

TO: Washington Department of Ecology
FROM: State Agencies (Commerce, DAHP, DNR, Parks, WDFW, WSDOT)¹
RE: 2012 SEPA Rulemaking
Date: October 4, 2012

The state agency caucus would like to offer the following comments on Ecology's Preliminary Draft (9/25/2012) of proposed revisions to WAC 197-11 regarding SEPA rulemaking as well as Draft Proposal C (ad hoc, 10/2/12). You have already received comments directly from the Washington State Historic Preservation Officer (SHPO) and Department of Archaeology and Historic Preservation (DAHP) staff on the Ecology Preliminary Draft (9/28/12). We provide these comments to emphasize the importance of making changes to the categorical exemptions that maintain environmental protections in a manner consistent with RCW 43.21C.110(1)(a), which requires that "types of actions included as categorical exemptions in the rules shall be limited to those types which are not major actions significantly affecting the quality of the environment." This is wholly consistent with 6406 and the legislative intent associated with it.

Proposed increased maximum thresholds

State agencies support increased thresholds provided that findings supporting the adoption of them by city and county governments meet the requirements of RCW 43.21C.110(1)(a), which does not appear to be the case with the current draft of the rule being considered by Ecology. Although state agencies do not suggest specific numeric thresholds, the underlying analytical basis for any new thresholds is a prerequisite to state agency support for any increases. Our primary concern is the potential for adverse impacts on state resources.

Additionally, without some form of notice to state agencies and affected tribes that a threshold is increasing, state agencies have no way to ascertain whether an increased threshold is supportable under RCW 43.21C.110(1)(a). Without this safeguard, state agencies would need to rely upon local agencies to consider state-managed resources when evaluating proposals without the opportunity for input that the SEPA process provides. While all state agencies strive to have positive relationships with local governments that foster seeking input from state agencies, we cannot count on this in every instance.

Regarding findings

In prior correspondence, the state caucus offered suggestions and a menu of options to satisfy findings. We've heard stakeholders' concerns about overcomplicating the process. In the

¹ State Caucus meetings originally 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. Please note that state caucus consensus from this group varies and where only some agencies support a comment, it is noted.

10/2/12 stakeholder meeting, state agencies advocated that the proposed language for WAC 197-11-800 (1) (c) also specify that the city, town or county's demonstration / findings be done specifically for each element of the environment, as well as requiring notice to agencies with expertise, when a local government is considering a resolution or ordinance to raise the exemption levels. This is a straightforward approach.

Please note that we generally supported Ecology's language proposed under its 9/25/12 proposal related to the Tier 2 optional thresholds, which stated: "The city, town or county shall explain how these existing requirements adequately avoid, minimize or otherwise compensate for probable significant impacts with analysis and findings relevant to each element of the environment." At the 10/2/12 meeting, state agencies advocated for language that required each element of the environment be addressed in the findings supporting the threshold increase contemplated in what has been titled "Proposal C." The following are suggested revisions to Proposal C, consistent with our earlier communications at the Advisory Committee on this topic:

WAC 197-11-800(1)(c):

(c) Cities, towns or counties may raise the exempt levels to the maximum specified in Table 1 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.~~ To establish a new optional exempt level, a city, town or county shall enter findings that demonstrate that the requirements for environmental analysis, protection and mitigation for the exempt types of development have been adequately addressed in specific adopted development regulations, comprehensive plans, and applicable state and federal regulations addressing each element of the environment listed in WAC 197-11-444. An agency may adopt a system of several exempt levels (such as different levels for different geographic areas). The maximum exempt levels for the exemptions in (1)(b) of this section are identified on Table 1. Separate maximum optional thresholds are established in Table 1 applying to incorporated areas and unincorporated Urban Growth Areas; and for other unincorporated areas. ...

Finally, as the findings may rely upon regulations that are revised over time, it is also important for the ongoing validity of the adopted categorical exemption threshold level to continue to be supported by the development regulations that supported its adoption. Thus, Ecology should include language that invalidates an adopted maximum level upon the repeal or amendment of an adopted development regulation upon which it is based. For example, the following language could be utilized:

Comment [sac1]: Some state agencies are concerned that eliminating the transmission to Ecology will limit state agency awareness of changes at the local level.

Comment [sac2]: As comprehensive plans do not directly regulate the use of property, it is not clear how they could provide a basis for an increased exemption. (Noted by one state agency).

Comment [sac3]: As local governments do not have control over the applicability of, or changes to, state and federal regulations, it is unclear how an increased exemption could be supported by non-local regulations. This is information that could certainly be used in answering Checklist questions, provided the application of the state or federal regulations to the proposal was a certainty. (Noted by one state agency).

Comment [sac4]: Please note that Ecology's original language from the 9/25/12 proposal is also acceptable to some state agencies.

“The adopted maximum exempt level shall continue to be valid so long as the specifically adopted development regulations identified in findings supporting the exempt level remain in effect.”

Regarding the provision of notice of newly-exempted activities

State agencies favor the provision of notice of newly-exempted activities. In discussions at the 10/2/12 stakeholder meeting, we heard the concerns around the room about “what is the expectation that comes with notice.”

To enable reflection upon ultimately appropriate maximum thresholds, it will be helpful in the coming months for cities, counties, and towns that take advantage of the new maximums to keep a tally as to how many projects fall into the new exempt categories so that next year’s rulemaking can consider data.

As we tee up discussions for next year’s tasks regarding notice, state agencies will likely advocate for local agency notice that provides an opportunity for meaningful input on projects with potential impacts to resources they steward. SEPA notice and opportunity to comment provide a check & balance that may otherwise be lost. State agencies want to protect the state resources that could be affected by reduced opportunity to engage in informed decision making at the local level. This will not create unnecessary or redundant processes; rather, it will be a single review at the time a threshold level changes – rather than the multiple points of review that would occur if the threshold level did not change.

Regarding Ecology’s Proposed checklist changes

The state agency caucus supports the removal of the portions of the Checklist that apply to project proposals for proposals that are exclusively nonproject proposals (i.e., the proposal involves only nonproject actions) provided that sufficient information is provided to issue a threshold determination as a result. The state agency caucus also supports revisions to the nonproject review form in the second phase of rulemaking to contain more useful information tailored to nonproject proposals and to make it more useful for a complete review of nonproject proposal impacts.

Additionally, we suggest an additional efficiency measure be added to capture analysis provided under the National Environmental Policy Act (NEPA). We would like to add NEPA documentation, where logical, in the revisions related to the Checklist. Under the proposed changes to WAC 197-11-315, we suggest the following be included:

(d) Projects where questions on the checklist are adequately covered by a locally adopted ordinance, development regulation, land use plan, compliance with NEPA for the same proposal, or other legal authority (see subsection (6) of this section; or.

(6) The lead agency for an environmental review under this chapter may identify within the checklist provided to applicants instances where questions on the checklist are adequately covered by a locally adopted ordinance, development regulation, land use plan, compliance with NEPA for the same proposal or other legal authority. A lead agency still must consider whether the action has an impact on the particular element or elements of the environment in question.

Regarding Proposal C

As noted above, the state agencies did not provide specific threshold numbers. During the discussion of this proposal at the 10/2/12 stakeholder meeting, state agencies advocated that “the proposed language for WAC 197-11-800 (1) (c) also specify that the city, town or county’s demonstration / findings be done specifically for each element of the environment and that notice be provided to agencies with expertise and tribes (and the public) when a local government is considering a resolution or ordinance to raise the exemption levels.” (See above edits in “Regarding findings” section of this letter).

We also want to share a concern raised by WDFW: On excavation or landfill of 1,000 cubic yards of material is equal to approximately 100 dump truck loads. While there are many cases where this would not be a problem, it seems if it were near water, for example, near streams under 20 cfs not covered by SMA or sufficient GMA critical areas buffers then significant impacts from this amount of disturbed soils could occur.

Regarding electrical facilities thresholds (Ecology proposal)

The increase to the utility exemption is intended to be limited to the installation of utility facilities and should be a small incremental increase given the lack of data supporting a change at this time.² Indeed, increasing the exemption is unsupported by any finding as to what the exempt level should be and is therefore tenuous at best. With respect to an exemption that applies statewide to all utilities, it is troubling that a substantial increase is being considered that would allow hundreds of new miles of utility lines to be constructed across previously undisturbed acres of natural resources and other lands with no environmental review. While some state agencies may be affected by the increase to a different degree than others, all state agencies understand the desire to provide sufficient clarity to protect natural and cultural

² The desire for increased utility development by utility companies does not support an increased exemption that would allow for cross country transmission line projects in new corridors without environmental review, under SEPA’s mandates.

resources that exist within utility corridors. Some members of the state caucus suggest that the proposed language be further clarified to make clear the incremental increase for transmission lines is limited to areas with existing construction so that **new installations** do not impact undisturbed natural and cultural resources. The exemption would then read as follows:

(23) **Utilities.** The utility-related actions listed below shall be exempt, except for installation, construction, or alteration on lands covered by water. The exemption includes installation and construction, relocation when required by other governmental bodies, repair, replacement, maintenance, operation or alteration that does not change the action from an exempt class. . . .

(c) All electric distribution facilities, lines, equipment or appurtenances, not including distribution substations, with an associated voltage of 55,000 volts or less; ~~and~~ the overbuilding of existing distribution lines (55,000 volts or less) with transmission lines (more than 55,000 volts); ~~and~~ the undergrounding of all electric facilities, lines, equipment or appurtenances; electric transmission facilities, lines, equipment or appurtenances, not including transmission substations, up to and including a voltage of 115,000 volts, installed within the demonstrated vertical and horizontal limits of previous construction in existing rights-of-way and developed utility corridors; and the undergrounding of all electric facilities, lines, equipment, or appurtenances.

This language revision is not intended to limit state parks' ability to install electrical lines for connecting remote ticket dispensing machines (and other similar park-related devices or purposes) to an existing power source, which would involve the use of distribution lines that are already subject to the existing exemption in (c), or one of the other exemptions contained in WAC 197-11-800(23)(a), (b),(d), and (e).

Further changes to this statewide exemption can be considered in the next phase of rulemaking, when there is adequate time to ascertain how doing so would comport with RCW 43.21C.110(1)(a).

Please note that some of the reasons for concern with increasing this exemption substantially include the potential risks associated with new cross country utility line routes, such as; risks associated with crossing lands that include archeological, cultural, or sensitive species (i.e., natural area preserves and natural resource conservation areas), increased wildfire risks associated with new lines and new users of the corridor, removal of overstory habitat that may otherwise provide protection of endangered habitat or species, risk of the corridor becoming a highway for noxious weeds and undesirable vegetation, vegetation height limits associated with electrical requirements that eliminate vegetation that provides shading and other benefits near streams and in riparian areas, the bifurcation of landscapes that may support habitat and land management for varied purposes (i.e., state trust lands with specific management

Comment [sac5]: Please note that 6406 specifically identified "installation" as the activity requiring an increase and this proposal allows for technological upgrades of transmission lines consistent with utility representations that this is the primary immediate need.

requirements) in general, and the long-term operational impacts associated with accessing more remote areas in order to maintain, upgrade, or replace the lines -- some of which may or may not be covered by existing regulations to varied degrees in individual jurisdictions. Indeed, any existing land uses that are within the path of a proposed transmission utility corridor (i.e., road crossings, homes, agricultural and forestlands, parks, wildlife management areas) would no longer have an opportunity under SEPA to raise issues regarding impacts. Concerns flow from allowing an unlimited exemption related only to the voltage of the line at a level that allows for the development of transmission lines. There is too much variation in local regulations to say with any degree of certainty that a new statewide exemption for utility transmission lines would nonetheless have sufficient protections in place to address all environmental impacts – by adding it without limits now we lose the ability to inspect this question through the lens of what we hope will be a more structured approach to changing exemptions in the next phase of rulemaking (and perhaps create a short-term rush to permitting of long, linear utility line projects across many acres of land).