’s directive to “update, but not decrease¹” categorical exemptions as outlined in SB 6406 (2011-12), the enacting legislation on which this rulemaking is based.

Specifically, we are extremely concerned with Ecology’s proposals concerning repair, remodeling and maintenance activities related to in-water maintenance work, dredging and bulkheads (see *Status Report*, pg. 13). As currently written, Section 800(3) creates an exemption for the “repair, remodeling,

¹ HB 6406 (2011-12), Sect. 301(3)(a)(i), pg. 42.

maintenance, or minor alteration of existing private or public structures, facilities or equipment, including utilities, involving no material expansions or changes in use beyond the previously existing; except that, where undertaken wholly or in part on lands covered by water, only minor repair or replacement of structures may be exempt (examples including repair or replacement of piling, ramps, floats, or mooring buoys, or minor repair, alteration, or maintenance of docks).”

Through the rulemaking process, Ecology and the advisory committee are considering amendatory language to Section 800(3) to further stipulate that the “following shall not be considered exempt under this subsection²:

- (a) Dredging of over fifty cubic yards of material;
- (b) Reconstruction or maintenance of ~~groins and similar~~ shoreline protection structures such as bulkheads and groins; or
- (c) Replacement of utility cables...”

For purposes of analysis, let’s individually consider the proposed language concerning the following: subsection (a), related to dredging; and, subsection (b), related to bulkheads and groins. Then, we will consider how the proposals related to this section interact with other elements of SB 6406 as well as port concerns related to sections of the *Status Report* addressing industrial activities and cultural resources.

Dredging of less than fifty cubic yards

Ports support the clarification regarding dredging of “over fifty cubic yards of material” because it makes this exemption consistent with the state’s Hydraulic Project Approval statute, which allows marinas and marine terminals to perform “dredging of less than fifty cubic yards” as elements of regular maintenance activities³ and allows small-scale cleanup efforts to advance without unnecessary impedances. For example, a small-scale diesel leak from a locomotive in an urban industrial area might require the removal of up to 50 yards of unclean soil. If such an effort required complete SEPA review, it would inevitably prolong environmental exposure to potential toxins thereby threatening both human life and the natural environment.

Furthermore, we are additionally concerned that the potential for negative environmental impacts would be further exacerbated by the proposed condition that “material be free from toxic contamination.” In the interest of environmental protection, it seems Ecology would be *most* interested in expediting the prompt removal and appropriate disposal of contaminated materials from a site rather than prolonging potential exposures by leaving contaminated materials at a site for unnecessarily extended periods of time. Using the example above, it seems the prompt cleanup and removal of small amounts of diesel-contaminated soils would be preferable to leaving these materials where they lay (or leaving them in the natural environment for extended periods of time as more extensive regulatory processes are observed).

² Strikes and underlines show proposed amendments to the underlying rule.

³ See RCW 77.55.151(1)(e).

Groins and similar shoreline protections

Our next area of concern regards the persistent and confounding comingling of the terms “groins” and “bulkheads.” Ecology proposes to “add bulkheads in addition to groins as examples of the type of maintenance projects that are *not*⁴ exempt under 800(3)(b).” Ecology uses flawed logic in the assertion that this proposal is “a clarification that adds bulkheads in addition to groins as examples of the type of maintenance projects that are not exempt” and the defense that “Ecology does not interpret this clarification as adding a new requirement.” Here is the reason why Ecology’s logic is flawed:

- First, consider the underlying language as it currently exists:
“Reconstruction/maintenance of groins *and similar*⁵ shoreline protections.”
- Then, consider the proposed change: “Reconstruction or maintenance of ~~groins and similar~~ shoreline protection structures such as bulkheads and groins.”
- By taking the phrase “groins and similar shoreline protections” (which is to say, “groins and shoreline protections that are similar to groins”) and contorting it to read “shoreline protection structures such as bulkheads and groins” (which is to say, “shoreline protection structures generally, using groins and adding bulkheads as examples”), Ecology has committed a classical fallacy in deductive logic.

Although the words may be similar, the meaning is very different. Simply re-arranging the words does not result in the same meaning. In fact, it results in a very different literal meaning that would be, at the very least, open to broad (mis-)interpretation.

In committing this fallacy, Ecology has taken a provision that was specific to groins and expanded it to include shoreline protection structures as exemplified by bulkheads and groins. The underlying language specifically addresses groins and similar shoreline protections. Ecology’s proposal refocuses the rule to address a broad class of all “shoreline protection structures,” using bulkheads and groins as examples. This change from a specific structure to a whole class of structures is absolutely a new requirement and is, therefore, inconsistent with the Legislature’s directive to “update, but not decrease, the thresholds for all other project actions.”

To further understand the significance of this distinction, it is important to understand the differences between groins and bulkheads. In coastal engineering, a groin is a long, narrow structure extending perpendicular from a beach, out into the water in order to trap and accumulate sand that would otherwise drift along the beach face and nearshore zone under the influence of waves approaching the beach at an angle. Although a groin may successfully stabilize the up-drift side of a beach, erosion tends to be aggravated on the down-drift side. To counteract these



Figure 1: illustration of a "groin field."

⁴ Emphasis added.

⁵ Emphasis added.

tendencies, multiple groins are often built as “groin fields” designed to stabilize a larger beach area. In terms of construction and overall function, groins are similar to breakwaters or jetties.

In contrast, a marine terminal bulkhead is used to stabilize structures in an urban industrial setting. Often times, they are located beneath marine terminals where erosion characteristics are heavily influenced by blockage from large ships, structural features such as pilings which hold up the terminal, and by regular maintenance dredging. Given the loads consistently exerted at marine terminals, the prompt and timely maintenance of these bulkheads is essential to ensuring safety to human life and to maintaining the state’s trade competitiveness. Prompt and consistent maintenance of marine terminal bulkheads also prevents environmental degradation that would occur as structures destabilized by a failing bulkhead are put at risk of falling into waters of the state.



Figure 2: illustration of a marine terminal.

Given these facts, how are marine terminal bulkheads different than groins? First, marine terminal bulkheads are structurally different and constructed to achieve a different purpose. Like jetties, coastal groins are built extending away from a beach in order to offset the effects of waves or currents. It has long been understood that groins have a negative impact on the dissemination of coastal sands and the stabilization of coastal beaches, so it is entirely appropriate that they would not receive the same exemption as minor repair tasks at industrial sites in urban settings.

Marine terminal bulkheads, on the other hand, are not intended to trap and accumulate sand, do not project into a waterway, are not constructed in accumulated “fields” of structures, and occur in completely urbanized environments where the negative environmental effects of erosion are structurally offset and systematically controlled through processes that already require significant permitting and regulation. The integrity of these structures is absolutely essential to ensuring worker safety, so prompt attention to repair and maintenance is a priority. Also, the movement of goods that occurs directly above these stabilizing structures is critical to the state’s trade economy, so prolonged disruptions due to increasingly elaborate administrative processes could severely disadvantage the state’s economic competitiveness.

In summary, it would be inappropriate to add bulkheads to the underlying rule as shoreline protections similar to groins. The reason is because – unlike jetties, which are similarly constructed and serve a similar purpose of wave deflection and sand distribution – bulkheads are not similar to groins. They are not similarly constructed. They are not similarly impactful in either size or volume. In an urbanized marine environment they are not even similar in terms of intended use or resulting erosion control. They simply are not similar and the assertion that they are is based on a logical fallacy.

Aside from the role they play in stabilizing shorelines under piers and wharfs, marine bulkheads may also play an important role in structurally containing legacy environmental contamination, such as the contamination that is contained during a remedial action funded through the state’s Model Toxics

Control Account. In such an example, the economic and environmental costs of re-cleaning and re-stabilizing a site could be enormous.

Finally, removing the exemption for maintenance or repair of shoreline armoring or bank protection would also conflict with the state Hydraulic Project Approval statute, which allows marinas and marine terminals to perform “maintenance or repair of shoreline armoring or bank protection⁶.”

Repair and replacement of pilings

Ecology also discusses piling maintenance and recommends adding a “specific percentage of the structure to be replaced as a threshold for the maintenance exemption.” Like small-scale dredging and the maintenance of marine terminal bulkheads, this is another area where prompt maintenance is essential to protecting environmental quality, human life and economic activity along the state’s working waterfronts. Like the other proposals Ecology forwarded in this package, this is also subject matter that is anticipated and regulated through the state’s Hydraulic Project Approval statute.

In an urbanized waterfront setting, pilings serve an important role in holding up structures that are subject to heavy loads where Longshore workers and others labor under conditions where worker safety must be a fundamental priority. Ports also utilize “fender pilings⁷” which are sacrificial members designed to protect structural pilings from loads placed from heavy ships. Due to their sacrificial nature, these structures require regular maintenance and repair in order to assure continued safe operation.

Washington Ports opposes Ecology’s proposal to “include a specific percentage of the structure to be replaced as a threshold for the maintenance exemption” for several reasons. First, this new threshold would introduce a new and confusing threshold standard. Assigning a percentage to the level of maintenance work that could occur on a given piling is arbitrary, especially since environmental review has already occurred for the initial siting of every piling currently in the water. Addressing the proponents’ argument to its extreme level, the complete (100 percent) removal and replacement of a piling would not result in environmental degradation. In fact, it would result in an environmental benefit over time because it would likely involve the removal of a creosote timber that would be replaced with one made of more environmentally friendly material. Furthermore, it would be difficult to gauge the percentage of a piling repaired or replaced since these structures are anchored into the seabed with significant portions of their physical structure underwater. In the case of sacrificial fender pilings, the entire structure may regularly be replaced as an element of normal maintenance activities.

Introducing this additional layer of regulatory process would also duplicate review that has already occurred. As previously stated, environmental review already occurred before placement of the original piling. Repair or maintenance of the structure will not result in additional environmental impact. Even in the case of a complete replacement of the structure, the environmental review has already occurred and replacement would likely result in a net environmental benefit as structures built from older, less environmentally friendly materials are replaced with ones made of modern, more

⁶ See RCW 77.55.151(1)(e).

⁷ Also called “bumper pilings” in RCW 77.55.151(2)(d).

sustainable materials. Arguably, the act of replacing a piling may result in short-term environmental disruption. However, any short-term impacts are already mitigated through compliance with existing environmental regulations such as the Marine Mammal Protection Act.

The proposed expansion would also create a burdensome administrative process with little (if any) environmental benefit. Prompt maintenance and repair of pilings in an urban marine environment is critical to ensuring environmental quality, human safety and commerce. Applying an arbitrary percentage threshold and then requiring a SEPA checklist and process to occur before maintenance activities can progress will only postpone essential repairs.

For example, consider a situation where a ship hits and completely fractures a section of piling in excess of the proposed threshold. The fracturing of such a piling might: introduce toxins that could not be cleaned up until after a formal SEPA process is completed at which time they may be completely absorbed into the environment; destabilize waterfront structures making them unusable and endangering human life; and, create a navigational hazard that could make a marine terminal unusable, essentially closing one channel of the state's trade infrastructure. Any of these negative outcomes could be truncated by simply allowing the current categorical exemption on maintenance and repair activities.

Also, as with previous expansions proposed by Ecology with regard to regular maintenance activities, this proposed expansion would conflict with the state Hydraulic Project Approval statute, which allows marinas and marine terminals to perform "maintenance or repair of pilings, including bumper pilings⁸."

Conflicts with SB 6406 and the Hydraulic Project Approvals statute

In each of the subsections concerning repair, remodeling and maintenance activities, each of Ecology's proposals has created a direct conflict with both SB 6406 and with the state's Hydraulic Project Approval statute. In fact, the specific activities of minor maintenance dredging, bank protections and piling maintenance were specifically debated during legislative consideration of SB 6406. These activities are included in a special provision of the state Hydraulic Code allowing for five-year permits covering regular maintenance activities occurring at marinas and marine terminals. This language was closely reviewed by legislators, regulators and stakeholders including tribal and environmental representatives during consideration of SB 6406.

The final outcome of these discussions appears as agreed-upon language at Sec. 105 of the final bill as it was passed by both chambers of the Legislature and signed into law by Governor Chris Gregoire. It is important to note that this language was agreed upon by all sides early in the legislative process and was uncontroversial even as the bill went through many different drafts after this language was added. The final Sect. 105 bill language (and the current statute) reads as follows:

⁸ See RCW 77.55.151(1)(e).

- (1) Upon application under RCW 77.55.021, the department shall issue a renewable, five-year permit to a marina or marine terminal for its regular maintenance activities identified in the application.
- (2) For the purposes of this section, regular maintenance activities may include, but are not limited to:
 - (a) Maintenance or repair of a boat ramp, launch, or float within the existing footprint;
 - (b) Maintenance or repair of an existing overwater structure within the existing footprint;
 - (c) Maintenance or repair of pilings, including the replacement of bumper pilings;
 - (d) Dredging of less than fifty cubic yards;
 - (e) Maintenance or repair of shoreline armoring or bank protection;
 - (f) Maintenance or repair of wetland, riparian, or estuarine habitat; and,
 - (g) Maintenance of an existing outfall.
- (3) The five-year permit must include a requirement that a fourteen-day notice be given to the department before regular maintenance activities begin.

Obviously, the regulatory reform achieved with this permit streamlining provision of SB 6406 would be negated if port facilities staff are required to complete a State Environmental Protection Act (“SEPA”) checklist and review every time they replace a single piece of rip rap, repair a bumper piling or replace the bolt on a mooring cleat. It stands to reason that these extremely minor activities, which would have little if any negative environmental consequences (even when compounded by the number of times these activities may occur in a five-year span), do not represent the type of “damage to the environment and biosphere” that SEPA was created to prevent. In fact, regular maintenance of existing structures actually enhances environmental protection by ensuring that nearshore structures do not degrade and deteriorate in the state’s waters. By re-arguing these specific areas through rulemaking, Ecology is dangerously close to subverting both the spirit and the intent of SB 6406.

Conflicts with the Shoreline Management Act

Just as the proposed language would conflict with HB 6406 and the state Hydraulic Code, it would similarly conflict with the state’s Shoreline Management Act (the “Shorelines Act”). RCW 90.58.030(3)(c) provides a *statutory* exemption for normal maintenance and repair of existing structures within the shoreline environment. The exemption is reflected in related Ecology rules WAC 173-27-040(2)(b). Local shoreline master programs which have either already adopted or will soon adopt updated shoreline master programs are directed by Ecology to adhere to the administrative procedures mandated by both the Shoreline Act and the associated rules in WAC 173-27.

Maintenance and repair is, therefore, exempt under the new Shoreline Management Plans as well. The exemption reflects a state policy that maintenance and repair of existing structures is

consistent with the goals and policies of the Shorelines Acts and is exempt from permitting requirements.

Similarly, the federal agencies with jurisdiction over in-water construction have recognized that their review of minor and routine maintenance activities such as pile replacement and minor bulkhead repair should be streamlined. In the Corps. of Engineers Section 10/404 regulatory program, these activities are allowed under the nationwide permitting program and are often approved through a letter of permission. The federal fisheries agencies with oversight under the federal Endangered Species Act have also recognized that many minor and routine activities should be allowed with a minimum of bureaucratic procedures. Furthermore, these projects and activities are reviewed using programmatic biological evaluations.

Programmatic biological evaluations recognize that these are routine activities that do not require an individual project review. Indeed, the potential environmental impacts are almost invariably minor and temporary. There is also a general recognition that such maintenance activities often result in a substantial environmental benefit. For example, regular maintenance often results in benefits such as fewer pilings, less toxic materials, more widespread use of light penetrating materials, and improved designs. Conversely, the lack of timely maintenance can result in accelerated and expansive environmental degradation.

Some may argue that the relative lack of federal regulation over maintenance activities is a reason for additional measures at the state level. However, this thinking is also erroneous given the benefits and improvements that result from maintenance and prevention. Put simply, the trend is towards a recognition that well maintained facilities are more environmentally beneficial (or, at least, less environmentally impactful) than the same facilities would be if poorly maintained. Bureaucratic processes that delay common maintenance and repair activities only serve to redirect limited stewardship resources away from core activities without achieving additional environmental benefit.

Finally, the proposal to add bulkheads to the list of shoreline protection measures that would not be exempt under WAC 197-11-800(3)(b) is misguided because it ignores the statutory exemption in the Shorelines Act for “normal maintenance and repair of existing structures” from substantial development permitting requirements⁹. The “normal maintenance and repair exemption” is an important provision for the maintenance of docks and bulkheads in an urban industrial shoreline environment. Removing categorical exemptions for bulkheads is contrary to the legislative intent of reducing the regulatory requirements for routine maintenance and repair activities necessary to protect the shoreline environment.

Lingering concerns regarding “industrial use” and cultural resources

The concerns raised thus far are significant to ports, especially considering the unique impact Ecology’s proposed changes would have on facilities located in urban industrial marine settings. Also, ports are extremely concerned about the direct conflict Ecology’s proposals would have on other state

⁹ See RCW 90.58.030(3)(c)

environmental statutes which were updated and streamlined as part of SB 6406. However, Washington Ports also remains deeply concerned about other elements of Ecology's venture regarding categorical exemptions.

For example, with regard to the language concerning "industrial uses¹⁰," we were somewhat relieved that Ecology recognizes the "suggested approach would have too many unintended consequences." However, we continue to be concerned that Ecology is now seeking "an alternative approach to addressing the exemption exclusion when air/water permits are required." Obviously, this leaves tremendous room for variability and, while we understand that Ecology requires flexibility to address the numerous concerns of diverse stakeholders, we nevertheless remain concerned that future alternatives could result in similar unintended consequences and would therefore be similarly unworkable.

On this issue, we reiterate our initial comment that the originally proposed new definition of "industrial use" would add unnecessary process to minor activities. Although the word "industrial" conjures images of heavy equipment moving bulk commodities, the reality is that these operations utilize many ordinary facilities common to administrative or commercial operations. These include facilities such as washrooms, office spaces, small storage sheds and other minor buildings as well as treatment pads and awnings used for stormwater isolation.

By excluding industrial uses from the exemption for "minor new construction," Ecology is creating additional process for minor projects simply because they occur on properties where industrial activities occur. For example, we know of a project at a secure marine terminal where a women's washroom is being constructed to accommodate the needs of a female Longshore worker. The washroom is contiguous to the existing facility for male Longshore workers and the potential impacts are little more than adding a sink and latrine to an existing facility.

However, under the agency's proposal, this very minor construction project would require a full checklist, determination and public notice. Meanwhile, construction of a new housing tract (with up to 30 new houses or 60 multifamily units) would remain exempt. This is extremely problematic. The green table entitled "Summary – Draft proposed Amendments for Exemption Subsections" says that "industrial uses have different types of impacts from commercial." In many cases, this assumption is simply not correct.

Finally, we understand that a subcommittee has formed to discuss issues related to cultural resources. Due to the amount of earth moving that occurs with relative consistency at many port and industrial facilities, this subject is one with great potential to affect ports. We will watch this process with great interest in the outcomes.

¹⁰ See *Status Report*, pg. 6.

Conclusions

For the reasons listed herein, we request that Ecology writes the section concerning “repair, remodeling and maintenance activities” which currently occurs at WAC 197-11-800(3) to reflect that the “following shall not be considered exempt under this subsection¹¹:

- (a) Dredging of over fifty cubic yards of material;
- (b) Reconstruction or maintenance of groins and similar shoreline protection; or
- (c) Replacement of utility cables...”

For the section regarding industrial uses, we request that Ecology eliminate the new definition for “industrial use” which appeared in the agency’s *Draft Proposed Rules* document¹². Washington Ports is especially concerned about the specific reference to “marine terminal and transportation areas and facilities.” Furthermore, we object to the agency’s reference to industrial uses under the “minor new construction” section of this document (Ibid, pg. 2). The removal of the “minor new construction” language paired with the new definition of industrial uses would have a significant impact on minor projects, such as the expansion of restroom facilities to accommodate a female Longshore worker outlined herein. It is therefore arbitrary and creates additional process without any resulting environmental benefit.

In closing, we simply add that in reviewing each of the exemptions and the related activities Ecology seeks to affect, we are struck by the inconsistency between relatively benign activities that would lose their exemptions and major activities that would remain exempt. Is replacing a piece of rip rap shoreline protection at an urban industrial marine facility more environmentally damaging than building a new subdivision of up to 30 new houses or 60 multifamily residential units? Most reasonable people would say no, yet replacing the shoreline protection could be subject to additional process under proposals included in Ecology’s current *Status Report* document. In this way, the proposals forwarded in the *Status Report* and addressed herein seem strangely arbitrary, inconsistent and expansive.

Sincerely,



Johan Hellman
Assistant Director

cc: Keith Phillips, Policy Advisor to Governor Jay Inslee
Diana Carlen, Senate Republican Caucus
Gary Wilburn, Senate Democratic Caucus

¹¹ Strikes and underlines show proposed amendments to the underlying rule.

¹² Entitled *2013 SEPA Rulemaking Exemptions Draft Proposed Rule Language, May 3, 2013*.