

TO: SEPA Advisory Committee  
FROM: State Agencies (Commerce, DAHP, DNR, Parks, WDFW, WSDOT)<sup>1</sup>  
RE: 2012 SEPA Rulemaking

**General Concerns of State Agency Caucus re: 2012 SEPA Rulemaking**

**Basis for increasing categorical exemptions**

The state agency caucus is concerned about selecting a specific threshold for each type of activity that is minor new construction and identified in the bill without an analytical and science-based approach for doing so, given the bill's intent to increase categorical exemptions in light of increased environmental protections in place under the GMA and SMA while maintaining environmental protections. As the Legislature did not amend RCW 43.21C.110(1)(a), which requires that categorical exemptions adopted by rule "shall be limited to those types which are *not* major actions significantly affecting the quality of the environment," state agencies interpret the manner in which thresholds are increased with this mandatory limit in mind. State agencies are not suggesting the upper limits for thresholds in this context because we have little data to evaluate the exact upper limit that is appropriate. Instead, we suggest an analytical, science-based approach that allows for increased exemptions.

Because the bill language speaks specifically to increasing the "existing maximum threshold levels", which is language that is used in WAC 197-11-800(1)(c) ("maximum exempt level"), we believe there is an opportunity to allow the appropriate rationale to occur when the city, town, or county adopts increased thresholds. Therefore, state agencies suggest that the rulemaking authorize an increase of the existing thresholds to an upper limit (i.e., some percentage above the current threshold in each type of jurisdiction (City, inside UGA, outside UAG, non-UGA)) subject to required analytical or science-based substantiation for the specific limit adopted. This seems especially appropriate given the timeline for completing this year's rule change and the nature of the process Ecology has designed for the Advisory Committee. It allows for Ecology to authorize increasing the maximums, as required by 6406, while allowing for local variation based on local conditions, also consistent with the current rule structure stated in WAC 197-11-800(c): "A newly established exemption level shall be supported by local conditions, including zoning or other land use plans or regulations." State agencies are providing some sample language to implement this concept, which is intended for discussion purposes, i.e., to illustrate how this could be done.

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<sup>1</sup> State Caucus meetings invited all possibly interested state agencies (from a list supplied by Ecology) to attend state caucus meetings and provide input; input was ultimately provided by the group of state agencies listed here.

### **Exceptions to the exemptions**

Secondly, state agencies have expressed concern about addressing exceptions to the exemptions – which serves to require environmental review when a certain type of resource may be adversely affected by a proposal because of the likelihood that an impact on that resource could involve probable substantial adverse impacts and an examination needs to be made before proceeding. If we eliminate the exceptions altogether, that eliminates the opportunity for this review as well as notice to state agencies and other interested parties (a requirement that our Advisory Committee needs to meet in doing our work on this rulemaking (Section 301(4)(a)(ii)).

However, it is of course true that, like the categorical exemptions, the exceptions need to be updated. Indeed, we know much more about areas that are particularly environmentally sensitive and how to protect them without unnecessarily limiting development. Once we get to the work on the Checklist, we suspect that there will be abundant knowledge amongst Advisory Committee members regarding how to improve the utilization of the Checklist to streamline environmental review. However, at the threshold stage, we want to be careful not to eliminate environmental review where substantial adverse impacts are probable to occur.

Given the analysis needed to support any particular exception and the limited time available, state agencies encourage the Advisory Committee to defer the issue of exceptions to the next phase of rulemaking. Then, we will have more time to deliberate over which exceptions should apply to which exemptions or whether an overall set of exceptions should apply to all exemptions and what they should entail. Below, we have provided a list of some possible areas to consider updating exceptions, for discussion purposes, to display the complexities. State agencies do not have a position on whether particular exceptions would be appropriate, only that the question of exceptions is a significant one that affects *how* the exemptions apply – rather than *what* the exemption limits are (the bill-supported scope of this rulemaking).

State agencies come from a variety of perspectives, including being property owners and managers, resource protectors, project proponents, agency decision-makers (including SEPA lead agencies), and regulators. We wear all of these hats and so see both the need for updating the categorical exemptions, as well as the need to do so thoughtfully and based upon proper analysis and science.

## SEPA Rulemaking Changes for Discussion Purposes Only, to Illustrate State Agency Input

Directly from text of current rule:

WAC 197-11-800

Categorical exemptions.

The proposed actions contained in Part Nine are categorically exempt from threshold determination and EIS requirements, subject to the rules and limitations on categorical exemptions contained in WAC [197-11-305](#).

Note: The statutory exemptions contained in chapter [43.21C](#) RCW are not included in Part Nine.

Chapter [43.21C](#) RCW should be reviewed in determining whether a proposed action not listed as categorically exempt in Part Nine is exempt by statute from threshold determination and EIS requirements.

### (1) **Minor new construction -- Flexible thresholds.**

(a) The exemptions in this subsection apply to all licenses required to undertake the construction in question, except when any of the following resources may be affected by a proposal (a rezone or any license governing emissions to the air or discharges to water is required):

- (i) A critical area as defined in RCW 36.70A.030(5) when there is no protection of x resources in an adopted critical area regulation that applies to a proposal;
- (ii) A Landform that is geologically hazardous, including: inner gorges, toes of deep-seated landslides, groundwater recharge areas for deep-seated landslides, outer edges of meander bends along valley walls or high terraces, other areas indicating the presence of unstable slopes, if otherwise not addressed in an adopted critical area regulation that applies to the proposal; or
- (iii) Archaeological or Historic sites listed with the Washington Department of Archeological and Historic Preservation (DAHP) or of known tribal concern and predicted (based on DAHP predictive modeling) to impact cultural resources.

. To be exempt under this subsection, the project must be equal to or smaller than the exempt level. For a specific proposal, the exempt level in (b) of this subsection shall control, unless the city/county in which the project is located establishes an exempt level under (c) of this subsection. If the proposal is located in more than one city/county, the lower of the agencies' adopted levels shall control, regardless of which agency is the lead agency.

**Comment [sac1]:** If the exceptions to the exemptions are to be considered during this phase of rulemaking, they should be updated to reflect the current identification of resource types that may trigger the need for environmental review regardless of the size or scope of the activity because of the higher potential for adverse impacts because of the sensitive nature of the resource. This list of possible exceptions is to generate discussion, not to represent a state agency position.

For example, it may be true that the listed type of landforms are dealt with in some critical areas ordinances but not others and therefore including them separate from critical areas would be duplicative in some contexts. It is also true that coverage in critical areas ordinances varies. While it is appropriate to defer to local entities when adopting maximum thresholds based on local conditions, the exceptions to the exemptions are of broader statewide interest and apply across the state.

It is for these reasons and others that state agencies encourage deferral of this set of issues until the next phase of rulemaking.

(b) The following types of construction shall be exempt, except when any of the following resources may be affected by a proposal:

- (i) A critical area as defined in RCW 36.70A.030(5) when there is no protection of x resources in an adopted critical area regulation that applies to a proposal;
- (ii) A Landform that is geologically hazardous, including: inner gorges, toes of deep-seated landslides, groundwater recharge areas for deep-seated landslides, outer edges of meander bends along valley walls or high terraces, other areas indicating the presence of unstable slopes, if otherwise not addressed in an adopted critical area regulation that applies to the proposal; or
- (iii) Archaeological or Historic sites listed with the Washington Department of Archeological and Historic Preservation (DAHP) or of known tribal concern and predicted (based on DAHP predictive modeling) to impact cultural resources.

(undertaken wholly or partly on lands covered by water):

(i) The construction or location of any residential structures of four dwelling units.

(ii) The construction of a barn, loafing shed, farm equipment storage building, produce storage or packing structure, or similar agricultural structure, covering 10,000 square feet, and to be used only by the property owner or his or her agent in the conduct of farming the property. This exemption shall not apply to feed lots.

(iii) The construction of an office, school, commercial, recreational, service or storage building with 4,000 square feet of gross floor area, and with associated parking facilities designed for twenty automobiles.

(iv) The construction of a parking lot designed for twenty automobiles.

(v) Any landfill or excavation of 100 cubic yards throughout the total lifetime of the fill or excavation; and any fill or excavation classified as a Class I, II, or III forest practice under RCW [76.09.050](#) or regulations thereunder.

**Comment [sac2]:** Given the potential need for repetition, it may be better to create a separate section indicating that none of the categorical exemptions apply when these resources may be affected – but that determination should be made during the next phase of rulemaking that will cover a broader scope.

**Comment [sac3]:** Ecology has not confirmed whether or not they interpret the scope of the rulemaking to cover these “baseline” exemptions or only the increased maximums in (C) below. State agencies have assumed the baseline exemptions are not being addressed during this 2012 rulemaking due to the bill language referencing “maximum” exempt levels which is found only in 197-11-800(1)(c).

(c) Cities, towns or counties may raise the exempt levels to the maximum specified below by implementing ordinance or resolution. Such levels shall be specified in the agency's SEPA procedures (WAC [197-11-904](#)) and sent to the department of ecology. A newly established exempt level shall be supported by local conditions, including zoning or other land use plans or regulations. An agency may adopt a system of several exempt levels (such as different levels for different geographic areas). The maximum exempt level for the exemptions in (1)(b) of this section shall be, respectively:

- (i) 20 dwelling units.
- (ii) 30,000 square feet.
- (iii) 12,000 square feet; 40 automobiles.
- (iv) 40 automobiles.
- (v) 500 cubic yards.

provided that these exemptions may be increased up to twenty-five percent (25%) in excess of the foregoing limits if the city, town or county adopts additional findings as specified in WAC [197-11-800\(26\)](#).

(new) (26) Required findings related to increasing categorical exemptions. Prior to the adoption of increased maximum exempt levels pursuant to WAC [197-11-800\(1\)\(c\)](#), the entity adopting the new level must satisfy the following prerequisites:

(a) Provide notice and an opportunity to comment prior to the adoption of the new maximum exempt levels to all agencies with expertise and affected tribes;

(b) Adopt findings supported by substantial evidence demonstrating that the category of activity and new maximum exempt level is consistent with RCW [43.21C.110\(a\)](#) based upon one or more of the following:

- (i) professional staff or expert opinions;
- (ii) research study results;
- (iii) records of prior threshold determinations maintained by the adopting entity that indicate all proposals related to the same category of activity have resulted in a determination of nonsignificance (DNS) for at least the previous five (5) years or covering at least ten (10) threshold determinations, whichever is greater;

**Comment [sac4]:** 25% is not magical or a specific state agency requested increase in the exemption level; it is inserted just to have an exemption increase inserted.

**Comment [sac5]:** Another alternative is to limit the increase in the exemptions differently depending on whether the proposal is located in a city (up to 25%), within a UGA (up to 20%), outside of a UGA (up to 10%), or in a non-GMA county (up to 10%). State agencies did not identify a logical rationale for distinguishing solely among these categories and these percentages are provided as examples for variation between locations.

Either approach allows for an increased exemption level while maintaining environmental protection (via the findings required in new [-800\(26\)](#)), consistent with the statement of intent in 6406.

(iv) similar maximum exempt levels that have been adopted by other agencies and the exempt level is supported by local conditions, including zoning or other land use plans or regulations;

(v) the completion of an impact demonstration project monitoring the results of actual impacts from the category of activity demonstrating a low likelihood of probable adverse significant impacts;

**Comment [sac6]:** The definition of "impact demonstration project" needs to be added to 197-11-700 series.

(vi) an analysis including each element of the environment listed in WAC 197-11-444, indicating why the category of activity is unlikely to have a probable significant adverse impact, which may be supported by the following list of nonexclusive factors:

- (i) existing regulations providing environmental protection, provided that the adoption of the new maximum exempt level requires re-analysis when the regulations relied upon are amended or repealed;
- (ii) for activities that may impact state and regional transportation facilities or services, existing regulations or mitigation plans that adequately address impacts;
- (iii) for activities involving ground disturbance in areas where an archeological or historic site survey or cultural resource impact assessment has not been completed, either: a) a cultural resource management plan is incorporated into a local comprehensive plan b) local development regulations address pre-project review for these impacts and contain standard inadvertent discovery language, or c) a data sharing agreement with DAHP that addresses access to DAHP cultural resource data is in place;
- (iv) for activities that may result in the conversion of forestland to a non-forest use, development regulations that require consideration of the cumulative loss of forestland;
- (v) others??

**Comment [sac7]:** Please note this is very preliminary for DNR as the appropriate mechanism.

[Statutory Authority: RCW [43.21A.090](#), chapter [43.21C](#) RCW, RCW [43.21C.035](#), [43.21C.037](#), [43.21C.038](#), [43.21C.0381](#), [43.21C.0382](#), [43.21C.0383](#), [43.21C.110](#), [43.21C.222](#). 03-16-067 (Order 02-12), § 197-11-800, filed 8/1/03, effective 9/1/03. Statutory Authority: 1995 c 347 (ESHB 1724) and RCW [43.21C.110](#). 97-21-030 (Order 95-16), § 197-11-800, filed 10/10/97, effective 11/10/97. Statutory Authority: RCW [43.21C.110](#). 84-05-020 (Order DE 83-39), § 197-11-800, filed 2/10/84, effective 4/4/84.]