
HOUSE BILL 2532

State of Washington

60th Legislature

2008 Regular Session

By Representatives Nelson, Lantz, and Cody

Prefiled 01/07/08. Read first time 01/14/08. Referred to Committee on Ecology & Parks.

1 AN ACT Relating to providing environmental analysis of impacts to
2 endangered marine species; amending RCW 43.21C.075 and 43.21C.110;
3 adding a new section to chapter 43.21C RCW; adding a new section to
4 chapter 77.12 RCW; adding a new section to chapter 79.10 RCW; adding a
5 new section to chapter 43.21A RCW; adding a new section to chapter
6 35.21 RCW; adding a new section to chapter 35A.21 RCW; adding a new
7 section to chapter 36.32 RCW; and adding a new section to chapter 53.08
8 RCW.

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

10 NEW SECTION. **Sec. 1.** A new section is added to chapter 43.21C RCW
11 to read as follows:

12 (1) In addition to any other requirements of this chapter, any
13 public entity required by sections 2 through 8 of this act to prepare
14 an endangered marine species review prior to issuing a final permit,
15 lease, or other approval shall prepare and publish in the Washington
16 State Register the following prior to final issuance of the permit or
17 lease:

18 (a) An analysis of any potential impacts the permit, lease, or
19 other approval may have on endangered marine species;

1 (b) An analysis of any potential changes to the proposal requiring
2 a permit, lease, or other approval that may lessen the proposal's
3 impacts on endangered marine species; and

4 (c) Any other details required by rules adopted pursuant to RCW
5 43.21C.110.

6 (2) Any analysis conducted under this section must include all
7 direct impacts on endangered marine species and all reasonable and
8 foreseeable indirect impacts such as impacts on habitat, food sources,
9 and birthing areas.

10 (3)(a) The preparation of any analysis required by this section may
11 be either:

12 (i) Completed directly by the public entity responsible for issuing
13 the permit, lease, or other approval;

14 (ii) Contracted to a private third party by the public entity
15 responsible for issuing the permit, lease, or other approval; or

16 (iii) Completed by the entity requesting the permit, lease, or
17 other approval and subsequently approved by the appropriate public
18 entity.

19 (b) If the analysis is completed directly by a public entity, or
20 contracted to a third party by a public entity, the actual cost of
21 preparing and publishing the analysis under this section may be
22 collected by the public entity from the applicant for the permit,
23 lease, or other approval. Any reimbursement of cost under this section
24 is in addition to any applicable permit fees or lease rates.

25 (4) If the public entity required by this section to complete an
26 endangered marine species review determines that the review cannot be
27 completed prior to the issuance of the final permit, lease, or other
28 approval due to statutory deadlines or extenuating circumstances, then
29 an explanation of those circumstances must be published in the
30 Washington State Register prior to the final issuance of the permit,
31 lease, or other approval and the requirements of this section must be
32 completed in full no more than sixty days after the issuance of the
33 permit, lease, or other approval.

34 (5) If the endangered marine species review prepared under this
35 section finds a potential impact to endangered marine species, then the
36 public entity may, instead of publishing the entire endangered marine
37 species review in the Washington State Register, instead publish an

1 abbreviated finding along with directions as to how to access the full
2 endangered marine species review.

3 (6) As used in this section, the term "endangered marine species"
4 means all members of the following taxonomical genera that are
5 identified by the fish and wildlife commission as an endangered species
6 under RCW 77.12.020: *Balaenoptera*, *Megaptera*, *Orcinus*, *Physeter*,
7 *Balaena*.

8 NEW SECTION. **Sec. 2.** A new section is added to chapter 77.12 RCW
9 to read as follows:

10 (1) Prior to the final issuance of any permits, leases, or other
11 approvals under this title for projects or proposals to occur within or
12 adjacent to marine aquatic habitats, the department must conduct and
13 finalize an endangered marine species review under section 1 of this
14 act.

15 (2) This section does not apply to licenses issued under chapter
16 77.32 or 77.65 RCW or to emergency oral permits under RCW 77.55.021.

17 NEW SECTION. **Sec. 3.** A new section is added to chapter 79.10 RCW
18 under the subchapter heading "Part 1 General Provisions" to read as
19 follows:

20 Prior to the final issuance of any permits, leases, or other
21 approvals under this title for projects or proposals to occur within or
22 adjacent to marine aquatic habitats, including on state-owned aquatic
23 lands, the department must conduct and finalize an endangered marine
24 species review under section 1 of this act.

25 NEW SECTION. **Sec. 4.** A new section is added to chapter 43.21A RCW
26 to read as follows:

27 Prior to the final issuance of any permits, leases, or other
28 approvals by the department for projects or proposals to occur within
29 or adjacent to marine aquatic habitats, the department must conduct and
30 finalize an endangered marine species review under section 1 of this
31 act.

32 NEW SECTION. **Sec. 5.** A new section is added to chapter 35.21 RCW
33 to read as follows:

34 Prior to the final issuance of any permits, leases, or other

1 approvals by a city or town for projects or proposals to occur within
2 or adjacent to marine aquatic habitats, the city or town must conduct
3 and finalize an endangered marine species review under section 1 of
4 this act.

5 NEW SECTION. **Sec. 6.** A new section is added to chapter 35A.21 RCW
6 to read as follows:

7 Prior to the final issuance of any permits, leases, or other
8 approvals by a code city for projects or proposals to occur within or
9 adjacent to marine aquatic habitats, the code city must conduct and
10 finalize an endangered marine species review under section 1 of this
11 act.

12 NEW SECTION. **Sec. 7.** A new section is added to chapter 36.32 RCW
13 to read as follows:

14 Prior to the final issuance of any permits, leases, or other
15 approvals by a county for projects or proposals to occur within or
16 adjacent to marine aquatic habitats, the county must conduct and
17 finalize an endangered marine species review under section 1 of this
18 act.

19 NEW SECTION. **Sec. 8.** A new section is added to chapter 53.08 RCW
20 to read as follows:

21 Prior to the final issuance of any permits, leases, or other
22 approvals by a port district for projects or proposals to occur within
23 or adjacent to marine aquatic habitats, the port district must conduct
24 and finalize an endangered marine species review under section 1 of
25 this act.

26 **Sec. 9.** RCW 43.21C.075 and 1997 c 429 s 49 are each amended to
27 read as follows:

28 (1) Because a major purpose of this chapter is to combine
29 environmental considerations with public decisions, any appeal brought
30 under this chapter shall be linked to a specific governmental action.
31 The state environmental policy act provides a basis for challenging
32 whether governmental action is in compliance with the substantive and
33 procedural provisions of this chapter. The state environmental policy

1 act is not intended to create a cause of action unrelated to a specific
2 governmental action.

3 (2) Unless otherwise provided by this section:

4 (a) Appeals under this chapter, including section 1 of this act,
5 shall be of the governmental action together with its accompanying
6 environmental determinations.

7 (b) Appeals of environmental determinations made (or lacking) under
8 this chapter, including section 1 of this act, shall be commenced
9 within the time required to appeal the governmental action which is
10 subject to environmental review.

11 (3) If an agency has a procedure for appeals of agency
12 environmental determinations made under this chapter, such procedure:

13 (a) Shall allow no more than one agency appeal proceeding on each
14 procedural determination (the adequacy of a determination of
15 significance/nonsignificance or of a final environmental impact
16 statement);

17 (b) Shall consolidate an appeal of procedural issues and of
18 substantive determinations made under this chapter (such as a decision
19 to require particular mitigation measures or to deny a proposal) with
20 a hearing or appeal on the underlying governmental action by providing
21 for a single simultaneous hearing before one hearing officer or body to
22 consider the agency decision or recommendation on a proposal and any
23 environmental determinations made under this chapter, with the
24 exception of:

25 (i) An appeal of a determination of significance;

26 (ii) An appeal of a procedural determination made by an agency when
27 the agency is a project proponent, or is funding a project, and chooses
28 to conduct its review under this chapter, including any appeals of its
29 procedural determinations, prior to submitting an application for a
30 project permit;

31 (iii) An appeal of a procedural determination made by an agency on
32 a nonproject action; or

33 (iv) An appeal to the local legislative authority under RCW
34 43.21C.060 or other applicable state statutes;

35 (c) Shall provide for the preparation of a record for use in any
36 subsequent appeal proceedings, and shall provide for any subsequent
37 appeal proceedings to be conducted on the record, consistent with other
38 applicable law. An adequate record consists of findings and

1 conclusions, testimony under oath, and taped or written transcript. An
2 electronically recorded transcript will suffice for purposes of review
3 under this subsection; and

4 (d) Shall provide that procedural determinations made by the
5 responsible official shall be entitled to substantial weight.

6 (4) If a person aggrieved by an agency action has the right to
7 judicial appeal and if an agency has an administrative appeal
8 procedure, such person shall, prior to seeking any judicial review, use
9 such agency procedure if any such procedure is available, unless
10 expressly provided otherwise by state statute.

11 (5) Some statutes and ordinances contain time periods for
12 challenging governmental actions which are subject to review under this
13 chapter, such as various local land use approvals (the "underlying
14 governmental action"). RCW 43.21C.080 establishes an optional "notice
15 of action" procedure which, if used, imposes a time period for
16 appealing decisions under this chapter. This subsection does not
17 modify any such time periods. In this subsection, the term "appeal"
18 refers to a judicial appeal only.

19 (a) If there is a time period for appealing the underlying
20 governmental action, appeals under this chapter shall be commenced
21 within such time period. The agency shall give official notice stating
22 the date and place for commencing an appeal.

23 (b) If there is no time period for appealing the underlying
24 governmental action, and a notice of action under RCW 43.21C.080 is
25 used, appeals shall be commenced within the time period specified by
26 RCW 43.21C.080.

27 (6)(a) Judicial review under subsection (5) of this section of an
28 appeal decision made by an agency under subsection (3) of this section
29 shall be on the record, consistent with other applicable law.

30 (b) A taped or written transcript may be used. If a taped
31 transcript is to be reviewed, a record shall identify the location on
32 the taped transcript of testimony and evidence to be reviewed. Parties
33 are encouraged to designate only those portions of the testimony
34 necessary to present the issues raised on review, but if a party
35 alleges that a finding of fact is not supported by evidence, the party
36 should include in the record all evidence relevant to the disputed
37 finding. Any other party may designate additional portions of the
38 taped transcript relating to issues raised on review. A party may

1 provide a written transcript of portions of the testimony at the
2 party's own expense or apply to that court for an order requiring the
3 party seeking review to pay for additional portions of the written
4 transcript.

5 (c) Judicial review under this chapter shall without exception be
6 of the governmental action together with its accompanying environmental
7 determinations.

8 (7) Jurisdiction over the review of determinations under this
9 chapter in an appeal before an agency or superior court shall upon
10 consent of the parties be transferred in whole or part to the
11 shorelines hearings board. The shorelines hearings board shall hear
12 the matter and sign the final order expeditiously. The superior court
13 shall certify the final order of the shorelines hearings board and the
14 certified final order may only be appealed to an appellate court. In
15 the case of an appeal under this chapter regarding a project or other
16 matter that is also the subject of an appeal to the shorelines hearings
17 board under chapter 90.58 RCW, the shorelines hearings board shall have
18 sole jurisdiction over both the appeal under this section and the
19 appeal under chapter 90.58 RCW, shall consider them together, and shall
20 issue a final order within one hundred eighty days as provided in RCW
21 90.58.180.

22 (8) For purposes of this section and RCW 43.21C.080, the words
23 "action", "decision", and "determination" mean substantive agency
24 action including any accompanying procedural determinations under this
25 chapter (except where the word "action" means "appeal" in RCW
26 43.21C.080(2)). The word "action" in this section and RCW 43.21C.080
27 does not mean a procedural determination by itself made under this
28 chapter. The word "determination" includes any environmental document
29 required by this chapter and state or local implementing rules. The
30 word "agency" refers to any state or local unit of government. Except
31 as provided in subsection (5) of this section, the word "appeal" refers
32 to administrative, legislative, or judicial appeals.

33 (9) The court in its discretion may award reasonable attorneys'
34 fees of up to one thousand dollars in the aggregate to the prevailing
35 party, including a governmental agency, on issues arising out of this
36 chapter if the court makes specific findings that the legal position of
37 a party is frivolous and without reasonable basis.

1 **Sec. 10.** RCW 43.21C.110 and 1997 c 429 s 47 are each amended to
2 read as follows:

3 It shall be the duty and function of the department of ecology:

4 (1) To adopt and amend thereafter rules of interpretation and
5 implementation of this chapter, including section 1 of this act,
6 subject to the requirements of chapter 34.05 RCW, for the purpose of
7 providing uniform rules and guidelines to all branches of government
8 including state agencies, political subdivisions, public and municipal
9 corporations, and counties. The proposed rules shall be subject to
10 full public hearings requirements associated with rule promulgation.
11 Suggestions for modifications of the proposed rules shall be considered
12 on their merits, and the department shall have the authority and
13 responsibility for full and appropriate independent promulgation and
14 adoption of rules, assuring consistency with this chapter as amended
15 and with the preservation of protections afforded by this chapter. The
16 rule-making powers authorized in this section shall include, but shall
17 not be limited to, the following phases of interpretation and
18 implementation of this chapter:

19 (a) Categories of governmental actions which are not to be
20 considered as potential major actions significantly affecting the
21 quality of the environment, including categories pertaining to
22 applications for water right permits pursuant to chapters 90.03 and
23 90.44 RCW. The types of actions included as categorical exemptions in
24 the rules shall be limited to those types which are not major actions
25 significantly affecting the quality of the environment. The rules
26 shall provide for certain circumstances where actions which potentially
27 are categorically exempt require environmental review. An action that
28 is categorically exempt under the rules adopted by the department may
29 not be conditioned or denied under this chapter.

30 (b) Rules for criteria and procedures applicable to the
31 determination of when an act of a branch of government is a major
32 action significantly affecting the quality of the environment for which
33 a detailed statement is required to be prepared pursuant to RCW
34 43.21C.030.

35 (c) Rules and procedures applicable to the preparation of detailed
36 statements, endangered marine species reviews, and other environmental
37 documents, including but not limited to rules for timing of
38 environmental review, obtaining comments, data and other information,

1 and providing for and determining areas of public participation which
2 shall include the scope and review of draft environmental impact
3 statements.

4 (d) Scope of coverage and contents of detailed statements and
5 endangered marine species reviews assuring that such statements and
6 reviews are simple, uniform, and as short as practicable; statements
7 are required to analyze only reasonable alternatives and probable
8 adverse environmental impacts which are significant, and may analyze
9 beneficial impacts.

10 (e) Rules and procedures for public notification of actions taken
11 and documents prepared.

12 (f) Definition of terms relevant to the implementation of this
13 chapter including the establishment of a list of elements of the
14 environment. Analysis of environmental considerations under RCW
15 43.21C.030(2) may be required only for those subjects listed as
16 elements of the environment (or portions thereof). The list of
17 elements of the environment shall consist of the "natural" and "built"
18 environment. The elements of the built environment shall consist of
19 public services and utilities (such as water, sewer, schools, fire and
20 police protection), transportation, environmental health (such as
21 explosive materials and toxic waste), and land and shoreline use
22 (including housing, and a description of the relationships with land
23 use and shoreline plans and designations, including population).

24 (g) Rules for determining the obligations and powers under this
25 chapter of two or more branches of government involved in the same
26 project significantly affecting the quality of the environment.

27 (h) Methods to assure adequate public awareness of the preparation
28 and issuance of detailed statements required by RCW 43.21C.030(2)(c)
29 and endangered marine species reviews required under section 1 of this
30 act.

31 (i) To prepare rules for projects setting forth the time limits
32 within which the governmental entity responsible for the action shall
33 comply with the provisions of this chapter.

34 (j) Rules for utilization of a detailed statement for more than one
35 action and rules improving environmental analysis of nonproject
36 proposals and encouraging better interagency coordination and
37 integration between this chapter and other environmental laws.

1 (k) Rules relating to actions which shall be exempt from the
2 provisions of this chapter in situations of emergency.

3 (l) Rules relating to the use of environmental documents in
4 planning and decision making and the implementation of the substantive
5 policies and requirements of this chapter, including procedures for
6 appeals under this chapter.

7 (m) Rules relating to the level of detail and other requirements of
8 endangered marine species reviews required under section 1 of this act.

9 (n) Rules and procedures that provide for the integration of
10 environmental review with project review as provided in RCW 43.21C.240.
11 The rules and procedures shall be jointly developed with the department
12 of community, trade, and economic development and shall be applicable
13 to the preparation of environmental documents for actions in counties,
14 cities, and towns planning under RCW 36.70A.040. The rules and
15 procedures shall also include procedures and criteria to analyze
16 planned actions under RCW 43.21C.031(2) and revisions to the rules
17 adopted under this section to ensure that they are compatible with the
18 requirements and authorizations of chapter 347, Laws of 1995, as
19 amended by chapter 429, Laws of 1997. Ordinances or procedures adopted
20 by a county, city, or town to implement the provisions of chapter 347,
21 Laws of 1995 prior to the effective date of rules adopted under this
22 subsection (1)(~~(m)~~) (n) shall continue to be effective until the
23 adoption of any new or revised ordinances or procedures that may be
24 required. If any revisions are required as a result of rules adopted
25 under this subsection (1)(~~(m)~~) (n), those revisions shall be made
26 within the time limits specified in RCW 43.21C.120.

27 (2) In exercising its powers, functions, and duties under this
28 section, the department may:

29 (a) Consult with the state agencies and with representatives of
30 science, industry, agriculture, labor, conservation organizations,
31 state and local governments, and other groups, as it deems advisable;
32 and

33 (b) Utilize, to the fullest extent possible, the services,
34 facilities, and information (including statistical information) of
35 public and private agencies, organizations, and individuals, in order
36 to avoid duplication of effort and expense, overlap, or conflict with
37 similar activities authorized by law and performed by established
38 agencies.

1 (3) Rules adopted pursuant to this section shall be subject to the
2 review procedures of chapter 34.05 RCW.

--- END ---