

# HOUSE BILL REPORT

## HB 2253

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### As Reported by House Committee On:

Environment

General Government Appropriations & Oversight

**Title:** An act relating to modernizing the functionality of the state environmental policy act without compromising the underlying intent of the original legislation.

**Brief Description:** Modernizing the functionality of the state environmental policy act.

**Sponsors:** Representatives Fitzgibbon, Billig and Jenkins.

### Brief History:

#### Committee Activity:

Environment: 1/13/12, 1/27/12 [DPS];

General Government Appropriations & Oversight: 2/2/12, 2/3/12 [DP2S(w/o sub ENVI)].

#### Brief Summary of Second Substitute Bill

- Requires the Department of Ecology (DOE) to conduct two phases of rulemaking over the next two years to update the State Environmental Policy Act (SEPA) categorical exemptions in rule, as well as the SEPA environmental checklist, and specifies minimum requirements to be included in the initial phase of rulemaking.
- Modifies other provisions under the SEPA related to planned actions and environmental checklist requirements.
- Specifies that agencies that may be impacted by a proposed subarea plan should be notified.
- Authorizes funding in the Growth Management Planning and Environmental Review Fund to be used for loans, as well as grants, to local governments.
- Requires the DOE in its 2013 rulemaking to create a categorical exemption for projects designed to restore natural wildlife or fishery habitats, or to serve as environmental mitigation for other projects.
- Requires that public notice be given and a public meeting be held before a scoping notice for a planned action is issued, if the planned action encompasses the entire jurisdictional boundary of a county, city, or town.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

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## HOUSE COMMITTEE ON ENVIRONMENT

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Upthegrove, Chair; Tharinger, Vice Chair; Short, Ranking Minority Member; Fitzgibbon, Hansen, Jinkins, Moscoso, Pollet, Takko and Wylie.

**Minority Report:** Do not pass. Signed by 4 members: Representatives Crouse, Morris, Pearson and Shea.

**Staff:** Anna Jackson (786-7194).

### **Background:**

#### State Environmental Policy Act.

The State Environmental Policy Act (SEPA) applies to decisions by every state and local agency within Washington. The SEPA applies to both "project" and "nonproject" actions of state and local agencies. Examples of nonproject actions include an agency decision on a policy, plan, or program, as well as legislation, ordinances, rules, and regulations that contain standards controlling use of the environment. One agency is usually identified as the lead agency for a specific proposal. The lead agency is responsible for identifying and evaluating the potential adverse environmental impacts of a proposal. Some minor projects do not require environmental review, so the lead agency will first decide if environmental review is needed. If the lead agency determines that a proposed project will have a probable significant, adverse impact on the environment, it must prepare an Environmental Impact Statement (EIS). If the proposed project is the type of project that has been "categorically exempt" from the SEPA review process, no further environmental review is required.

Categorical exemptions are identified in both the Revised Code of Washington (RCW) and the Washington Administrative Code (WAC). The Department of Ecology (DOE) may adopt categorical exemptions by rule for the types of actions that are not major actions significantly affecting the quality of the environment. An action that is categorically exempt under the rules adopted by the DOE may not be conditioned or denied (RCW 43.21C.110).

#### Growth Management Act.

The Growth Management Act (GMA) is the comprehensive land use planning framework for county and city governments in Washington. Enacted in 1990 and 1991, the GMA establishes numerous requirements for local governments obligated by mandate or choice to fully plan under the GMA and a reduced number of directives for all other counties and cities. Twenty-nine of Washington's 39 counties, and the cities within those counties, are planning jurisdictions. The Department of Commerce (Commerce) provides technical and financial assistance to jurisdictions that must implement requirements of the GMA.

The SEPA permits counties and cities to designate types of projects as "planned actions." A planned action is a project plan whose impacts are analyzed in an EIS associated with specified planning actions, including, but not limited to, a local government's use of a

comprehensive plan or subarea plan under the GMA. Development consistent with a planned action may not require additional environmental review.

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### **Summary of Substitute Bill:**

#### Required Rulemaking by the DOE.

By December 31, 2012, the DOE is required to update the rule-based categorical exemptions to the SEPA found in WAC 197-11-800, as well as update the environmental checklist found in WAC 197-11-960. In updating the categorical exemptions, the DOE must increase the existing maximum threshold levels for the following project types:

- the construction or location of single-family residential developments;
- the construction or location of multifamily residential development;
- the construction of an agricultural structure, other than a feed lot, that is similar to a barn, a loafing shed, a farm equipment storage building, or a produce-storing or packing structure;
- the construction of an office, school, commercial building, recreational building, service building, or storage building, including any associated parking areas or facilities for any of these structures;
- landfilling or excavation activities; and
- the installation of an electric facility, lines, equipment, or appurtenances, other than substations.

In updating the categorical exemptions, the DOE also must establish maximum exemption levels for action types that differ based on whether the project is proposed to occur in: (1) an incorporated city; (2) an unincorporated area within an Urban Growth Area; (3) an unincorporated area outside of an Urban Growth Area but within a county planning under the GMA; or (4) an unincorporated area within a county not planning under the GMA.

In updating the environmental checklist, the DOE must reduce duplication in the checklist that has occurred due to subsequent amendments to the SEPA and SEPA rules that have occurred since the checklist was last updated. The DOE may not include any new subjects in the scope of the checklist.

Until the completion of the rulemaking required by December 31, 2012, any actions located within a city or a city's Urban Growth Area may apply the highest categorical exemption levels authorized under WAC 197-11-800, regardless if the city or county with jurisdiction has exercised its authority to raise the exemption levels above the established minimum, unless the city or county with jurisdiction passes an ordinance or resolution that lowers the exemption level below the allowed maximum but not less than the default minimum levels detailed in rule.

By December 31, 2013, the DOE must update the thresholds for all other project actions. During this process, the DOE may also review and update the thresholds resulting from the 2012 rulemaking process.

For both phases of required rulemaking, the DOE must convene an advisory committee to assist in updating the environmental checklist and the thresholds for other project actions consisting of members representing, at minimum, the following: cities; counties; business interests; environmental interests; agricultural interests; cultural resources interests; state agencies; and tribal governments.

In addition, for both phases of rulemaking, the DOE must consider opportunities to ensure that state agencies and other interested parties can continue to receive notice about projects of interest through a means other than through notice under the SEPA.

#### Planned Actions.

The types of development that qualify as a planned action are expanded to include essential public facilities that are part of a residential, office, school, commercial, recreational, service, or industrial development that is designated as a planned action. In addition, local governments are given the authority to define the types of development included in the planned action. To determine project consistency with a planned action ordinance, local governments may use either: (1) a modified environmental checklist pursuant to rules adopted by the DOE to implement the SEPA; (2) a form that is designated in the planned action ordinance; or (3) a form contained in rules adopted by an agency pursuant to the SEPA requirements.

The DOE must accept electronic submittal of all required notice filings from lead agencies.

#### Categorical Exemptions.

Categorical exemptions are created in statute for the following activities:

- habitat restoration projects and environmental mitigation projects (excluding stand-alone commercial wetland mitigation banks on more than five acres, fish hatcheries, and projects that are located on or that would affect lands of long-term commercial significance under the GMA); and
- certain nonproject actions, including amendments to development regulations required to ensure consistency with comprehensive plans and shoreline master programs, and amendments to local technical codes to ensure consistency with minimum standards contained in state law.

#### Local Options for Completing an Environmental Checklist.

A lead agency using an environmental checklist may satisfy the requirements of the checklist by identifying instances where the questions on the checklist are adequately covered by a local ordinance, development regulation, land use plan, or other legal authority, provided the lead agency explains how the proposed project satisfies the applicable local legal authority. Even if a lead agency identifies instances where a local ordinance or regulation covers the questions on the checklist, an applicant may still provide answers to any questions on the checklist.

A lead agency may not ignore or delete a question on the checklist.

## Growth Management Planning and Environmental Review Fund.

Money in the Growth Management Planning and Environmental Review Fund may be used to make loans, in addition to grants, to local governments for the purposes outlined in the SEPA. In awarding grants or loans, the Commerce is directed to give preference to proposals that include, among other elements listed in statute, environmental review that addresses the impacts of increased density or intensity of comprehensive plans, subarea plans, or receiving areas designated by a city or town under the regional transfer of development rights program.

### **Substitute Bill Compared to Original Bill:**

The substitute bill removes the Categorical Exemptions Board (Board) and restores all SEPA rulemaking authority with the DOE. The substitute bill also directs the DOE to conduct two phases of rulemaking over the next two years to update the categorical exemptions in rule, as well as the environmental checklist, and specifies minimum requirements to be included in the initial rulemaking. The DOE must convene an advisory committee consisting of members from a vast array of sectors to assist in both phases of rulemaking to update the thresholds for categorical exemptions and the environmental checklist.

The DOE is required to accept electronic submittal of all required notice filings from lead agencies.

Commercial development under 10,000 square feet and industrial development are removed from the list of development types that a local government may adopt an exemption for, if certain criteria are met.

Projects that are located on or which would affect lands designated as agricultural lands of long-term significance pursuant to the GMA are added to the list of projects that still require environmental review under the SEPA, even if they are designed exclusively to restore natural wildlife or fishery habitats, or if they serve as environmental mitigation for other projects.

The substitute bill removes the statutory exemption for certain utility-related actions (although the DOE is required to increase the existing maximum threshold levels for the installation of an electric facility, lines, equipment, or appurtenances, other than substations, in its initial phase of rulemaking). In addition, the substitute bill specifies that the statutory categorical exemptions for nonproject actions are applicable to all local governments, not just those planning under the GMA. Finally, the substitute bill removes statutory categorical exemptions for project actions.

The substitute bill specifies that an applicant may still provide answers to any questions on the environmental checklist, even if a lead agency identifies instances where questions on the checklist are adequately covered by a locally adopted ordinance, development regulation, land use plan, or other legal authority.

The substitute bill also specifies that nothing in the section of law related to the environmental checklist affects the general SEPA appeal provisions.

The sections related to integrated notice, comment, and appeals procedures for projects under the SEPA and the Local Planning and Review Act are removed.

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**Appropriation:** None.

**Fiscal Note:** Requested on January 10, 2012.

**Effective Date of Substitute Bill:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) This bill is the result of a lengthy stakeholder process. The SEPA was enacted in 1971, and it has not kept pace with other laws that have been updated since their passage, such as the GMA. The goal of this bill is to streamline the SEPA in order to make it more useful for applicants, so it includes provisions related to planned actions, infill exemptions, and integrating the notice and comment procedures with the Local Project Review Act. The bill is a work in progress, but the ultimate objective is to have a more useful process with better results on the ground for the environment.

The attempt to streamline the SEPA in this bill is admirable and will be useful for cities and counties in their planning processes. The SEPA checklist should also include provisions related to downstream impacts.

The focus of the discussions surrounding this bill has been on adding categorical exemptions or raising the current thresholds, but this has not been very productive so the sponsor and stakeholders are now looking at scaling back the categorical exemptions and focusing more on reforming or streamlining the planned action process.

The creation of the Board represents a compromise between different stakeholders' interests. Some stakeholders have concerns about creating new categorical exemptions in statute, while others have concerns about directing the DOE to conduct rulemaking. The Board would function similarly to the Forest Practices Board, with representatives that would be able to engage at the level of detail necessary to implement rules related to categorical exemptions under the SEPA. Also, the representatives listed in the bill on the Board would allow input from a broad spectrum of stakeholders. The fiscal impact of creating this Board may be significant, but it is a practical solution to this problem.

Early, upfront planning under the SEPA process is a good idea, as is allowing local governments to get loans and grants from the Growth Management Planning and Environmental Review Fund and implement cost recovery. Other beneficial elements of the bill include new options for local governments to complete the environmental checklist, the changes to planned actions, and the categorical exemptions for nonproject actions. The notice and comment sections still need work, but are a good starting point.

Creating categorical exemptions for nonproject actions, as this bill does, would be beneficial for local governments. Cost and productivity are major elements in nonproject review, and there are numerous examples of a city trying to update its regulations or remove archaic ones, and still being required to go through the entire process under the SEPA. This is not an effective use of local governments' time or resources.

The categorical exemptions created in this bill for commercial and industrial uses within Urban Growth Areas would be useful to cities with high density areas.

Allowing local governments to use local ordinances and development regulations to meet the SEPA checklist requirements is a good idea that will ease the burden on local governments.

(Neutral) The need for reforming the SEPA is widely recognized; currently, applicants spend too much time asking questions that have already been answered. This bill has all of the main ingredients for accomplishing this reform. Key tools include new infill exemptions, better options for planned actions, creating new statutory categorical exemptions for nonproject actions, and giving local governments more options for meeting requirements on the environmental checklist.

Dividing the authority to conduct rulemaking regarding categorical exemptions between the DOE and a new Board raises a number of concerns and would likely lead to confusion. The creation of categorical exemptions for project actions is also concerning. The integrated notice and comment provisions need additional work.

(With concerns) The prime sponsor should be commended for undertaking such a major reform of a complex environmental law, but reform should be enacted in response to an identified long-term need, not a transitory one like an economic downturn.

This is not a wise time to create a new Board, given the state's current economic situation. The Board does not represent a practical path forward; the actions the bill specifies the Board would be able to perform can already be performed by the DOE, and mediated rulemaking is an option for doing so. The bill also specifies that the Board would never be able to consider climate change, which is problematic.

If the Board is created, it should have a representative from labor interests as well.

Categorical exemptions should not be created for project actions in statute, but more should be created via rulemaking. The new statutory categorical exemptions in the bill for project and nonproject actions should apply to all local governments, not just those planning under the GMA. Regarding the exemption for habitat restoration projects, the Department of Fish and Wildlife estimates that approximately 20 projects per year would be impacted, and there is some concern around this exemption.

The new categorical exemptions for industrial development may need some sideboards, possibly around use, not size.

The new options for local governments to complete the SEPA environmental checklist should not be subject to appeal.

The integrated notice, comment, and appeals procedures contained in the bill are problematic as currently written.

The Department of Archaeology and Historical Preservation has an extensive database of areas identified as one of cultural resources significance, and the SEPA is really the only notice tool currently available in the state for cultural resources. The requirement in the bill related to consultation still being required with the Department of Archaeology and Historical Preservation for habitat restoration and environmental mitigation projects should be extended to all projects.

(Opposed) None.

**Persons Testifying:** (In support) Representative Fitzgibbon, prime sponsor; Kelsey Bech, and Mike Podowski, City of Seattle; Bob Marti, City of Sultan; Carl Schroeder, Association of Washington Cities; and Mary Kate McGee, City of Spokane Valley.

(Neutral) Tom Clingman, Washington State Department of Ecology.

(With concerns) David Baker, City of Kenmore; Carly Golden, City of Tacoma; Faith Lumsden, The Governor's Office of Regulatory Assistance; Pamela Krueger, Washington State Department of Natural Resources; Brandon Houskeeper, Association of Washington Business; Josh Weiss, Washington State Association of Counties; Michael Groesch, Washington Trust for Historic Preservation; Cody Arledge, United Food and Commercial Workers Local 21; Miguel Perez-Gibson, Colville Tribes; Dawn Vyvyan, Yakama Nation and Puyallup Tribe; Scott Hildebrand, Master Builders Association of King and Snohomish Counties; April Putney, Futurewise; and Maurin McBroom, Washington Environmental Council.

**Persons Signed In To Testify But Not Testifying:** None.

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## HOUSE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS & OVERSIGHT

**Majority Report:** The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Environment. Signed by 8 members: Representatives Hudgins, Chair; Moscoso, Vice Chair; Taylor, Assistant Ranking Minority Member; Blake, Fitzgibbon, Ladenburg, Pedersen and Van De Wege.

**Minority Report:** Do not pass. Signed by 3 members: Representatives McCune, Ranking Minority Member; Ahern and Wilcox.

**Staff:** Michael Bennion (786-7118).

**Summary of Recommendation of Committee On General Government Appropriations & Oversight Compared to Recommendation of Committee On Environment:**



The categorical exemption is removed for projects designed to restore natural wildlife or fishery habitats or to serve as environmental mitigation for other projects.

The Department of Ecology (DOE), in its 2013 rulemaking, must create a categorical exemption for projects designed to restore natural wildlife or fishery habitats or to serve as environmental mitigation for other projects. During this process, the DOE may also review and update the thresholds resulting from the 2012 rulemaking process.

Public notice must be given and a public meeting be held before a scoping notice for a planned action is issued, if the planned action encompasses the entire jurisdictional boundary of a county, city or town.

Provisions related to the environmental checklist are clarified as not modifying existing rules for determining the lead agency, nor modifying agency procedures for compliance when an agency other than a local government is serving as the lead agency.

**Appropriation:** None.

**Fiscal Note:** Preliminary fiscal note available. New fiscal note requested on February 1, 2012.

**Effective Date of Second Substitute Bill:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) A lot of time has been spent developing this bill over the last year with a large group of diverse stakeholders, ranging from local governments to environmental and business interests. Most of the changes made in the second substitute bill should reduce the fiscal impact of the bill, particularly to the Department of Archaeology and Historic Preservation and to the DOE, but reviewing the DOE's revised fiscal note will be helpful. The expenditures in this bill are worthwhile because they will result in serious time and expense savings for cities, counties, and developers throughout the state.

By removing the creation of the Categorical Exemptions Board, the second substitute bill significantly reduces the cost to the DOE, and the only remaining cost is for conducting rulemaking, which would be an 18-month process. The DOE's revised fiscal note will be around \$180,000 in expenditures for fiscal year (FY) 2013 and \$105,000 in FY 2014, which includes the work on the part of the assistant attorneys general. This is a very useful bill, and it recognizes that rulemaking is required to update the State Environmental Policy Act (SEPA) because the details of this law are contained in rule.

This bill is a good investment for a relatively small amount of money, and it would result in long-term benefit to the state. The fiscal note is getting smaller because the bill itself is getting smaller—there is less policy in the substitute bill. Representative Fitzgibbon has done a great job at trying to strike the right balance between benefits to the business community and local governments while maintaining environmental protection. The

environmental caucus would still like to see more protection in the bill, but recognizes this bill is a middle road and it is worth moving forward.

The Association of Washington Cities (AWC) has been working on some iteration of this bill for two years, in an attempt to bring the SEPA into modern times. It is important to use local governments' ever-shrinking staff and resources as effectively as possible, and this bill moves in that direction. The AWC brought forward a more aggressive bill last session and aggressive Senate proposals this year. Regarding fiscal impacts, one of our original ideas was to do some of these changes in statute rather than through rulemaking, but that was problematic for some people. We are still working on this and are hopeful that the DOE can find a way to make the required rulemaking happen within their existing resources.

The original impetus for this bill was to try to find ways for local governments to do things more efficiently and save money at the local level, and this bill takes a step in that direction.

(Opposed) None.

**Persons Testifying:** Representative Fitzgibbon, prime sponsor; Tom Clingman, Department of Ecology; Mo McBrown, Washington Environment Council; Carl Schroeder, Association of Washington Cities; and April Putney, Futurewise.

**Persons Signed In To Testify But Not Testifying:** None.