

# SENATE BILL REPORT

## E2SHB 2253

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As of February 21, 2012

**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:** House Committee on General Government Appropriations & Oversight (originally sponsored by Representatives Fitzgibbon, Billig and Jinkins).

**Brief History:** Passed House: 2/13/12, 92-6.

**Committee Activity:** Environment: 2/21/12.

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### SENATE COMMITTEE ON ENVIRONMENT

**Staff:** Diane Smith (786-7410)

**Background:** The State Environmental Policy Act (SEPA) applies to decisions by every state and local agency within Washington. 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 DOE may not be conditioned or denied.

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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.*

The Growth Management Act (GMA) is the comprehensive land use planning framework for county and city governments in Washington. Enacted in 1990 and 1991, GMA establishes numerous requirements for local governments obligated by mandate or choice to fully plan under 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 GMA.

SEPA allows 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.

**Summary of Bill:** Required Rulemaking by the DOE. By December 31, 2012, DOE must increase the rule-based categorical exemptions to SEPA, as well as update the environmental checklist, both found in WAC. In updating the categorical exemptions, 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, 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, DOE must improve efficiency of the checklist and may not include any new subjects in the scope of the checklist, including climate and greenhouse gases.

Until the completion of the rulemaking required by December 31, 2012, a city or county may apply the highest categorical exemption levels authorized in WAC to any action, 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, DOE must update, but not decrease, the thresholds for all other project actions. During this process, DOE may also review and update the thresholds resulting from the 2012 rulemaking process. By December 31, 2013, DOE also must create a categorical exemption for projects designed to restore natural wildlife or fishery habitats or serve as environmental mitigation for other projects. Finally, DOE must propose methods for integrating the SEPA process with provisions of GMA.

For both phases of required rulemaking, 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. Members of the advisory committee must have direct experience with the implementation or application of SEPA.

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

Planned Actions. Planned action means development that:

- is designated as a planned action by counties, cities or towns planning under the GMA;
- has had its impacts adequately addressed under SEPA or GMA;
- has project level significant impacts adequately addressed in an EIS, unless the impacts are deferred to the project level;
- is inside an urban growth area (UGA);
- is not an essential public facility unless it is part of a designated planned action; and
- is consistent with the comprehensive plan.

To determine project consistency with a planned action ordinance, local governments may use either: (1) a modified environmental checklist pursuant to rules adopted by DOE to implement 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 SEPA requirements.

For a planned action that encompasses the entire jurisdictional boundary of a county, city, or town, at least one community meeting must be held before the scoping notice for such a planned action is issued. Notice of the scoping and of the community meeting must be mailed or otherwise verifiably provided to all property owners of record and affected federally recognized tribal governments.

Categorical Exemptions. Cities and counties planning under GMA may adopt categorical exemptions for the following activities proposed to fill in a UGA:

- residential development;
- mixed use development; or
- commercial development up to 65,000 square feet, not including retail development.

Nonproject actions, whether or not within a UGA, are categorically exempt from SEPA, as follows:

- amendments to development regulations that are required to ensure consistency with a comprehensive plan;
- amendments to development regulations that are required to ensure consistency with a shoreline master program;
- amendments to development regulations that will increase environmental protections in critical areas and shorelines;
- amendments to the building, energy and electrical codes adopted by local governments so that they are consistent with state law. and
- development regulations that do not change regulations applicable to the following: allowed uses or activities, intensity, density, building height, lot coverage, impervious surface limits, vegetation retention requirements, regulations for critical areas as defined in the GMA, cultural resource regulations, regulations for the protection of the environment, human health, and human safety, protections for other uses and activities, regulations for billboards and freestanding signs, requirements for public facilities or services, or uses, activities, developments, or structures that would have a probable adverse impact on the human or natural environment.

Tribal Notice. Upon receiving a completed environmental checklist, the lead agency must provide the checklist and other submitted documents, via mail and email, to the federally-recognized tribe or tribes' chair and natural resource manager affected by the proposed project.

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 SEPA. In awarding grants or loans, Commerce must 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.

**Appropriation:** None.

**Fiscal Note:** Requested on February 14, 2012.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: The categorical exemption for habitat needs to protect agricultural lands. The local checklist authority can work to provide valuable flexibility for everyone. The discussion about late-comer fees is continuing with agreement that project applicants should pay back a small portion of the money they save by the local government's provision of environmental review at the planning level. This bill is a modest effort at updating and reforming our state's core environmental protections. It allows local governments to focus their SEPA review on the projects with the most environmental risk. It removes duplicative reviews while helping to achieve growth management goals. Work is continuing to provide a fair and effective way to pay for this in a direct and adequate way. That certainty is provided is essential to the bill's purposes. It reduces costs while

safeguarding public participation and environmental priorities. Sideboards are needed to protect farmland. The rulemaking's elimination of climate change and greenhouse gases should be reinstated. The critical parts are the rulemaking, increasing categorical exemption thresholds and code review to comply with comprehensive and shoreline plans. The checklist language needs to be restored to help the smaller, less sophisticated project applicants.

CON: The unbridled categorical exemption for habitat restoration and mitigation projects can have serious environmental impact to farmland, the water table and ground water, and recreation. It compromises the intent of the original bill by eliminating the opportunity for public health concerns to be voiced. The water district's input would not be required. The categorical exemption language has a bias in favor of local processes. Flooded uplands can impact upland species. Notice provisions should be retained. Without SEPA review, the beach at the state park would have been lost. Aquifers should be added to the checklist. The attitude that fish are paramount over public health needs to be contested. Maximum thresholds should not be increased automatically. The infill allowance of 65,000 square foot buildings should go through environmental review. Giving tribes notice of the hearing when they are within a half mile of the jurisdiction-wide planned action is problematic, given ceded areas and watersheds. In addition to the notice added on the House floor, the tribes want notice during the application process.

OTHER: It is vital to update the rules, though the budget implications are unresolved. The blanket statutory exemption for wildlife mitigation is removed because the details are best suited for rulemaking, as is now required.

**Persons Testifying:** PRO: Representative Fitzgibbon, prime sponsor; Brandon Houskeeper, Assn. of WA Business; Art Castle, Building Assn. of WA; Josh Weiss, WA Assn. of Counties; Michael Shaw, American Planning Assn.- WA chapter; Carl Schroeder, Assn. of WA Cities; April Putney, Futurewise; Dan Wood, WA Farm Bureau.

CON: Ed Moats, Skagit County Farm Bureau; Rone Brewer, WA Waterfowl Assn.; Ralph Ferguson, Juniper Beach Water District; Dale Tyler, Camano Water Systems Assn.; Dawn Vyvyan, Puyallup Tribe, Yakima Nation.

OTHER: Tom Clingman, DOE.