SENATE BILL REPORT
E2SHB 2253

As Reported by Senate Committee On:
Environment, February 24, 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, 2/24/12 [DPA-WM, DNP].

SENATE COMMITTEE ON ENVIRONMENT

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.
Signed by Senators Nelson, Chair; Rolfes, Vice Chair; Chase, Fraser, Pridemore and Sheldon.

Minority Report: Do not pass.
Signed by Senators Ericksen, Ranking Minority Member; Honeyford and Morton.

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.

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.

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.

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.

Low impact development includes stormwater management practices integrated into a project design, that emphasize pre-disturbance hydrologic process of infiltration, storage, evaporation and transpiration.

Summary of Bill (Recommended Amendments): 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 propose categorical exemptions for low-impact development. 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 the Department of Archaeology and Historic Preservation (DAHP), the Department of Transportation (DOT), and other 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 either less than or 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 in the case of the jurisdiction-wide planning action, and to 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

Tribal Notice. Affected federally recognized tribes receive their initial notice of a project in writing by means of the notice of application of a development project. Further notices must be requested and may be sent electronically.

Local jurisdictions may recover a reasonable fee that is proportionate to the expenses incurred in preparation the nonproject EIS regarding planned actions and infill development. The project proponent may elect to pay the fee or to certify that it does not want the local jurisdiction to use the nonproject EIS. If the project proponent elects the latter and performs its own review, it may not make use of or benefit from the EIS prepared by the local jurisdiction.

Prior to collecting fees, the local jurisdiction must enact an ordinance establishing the total amount of expenses to be recovered through fees. The fees may be paid under protest. No fee may be assessed after the expenses have been fully recovered. If a court holds the environmental review regarding planned actions or infill development was not sufficient to comply with SEPA, the local jurisdiction must refund the fees it collected for the project. This requirement may be negotiated in order to reach a settlement.

A local jurisdiction may identify checklist items that are adequately covered by local ordinance, development regulation, land use plan or other legal authority. The lead agency must nevertheless consider the impact of the action on the particular environmental element and explain how the proposed project satisfies the underlying legal authority.

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 of town under the regional transfer of development rights program.

Without funding provided by June 30, 2012, the Act is null and void.

EFFECT OF CHANGES MADE BY ENVIRONMENT COMMITTEE (Recommended Amendments): Environmental mitigation for other projects; projects that are fish hatcheries; and projects that are located on or that are adjacent to agricultural land of long-term significance are deleted as subjects of the second round of rulemaking that creates categorical exemptions. Added to the second round of rulemaking is the direction to DOE to propose categorical exemptions for low-impact development. Together with the advisory committee, DOE must consider in its rulemaking, opportunities to ensure DOT and DAHP can receive notice about projects of interest through a means other than SEPA.

At least one community meeting must be held before the scoping notice is issued for a both jurisdiction-wide and non-jurisdiction-wide planned action ordinances. Notice must be given to agencies with jurisdiction over the future development anticipated for the planned action and to affected federally recognized tribes, without limitation as to the proximity of their ceded lands to the area affected by the ordinance.

The cost recovery section is restored and edited for clarity. Local jurisdictions may recover a reasonable fee that is proportionate to the expenses incurred in preparation the nonproject EIS regarding planned actions and infill development. The project proponent may elect to pay the fee or to certify that it does not want the local jurisdiction to use the nonproject EIS. If the project proponent elects the latter and performs its own review, it may not make use of or benefit from the EIS prepared by the local jurisdiction.

Prior to collecting fees, the local jurisdiction must enact an ordinance establishing the total amount of expenses to be recovered through fees. The fees may be paid under protest. No fee may be assessed after the expenses have been fully recovered. If a court holds the environmental review regarding planned actions or infill development was not sufficient to comply with SEPA, the local jurisdiction must refund the fees it collected for the project. his requirement may be negotiated in order to reach a settlement.

No amendments are made to RCW 43.21C.420, so that Section 6 of the underlying bill is deleted from this striking amendment so that existing statutory language for cost recovery is not changed.

When amendments are made to development regulations that create nonproject categorical exemptions, the impacts associated with the proposed regulations must be specifically addressed in the prior environmental review process.

Deleted is the statutory categorical exemption for amendments to development regulations that do not change various regulations.

The authority for a local jurisdiction to identify checklist items that are adequately covered by local ordinance, development regulation, land use plan or other legal authority is restored. The lead agency must nevertheless consider the impact of the action on the particular environmental element and explain how the proposed project satisfies the underlying legal authority.

Section 10 of the underlying bill, which states legislative findings, is deleted.

Notification to tribal governments is altered. Affected federally recognized tribes receive their initial notice of a project in writing by means of the notice of application of a development project. Further notices must be requested and may be sent electronically.

Without funding provided by June 30, 2012, the Act is null and void.

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 as Heard in Committee: 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.