

# Staff Report for 2012 SEPA Rulemaking

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The proposed 2012 SEPA rule amendment is focused on the following specific topics:

1. Increase the flexible thresholds that local governments may adopt to exempt minor new construction projects from SEPA review in Washington Administrative Code (WAC) 197-11-800(1);
2. Increase the threshold for SEPA review of electrical facilities under WAC 197-11-800 (23)(c); and
3. The proposal includes added flexibility for all lead agencies to improve the efficiency of the SEPA environmental checklist in WAC's 197-11-315, -906, and -960.

## Need and Objectives

Ecology has a need to update the SEPA rules to help streamline regulatory processes and achieve program efficiencies as directed by 2ESSB 6406. The categorical exemptions and other sections of WAC 197-11 have not been reviewed for substantial revision in almost twenty years (see the 1983 Report [Ten Years' Experience with SEPA](#)).

Ecology's framework for the rulemaking includes:

- The SEPA process and documentation requirements can become more efficient with current technology and better aligned with current regulatory processes.
- New categorical exemptions will not reduce protection of natural and built environment.
- Public notice for projects exempted from SEPA will be maintained or improved.
- The category of actions in the revision "shall be limited to those types which are not major actions significantly affecting the quality of the environment" (from RCW 43.21C.110).
- Consider the range and severity of environmental impacts of the activities covered by the proposed amendment, and the approximate number of actions of this type.
- Consider existing tools that local governments can use to streamline project-level SEPA review, including:
  1. Infill exemption.
  2. Planned actions.
  3. Subarea planning for transit-oriented development.

## Specific objectives that are met with proposed rule amendments

- Increase the maximum flexible exemption threshold for minor new construction projects and establish different levels for fully planning GMA jurisdictions.

- Add a minor clarification regarding the exemption for fill or excavation projects.
- Revise the process that local governments follow in adopting flexible SEPA exemption thresholds.
- Add flexibility for all lead agencies to allow for the submittal of electronic documents.
- Add flexibility for lead agencies when completing checklist for nonproject actions.

This initial rulemaking is to be completed by December 31, 2012 pursuant to 2012 legislative directive (2ESSB 6406 Section 301). Ecology will follow this initial rule making with a more comprehensive update to the SEPA rule with amendments, to be completed by December 31, 2013.

### **Range and severity of environmental impacts and the approximate number of actions for each new exemption level**

The environmental review of regulatory standards involves an analysis of the consequences of the change from the existing rules to the new rule levels. In other words, what is the change from existing requirements? To support the proposed changes, data about recent projects were analyzed by review of SEPA documents submitted for the SEPA Register. The SEPA register provides some indication of the types of projects that would be subject to increased exemption levels.

There are currently 105,000 records in the SEPA Register that date back to the year 2000. The following statistics are based on a limited data set from 2012. 2012 was selected to represent currently proposed projects relative to current exemptions levels. While a larger dataset may be available by reaching further into the past for older projects, they may not be as representative of current conditions. See attached spreadsheets for the data used to analyze the categories of residential (single family and multi-family combined), agricultural, commercial/office/school, and electrical utility construction. Landfill/excavation projects not associated with other construction projects are less common and a separate data set was not prepared for this category.

When analyzing the data sets for each category, it was not possible to determine in all cases whether a given project was located inside or outside of an Urban Growth Area (UGA); therefore a worst-case assumption was used and all projects were compared to the higher exemption levels for projects within an UGA. Additionally, from the summary descriptions in the SEPA Register, it was not always possible to tell all the reasons a project may be subject to SEPA. Where it was evident, we have noted that a project does not appear to qualify for exemption (at both old and new levels) due an exception (such as being located in a critical area whether the local city or county has determined that SEPA review is still required).

Based on this information, the proposed exemption levels could apply a very small number of projects in some cases (single family residential construction, agricultural construction, electrical utility construction all have a small number of projects annually that are subject to SEPA). The

proposed levels could apply to a moderate numbers of projects in other cases (multi-family residential construction and commercial/office/school/warehouse construction). In summary:

- Roughly 30% of multi-family residential projects (between 20 and 60 units) in the current analysis would potentially be subject to the new exempt level.
- Approximately 25% of the commercial/office/school/warehouse projects would be eligible for exemption under the proposed rule (from a total of 141 records, about 25% range between 12,000 square feet and 30,000 square feet and therefore would become eligible for exemption if the local jurisdictions adopted the higher levels).
- For single family homes, most are analyzed at the time the land is subdivided. So SEPA for single family home construction alone (separate from subdivision of the underlying land) is rare.
- Few agriculture structures large enough to exceed current thresholds are proposed, so the data set was limited.
- For electrical utility lines, most of the recent projects do not appear to be subject to SEPA due to the voltage of the line (construction involving a substation or work in water or in critical areas appears to be a more common reason). As a result, few projects in the electrical utility data set appear to qualify for the new exempt level. Additionally, it is not clear from the 3 or 4 projects that may qualify for the new 115kv exemption whether they meet the criteria on the proposed rule (only in existing right of way and develop utility corridors).

Project Types	Current Maximum Exemption Level	Proposed Maximum Exemption Level	Number of Projects between min. and max.
Single family residential [# of units ]	20	30	1 out of 3
Multifamily residential [# of unit]	20	60	27 out of 86 <i>2 records have no # of units data</i>
Agricultural [sq ft]	30,000	40,000	0 out of 6
Office, school, commercial + parking [sq ft + # of spots]	12,000 + 40	30,000 + 90	24 out of 141 <i>33 records have no size data</i>
Landfill or excavation [cu yds]	500	1000	Not available
Electric Utility Lines	55kv distribution	Add 115kv in existing right of way and develop utility corridors	Not available

## Appropriate Context When Considering New Exempt Levels

The evaluation of probable consequences of increasing exemption levels involves more than just the number or size of the project types. The analysis includes the impact of the new flexible exemption level within the regulatory context (including SEPA, local, state, and federal regulation) for the exemption.

Context in this case includes:

1. Exceptions to exemption in statewide rules.
2. Local exceptions and geographic limitation to flexible exemption levels.
3. Local adoption of exempt level supported by findings that are based on existence of adequate regulations to avoid, minimize and compensate for adverse impacts.

### 1. Statewide SEPA rules related to *exceptions* for exemptions

WAC 197-11-305(1)(b)(i) – this provision of the SEPA rules states that if some parts of a proposal are exempt, but others are not, then the whole proposal is not exempt. No changes are proposed to this segment of rule.

WAC 197-11-800(1)(a) and (b) – states the minor new construction exemptions do not apply under the following scenarios: when a rezone or any license governing emissions to the air or discharges to water is required and when undertaken on lands covered by water.

WAC 197-11-800(1)(6) – The underlying subdivision of land is covered under this separate exemption.

WAC 197-11-908 – states that cities and counties may specify that certain categorical exemptions (including minor new construction and utilities) do not apply in one or more critical areas.

WAC 197-11-305(1)(b)(ii) – states that a series of exempt actions that are physically or functionally related to each other, and that together may have a probable significant adverse environmental impact in the judgment of an agency with jurisdiction may be subject to SEPA.

2. Local adoption of exempt level supported by findings – Cities and counties may select an exempt level in their SEPA procedures ordinance within the range provided in the rule (including different levels based on factors such as geography). The proposed rule language clarifies and expands on previous rule language in WAC 197-11(800)(1)(c) stating that local adoption of an exempt level must be supported by local conditions, including zoning or other land use plans or regulations.
3. Other local, state, and federal regulation – In addition to SEPA, other local, state, and federal regulations, permits, licenses, and approvals apply to the residential construction (whether it is SEPA exempt or not). For construction projects, other relevant commonly required permits/approvals that address some potential impacts include: building permits,

site plan approvals, clearing and grading permits, GMA impact fees, shoreline permits, construction stormwater permits, and hydraulic project approvals.

## **Advisory committee and public input**

Ecology convened an Advisory Group with the representation requirements in the legislation (see 2ESSB 6406 Section 301). Specifically these stakeholders were to help ensure project notification for the public and tribes in light of higher exemption thresholds. In addition we notified interested parties on our SEPA listserv and posted a preliminary draft on the SEPA rule making advisory committee website.

The Advisory Group outlined a number of probable significant impacts related to the proposed rule amendments including the following:

- Water quality issues related to stormwater from minor new construction.
- Traffic increases without appropriate mitigation with higher SEPA exemption levels.
- Additional noise impacts with higher exemption levels.
- Critical area impacts when ordinances are outdated or inadequate.
- Historic and cultural resources are not addressed in local development regulations and SEPA provides regulatory authority to avoid, minimize and compensate for those impacts.
- Land-use conflicts could increase if higher exemption levels result in urbanization outside of Urban Growth Areas and in rural and resource lands.
- Increased exemption level for agricultural structures can result in noise, lighting and odor impacts for nearby residential areas.
- GMA does not require local government to have development regulations that protect cultural and historic resources. SEPA is the only avenue for tribes, agencies with expertise and the public to provide comments and help to avoid significant adverse impacts to those resources.
- Although the SEPA checklist is considered cumbersome or unnecessary, it is vital for tribal review of the proposal's probable impacts to Treaty reserved rights and cultural resources.

## **Alternatives considered**

Ecology considered but did not pursue alternative rule proposals that included the following:

- Required project application notice to SEPA register for proposals exempt under minor construction flexible thresholds. Currently exempt projects do not require notification and under the rule proposal newly exempt projects from SEPA also do not need to notify the SEPA register.

- Established a lower increase and more restrictive exemption threshold levels that would have limited the range of flexible minor new construction thresholds that a local government could adopt.
- Established higher and less restrictive exemption threshold levels that could result in significant adverse environmental impacts.
- Required additional and more specific criteria for local government to apply the higher exemption thresholds. Maintaining the current and lower criteria for local government to apply the higher exemption thresholds. This option increases the risk of environmental impacts and limits public and interagency review of proposed exemption levels at the local level.
- Requiring additional project level public notice and comment for newly exempt proposals pursuant to the flexible threshold increases. This reduces the streamlining benefit from the optional increased SEPA exemptions.
- Increasing the minimum exemption threshold sizes as well as the maximum. This would impose additional burden on local agencies to change their SEPA policies if they are currently using the minimum exemption levels.

Ecology considered other methods beside rule amendments to meet the objectives. Although the legislation required a minimum scope of rule changes, Ecology has identified the following topics for additional guidance:

- Cultural resource protection criteria and examples of adequate development regulations to assist local jurisdictions when considering applying flexible exemption thresholds.
- Criteria and additional information about transportation impacts to the state highway system from construction projects available for increased exemption levels.

### **Location - the jurisdiction or areas where the rule is applicable**

The SEPA rules in WAC 197-11 apply to all state and local agencies in Washington. The flexible exemptions in 197-11-800(1) authorize but do not require cities and counties to increase the exemption levels for any or all of the project types. The proposed rule creates additional geographic categories for exemption levels based on level of GMA planning for counties and the cities within those counties.