



Washington State's Chamber of Commerce

Tom Clingman
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RE: Association of Washington Business comments on ECY's pre-draft rule language

Mr. Clingman:

On behalf of the Association of Washington Business, thank you for the opportunity to comment on the pre-draft SEPA rule language being put forward by Ecology at this time. Given that Ecology is still in the informal pre-rule making process, our comments are presented in an informal manner.

While we are appreciative of Ecology, and other stakeholders, willingness to have a conversation throughout the Advisory Committee process, the broader business community is still frustrated by the lack of progress to streamline SEPA rules by identifying and removing duplications in the regulatory process, and increasing exemptions.

The legislative directive, in SB 6406, Sec. 301, was to update the rules, "in light of the increased environmental protections in place under chapters 36.70A and 90.58 RCW, and other laws."

We give credit to the Department for providing draft status reports in the latter-part of the process, but we still believe Ecology failed to appropriately identify the areas of law noted by the enacting legislation, to facilitate a more meaning for discussion. Instead, Ecology used the rulemaking process to highlight the lack of funding, or staffing, available to the agency to perform more comprehensive reviews, this despite Ecology's lead to encourage rulemaking during the legislative process.

The current rule language around Cultural Resources highlights our concerns and consternation with Ecology. We do not support the language as presented by the Department, as we believe inclusion of the language goes beyond the scope of the

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rulemaking. As Ecology is aware, there have been robust discussions around the topic of cultural resources during the 2013 rulemaking. The conversations included:

- Debate before the 2013 Legislature, which included identical language now being put forward by Ecology;
- Several notice provisions provided by stakeholders, including business, cities, counties, cultural resource community; and

- A series of separate stakeholder meetings, specifically to discuss all the options above.

In the status report dated September 9, 2013, Ecology notes:

“There does not seem to be adequate support at this time for the exception to exemptions approach within the SEPA Rules. A solution outside of the SEPA rules may ultimately be needed to address the cultural/historic preservation issues, which will take further work by stakeholders. However, Ecology believes that the planning level approach has some merit for inclusion in the current round of rule amendments. Ecology is proposing that, for SEPA ordinances revised or adopted after the effective date of this current round of rule amendments, a jurisdiction fully planning under the GMA will have to document within their local ordinance consideration of the provisions of that planning-level approach.”

We agree with Ecology that there is a lack of adequate support for the exception to the exemptions provisions. The question, however, remains on how does Ecology justifies the jump to supporting a planning level approach? Where is the justification, or explanation justifying this approach?

As previously mentioned, others have offered equally viable options for meeting the enacting legislation requirements, to allow for increases to exemptions, streamline SEPA and ensuring notice. We continue to support a rule that will ensure notice to interested parties, but cannot support the language put forward at this time.

We would propose a more viable option, following the path Ecology took during the 2012 rulemaking. We suggest Ecology consider updating the findings section as follows:

Using the procedure set out in WAC 197-11-800(1)c to demonstrate how specific adopted development regulations and applicable state and federal laws provide adequate protections for cultural and historic resources when exemption levels are raised. An additional provision could be added requiring that the local government document compliance with requirements for notice and opportunity to comment in WAC 197-11-800(1)c (ii) and (iii) for protection and mitigation in WAC 197-11-800(1)c(i).

In all, the pre-draft rule language provided by Ecology represents minimal progress. Nevertheless, there are many provisions included in the rule that are worthy of review, and

support by the business community. Following are additional comments on other areas of the rule that we either support or recommend minor changes to the proposed pre-draft rule.

1. Lands Covered by Water/Minor Land Use Decisions
2. Minor Code Amendments
3. Mixed Use Exemptions

Lands covered by water/Minor Land Use Decisions:

One of the major areas of dispute in this rulemaking process has been how to deal with the exception to SEPA exemptions that applies to projects or activities occurring on “lands covered by water.” For local governments and business this issue goes straight to the core of why the legislature enacted SB 6406 and directed this rulemaking effort. Many layers of regulatory systems have been placed over lands covered by and adjacent to the water since the adoption of SEPA. These activities are now governed by local critical areas codes under GMA, local SMPs under the SMA, hydraulic project approval permits, and, more often than not, federal permits from the Corps of Engineers or Coast Guard. For that reason, we continue to question the need for applying an additional layer of SEPA review to these already highly-regulated activities.

In order to at least acknowledge this concern, we would like Ecology to clarify that for project actions the lands covered by water exception only applies when the project itself is actually undertaken below the ordinary high water line. In addition, we recommend the following language for lands covered by water:

The following land use decisions shall be exempt except on lands covered by water:

(a) Short subdivisions or short platting within the original short plat short subdivision boundaries that would not cause the cumulative division to exceed the total lots allowed to be created under a short subdivision

(b) Binding Site Plans, which do not exceed the maximum exemption levels adopted by local government for single family, multi-family, or commercial development in WAC 197-11-800(1)

Cities, towns, and counties may raise exemption levels to include subdivisions following the procedures in WAC 197-11-800(1)(c). The maximum exemption levels are

	<u>Fully planning GMA counties</u>	<u>All other counties</u>
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<u>Project types</u>	<u>Incorporated and unincorporated UGA</u>	<u>Other unincorporated areas</u>	<u>Incorporated and unincorporated areas</u>
<u>Subdivisions</u>	<u>60</u>	<u>15</u>	<u>15</u>

We continue to believe that the uses authorized by land use decisions are the appropriate way to determine whether SEPA applies to land use actions, rather than the process an individual local government uses to make that land use decision. Many jurisdictions use different terms for similar processes, so the proposal on Page 17 of the status report to provide specific exemptions for conditional use permits or special use permits is unacceptable.

Further, providing these specific exemptions may call into question long established practice of declining to review through SEPA other minor land use decision such as right of way permits or street vacations. Additionally, minor decisions like binding site plans or code interpretations would potentially be subject to SEPA review when the analysis provides no value added.

We believe that the intent of SB 6406 on this front could be best realized by dealing with this in the reverse manner from which has been proposed. Specifically, the rules should provide a clearer exemption for land use decisions where the underlying action is exempt, and then allow clear exceptions to that exemption where there is a potential for significant environmental impact. We have yet to hear compelling specific examples of why this approach would be harmful.

We believe this concern could be addressed through addition of the following language:

WAC 197-11-800(6)

(6)Land use decisions: The following land use decisions shall be exempt:

Land use decisions where the underlying action being proposed is exempt from SEPA, except rezones, unless they meet the criteria in 197-11-800(6)(b)

Rezones, within cities and Urban Growth Areas, in fully planning counties, which do not require an amendment to the Comprehensive Plan map and where the city or county's applicable comprehensive plan was previously subjected to environmental analysis through an environmental impact statement under the requirements of chapter 43.21C prior to adoption

Minor Code Amendments:

We fundamentally disagree with the interpretation that the statutory exemptions for minor code amendments in Section 307 of SB 6406 precludes the Department from offering new SEPA exemptions for minor code amendments that do not lessen environmental protections as directed by Section 301 (3)a(iii). It makes little practical or legal sense for the Legislature to have put the provisions in Section 301 in place if they intended them to be invalidated by Section 307.

We believe that the Department has not adequately fulfilled its responsibility to create new non-project exemptions, and so we support continued work on this front. Actions like sign codes, process changes, updates to fee ordinances or modifications to use matrixes are all actions that are undergoing entirely unnecessary SEPA review right now. These types of actions are ripe for further consideration for amendment by the Department.

Mixed Use:

We strongly support the Department's intention to allow local governments to adopt jurisdictionally appropriate mixed use exemption levels at local discretion. We appreciate that the Department appears to agree with us that limiting the scale of these exemptions or rating down the positive land use decision to undertake mixed use development has adverse policy consequences for the state as a whole. We do not want to be in a position to be encouraging development to subdivide land and develop less efficiently than a mixed use development might simply to take advantage of legal SEPA exemption thresholds.

In closing, we welcome the opportunity to continue to work with Ecology, and other stakeholders, to update the SEPA rules. We would encourage Ecology to reevaluate its role in meeting the directives of the rulemakings enacting legislation, to ensure better progress is made in the final rule proposal.

We would be happy to answer any questions that may have arisen as a result of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Brandon Houskeeper". The signature is fluid and cursive, with the first name being more prominent.

Brandon Houskeeper
Director, Government Affairs
Association of Washington Business