

SENATE BILL REPORT

SB 6406

As of February 16, 2012

Title: An act relating to modifying programs that provide for the protection of the state's natural resources.

Brief Description: Modifying programs that provide for the protection of the state's natural resources.

Sponsors: Senators Hargrove, Hobbs, Delvin, Hatfield, Tom, Stevens, Regala, Morton, Ranker and Shin.

Brief History:

Committee Activity: Energy, Natural Resources & Marine Waters: 1/25/12.

Brief Summary of Bill

- Specifies circumstances in which a hydraulic project approval (HPA) is required.
- Establishes a system of HPA fees and exemptions.
- Specifically authorizes general and multiple site HPAs.
- Modifies civil and criminal enforcement provisions for HPAs.
- Integrates HPAs for forestry activities into the associated forest practices application (FPA).
- Extends the duration of an approved FPA.
- Increases FPA fees.
- Convenes the Council on Environmental Policy to conduct State Environmental Policy Act (SEPA) rulemaking.
- Modifies provisions relating to planned actions.
- Modifies and creates new statutory categorical exemptions.
- Makes other changes relating to SEPA, local development, and project review.

SENATE COMMITTEE ON ENERGY, NATURAL RESOURCES & MARINE WATERS

Staff: Curt Gavigan (786-7437)

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.

Background: Hydraulic Project Approvals (HPA). An HPA is required for any project that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state. HPAs are issued by the Department of Fish and Wildlife (DFW) to ensure the proper protection of fish life. There is currently no fee for an HPA. Generally, a person must apply for and obtain an HPA for each hydraulic project conducted.

A person is subject to a gross misdemeanor for certain HPA-related violations, which include conducting a hydraulic project without an HPA or violating a requirement or condition of an HPA. DFW may also impose civil penalties of up to \$100 per day for violations of the statutory provision that sets out the HPA requirement and basic permitting process.

Forest Practice Applications. The Forest Practices Act establishes four classes of forest practices based on the potential for a proposed operation to adversely affect public resources. The Forest Practices Board (Board) establishes standards that determine which forest practices are included in each class.

Any owner of forest land who proposes to conduct a forest practice must pay an application fee. The fee for most forest practices applications is \$50. However, a fee of \$500 generally applies to forest practice operations on lands that have high potential for conversion.

State Environmental Policy Act (SEPA). SEPA applies to decisions by every state and local agency within Washington, including proposals for projects such as construction projects; and nonproject actions such as an agency decision on a policy, plan, or program. The lead agency is responsible for identifying and evaluating the potentially adverse environmental impacts of a proposal. Generally, an Environmental Impact Statement (EIS) must be prepared for a proposal which the lead agency determines will have a probable significant, adverse impact on the environment. However, statute and SEPA rules contain categorical exemptions for certain actions that are not major actions significantly affecting the quality of the environment. Categorically exempt actions do not require further environmental review.

Summary of Bill: Specifies Circumstances in Which an HPA is Required. An HPA is required for a hydraulic project conducted at or below the ordinary high water line, and in circumstances where the Director of DFW determines that a project above the ordinary high water line:

- fits one of seven project types;
- will use, divert, obstruct, or change the natural flow or bed of any waters of the state; and
- creates a reasonable likelihood of impacts to fish life.

By September 1, 2013, the Office of Regulatory Assistance must conduct a study including analysis of the HPA and other regulatory programs that provide fish protection measures above the ordinary high water line.

Establishes a System of HPA Fees and Exemptions. DFW must generally charge fees for HPAs according to a statutory fee schedule that is adjusted annually for inflation. The fees are as follows:

- *Single-Site Permits.* A total of \$125 for low-complexity projects, \$250 for medium-complexity projects, and \$700 for high-complexity projects, with project complexity based on categories established in the act;
- *Multiple-Site Permits.* A fee established based on project complexity and the number of sites;
- *General Permits.* A total of \$5,000 for a general permit, authorizing up to three project types; and
- *Permit Modification.* A permit modification fee of \$75.

Applicants receive fee exemptions for specified project types, and DFW must refund a portion or all of the application submittal and permit processing fee in certain circumstances.

Specifically Authorizes General and Multiple Site HPAs. DFW may issue a multiple-site permit, which provides site-specific permitting for multiple projects. General permits are specifically authorized, which cover multiple projects at unspecified sites across a defined area that involve repair or maintenance activities. A specific category of general permit is provided for regular maintenance activities at marinas and marine terminals.

Modifies Civil and Criminal Enforcement Provisions for HPAs. DFW is authorized to issue a compliance notice or order for HPA violations. A compliance notice informs a person of a violation and recommends corrective actions. Only the Director of DFW may issue a compliance order, which specifies necessary corrective actions and is effective immediately. The Director of DFW may levy civil penalties of up to \$10,000 for each HPA related violation depending on project complexity.

Criminal penalties may apply to a violation of a stop work order or a DFW rule-identifying conditions under which an HPA is approved.

Integrates HPAs for Forestry Activities into the Associated Forest Practices Application (FPA). By July 1, 2013, the Board must incorporate fish protection standards from current DFW rules into the Forest Practices Rules, as well as approve technical guidance. Once these rules have been incorporated, a hydraulic project requiring a FPA is exempt from the HPA requirement and is regulated under the forest practices rules. Future changes in DFW's fish protection rules relevant to forestry must go through the forest practices adaptive management process and then be incorporated into the forest practices rules.

DFW may continue to review and comment on any FPA, and may provide information and technical assistance to the Department of Natural Resources (DNR) regarding any forestry-related hydraulic project. DFW must also provide concurrence review for certain FPAs that involve a water crossing structure, including specified culvert projects, bridge projects, and projects involving fill. Under this process, applicants must submit plans and specifications to DFW prior to submitting their FPA, and DFW has up to 30 days to review the project for consistency with standards for the protection of fish life.

Extends Timeframes Relating to FPAs. The duration of an FPA or notification is increased from two to three years, and can be renewed subject to any new forest practices rules.

Provides Local Governments the Authority to Issue a Notice of Conversion. The authority to issue a notice of conversion to a landowner who has converted forestland without authorization is transferred from DNR to local government entities. When DNR learns of potential conversation activities, it must take appropriate enforcement action under the forest practices rules and provide notice to the appropriate local government entities.

Increases FPA Fees. FPA fees are increased threefold. Specifically, forest practices applications in which the land is to remain in forestry, Class II, III, and IV special, are increased from \$50 to \$150. Class IV general applications involve conversion related activities and are increased from \$500 to \$1500.

Convenes the Council on Environmental Policy (Council) to Conduct SEPA Rulemaking. The Council is established as a five member body consisting of the Director of DOE, or a designee, as chair. Additionally, the Governor must appoint a county planning director, a city planning director, a representative of environmental interests, and a representative of business interests to the Council. Members on the Council serve four-year terms. DOE provides staff support to and serve as the administrative location for the Council.

Rulemaking authority regarding SEPA is transferred from DOE to the Council. Additionally, the Council is directed to complete rulemaking processes by December 31, 2012, and by December 31, 2013, its review of current categorical exemptions and the environmental checklist process. In reviewing SEPA rules, the Council must:

- ensure that rules reflect current conditions;
- reduce duplicative rules and regulations; and
- minimize avoidable costs while still meeting environmental objectives.

Modifies Provisions Relating to Planned Actions. Authorizes planned action status for an ordinance receiving SEPA environmental review, whether or not an EIS was required. The types of essential public facilities 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. The documents by which a local government may use to determine consistency with a planned action ordinance are specified to include the environmental checklist or a form adopted in the planned action ordinance.

Modifies and Creates New Statutory Categorical Exemptions. The existing categorical exemption for infill is expanded to include projects that propose commercial and industrial infill where current density and intensity of use is lower than called for in the local comprehensive plan.

Subject to local government authority to adopt lower thresholds, new statutory categorical exemptions are established for certain:

- nonproject actions including amendments to development regulations required to ensure consistency with comprehensive plans and shoreline master programs; and
- project actions including specified activities at below given thresholds, such as construction of single family dwelling units, construction of commercial buildings, and landfill or excavation activities.

Makes Other Changes Relating to SEPA, Local Development, and Project Review. A number of other changes to statutes pertaining to SEPA and local development review are made, including:

- authorizing the adoption by ordinance of a local environmental checklist, which may provide that some environmental impacts are adequately covered by other federal, state or local provisions;
- removing the ability of a person who participated orally or in writing before the county or city, but is not aggrieved or adversely impacted by the action, from appealing to the Growth Management Hearings Board regarding the matter on which a review is being requested; and
- providing integrated procedures for SEPA and project review in local governments planning under the Growth Management Act, which include provisions relating to notice, comment, and appeals.

Definitions are provided and amended. Technical changes are made.

Appropriation: None.

Fiscal Note: Available.

[OFM requested 10-year cost projection pursuant to I-960.]

Committee/Commission/Task Force Created: No.

Effective Date: The bill contains several effective dates. Please refer to the bill.

Staff Summary of Public Testimony: PRO: Integration of hydraulic project and forest practices permitting has been under discussion over the interim, and the agencies and stakeholders continue to work on the issue. The fees associated with the permit streamlining will be important so that the agencies can implement the work required. The hydraulics portion of the bill clarifies hydraulic project jurisdiction while maintaining fish protection and increasing DFW's capacity to enforce the law. The forests and fish law called for integration of hydraulic and forest practices permitting, and this bill finally implements that promise. While hydraulic project and forest practices integration will provide permit streamlining, DFW will still review a majority of water crossing structure projects.

CON: The SEPA portions of the bill impact one of the state's core environmental protections. DOE should continue to administer SEPA rules and categorical exemptions should not be a statutory exercise. The bill needs to further consider transportation impacts and potential impacts on state agencies required to utilize local checklists. Public participation standing is a key tool for Growth Management Act enforcement, and needs to be protected. This bill is an important one, and worthy of broad stakeholder discussion. The portion of the bill dealing with hydraulic projects narrows the upland authority of DFW, and having the Director of DFW approve the exercise of public jurisdiction and civil authority is too cumbersome. The current hydraulic project jurisdiction language may increase the challenges for permit applicants because of uncertainty about when they have to submit an application for upland projects. The integration of hydraulic project and forest practices permitting should retain DFW's responsibility for fish protection, and ensure bill implementation does not override other agency duties. Mineral prospectors are concerned that the hydraulic project fee

exemption in the bill is unclear, and about permit jurisdiction and the increase in civil penalties.

Testimony Other: The SEPA provisions of the bill recognize the overlaps between SEPA and other environmental regulations, and have created a healthy discussion. Public participation standing has led to appeals from individuals from out of state that are costly for counties, and eliminating this standing would not eliminate enforcement. The hydraulic project and forest practices pieces integration is moving in the right direction. Concerns exist about the scope of DFW's hydraulic project jurisdiction being too broad in the bill, and DFW needs to identify what upland resource protections are currently missing. The discussions around hydraulic project jurisdiction are continuing, and local governments need to develop a partnership with DFW. Ports appreciate the marine terminal maintenance general permit language. The study called for in the bill will require additional resources for the Office of Regulatory Assistance. This bill provides revenue opportunities to keep important programs operational and workers on the job.

Persons Testifying: PRO: Bridget Moran, Department of Natural Resources; Jeff Davis, DFW; Yoshe Revelle, citizen; Kevin Godbout, Weyerhaeuser; Deb Mungia, WA Forest Protection Assn.

CON: Cliff Traisman, Mo McBroom, WA Environmental Council; April Putney, Futurewise; Bruce Wishart, People for Puget Sound; Miguel Perez-Gibson, Washington Environmental Council, Colville Tribes; Bruce Beatty, Holly Gadbow, Arthur West, citizens; William Thomas, Washington Prospectors; Robert Cunningham, Northwest Treasure Supply; Megan White, Department of Transportation.

OTHER: Brandon Houskeeper, Assn. of WA Businesses; Paul Pearce, WA Assn. of Counties, Skamania County; Josh Weiss, WA Assn. of Counties; Johan Hellman, WA Public Ports Assn.; Kerry Graber, Michele Stellovich, WA Federation of State Employees; Carl Schroder, Assn. of WA Cities; Faith Lumsden, Office of Regulatory Assistance.