

# SENATE BILL REPORT

## SB 6406

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As Reported by Senate Committee On:  
Energy, Natural Resources & Marine Waters, February 2, 2012  
Ways & Means, February 27, 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, 2/02/12 [DPS-WM, DNP, w/oRec].

Ways & Means: 2/15/12, 2/27/12 [w/oRec, DNP, w/oRec].

### 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, and specified memorandums of agreement between the state and local governments relating to HPAs permitting.
- Modifies civil and criminal enforcement provisions for HPAs.
- Generally expires HPA provisions in the bill July 1, 2016.
- Integrates HPAs for forestry activities into the associated forest practices application (FPA).
- Extends the duration of an approved FPA.
- Increases FPA fees.
- Requires State Environmental Policy Act (SEPA) rulemaking.
- Modifies and creates new statutory categorical exemptions.

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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.*

- Makes other changes relating to SEPA and local development provisions.

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## SENATE COMMITTEE ON ENERGY, NATURAL RESOURCES & MARINE WATERS

**Majority Report:** That Substitute Senate Bill No. 6406 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Ranker, Chair; Delvin, Ranking Minority Member; Morton, Ranking Minority Member; Hargrove and Swecker.

**Minority Report:** Do not pass.

Signed by Senators Fraser and Murray.

**Minority Report:** That it be referred without recommendation.

Signed by Senator Stevens.

**Staff:** Curt Gavigan (786-7437)

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## SENATE COMMITTEE ON WAYS & MEANS

**Majority Report:** That it be referred without recommendation.

Signed by Senators Zarelli, Ranking Minority Member; Parlette, Ranking Minority Member Capital; Baumgartner, Brown, Hatfield, Hewitt, Holmquist Newbry, Honeyford, Kastama, Keiser, Schoesler and Tom.

**Minority Report:** Do not pass.

Signed by Senators Murray, Chair; Conway, Fraser, Harper, Kohl-Welles and Pridemore.

**Minority Report:** That it be referred without recommendation.

Signed by Senator Padden.

**Staff:** Michael Bezanson (786-7449)

**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 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 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.

Authorizes a Memorandum of Agreement (MOA) Process with Local Governments. DFW and a city or county may enter into a voluntary MOA for purpose of integrating state and local permitting of one or more hydraulic project types that occur above the ordinary high water line and require an HPA. By December 31, 2013, DFW must adopt rules establishing best management practices that provide for the protection of fish life for those hydraulic projects. Prior to entering into an MOA, DFW must determine that local government regulatory programs together with the best management practices are capable of providing fish life protection equivalent to the hydraulics code. Elements of an MOA are specified to include provisions for oversight, monitoring, local funding assurances, and enforcement.

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. DFW may issue a compliance order, which specifies necessary corrective actions and is effective immediately. Also, DFW may levy civil penalties of up to \$10,000 for each HPA related violation, with specific penalties depending on project complexity.

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

Generally Expires HPA Permitting Modification in the Bill in 2016. Most substantive changes relating to HPA permitting in the bill, including those relating to permitting jurisdiction, fees, and civil enforcement authority, expire July 1, 2016.

By September 1, 2015 and in cooperation with stakeholders, DFW must provide a report to the Legislature that includes a summary of the impact of HPA fees, a summary of the MOA process and its results, and a review of specified regulatory programs for protection of fish life above the ordinary high water line.

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.

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.

Requires SEPA-Related Rulemaking. By December 31, 2012, the Department of Ecology (DOE) must update the rule-based categorical exemptions to SEPA, as well as update the environmental checklist. In updating the categorical exemptions, DOE must increase the existing maximum threshold levels for the specified project types such as the construction or location of residential developments, agricultural structures, or construction of a commercial building. The maximum exemption levels must vary based on the location of the project, such as whether the project is proposed to occur inside or outside of an urban growth area. DOE may not include any new subjects in the scope of the checklist. DOE must update the thresholds for all other project actions by December 31, 2013.

During the rulemaking process ending December 31, 2012, the highest rule-based categorical exemption levels may apply in specified areas regardless of whether the city or county with jurisdiction has exercised its authority to raise the exemption levels above the established minimum.

DOE must convene an advisory committee to assist in the required rulemaking processes, which must include interests including local governments, businesses, environmental interests, state agencies and tribal governments.

Modifies and Creates New Statutory Categorical. 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. Tools are specified for the determination of project consistency with a planned action ordinance.

Categorical exemptions are created in statute for the following activities:

- certain habitat restoration projects and environmental mitigation projects; and
- certain nonproject actions, including amendments to development regulations required to ensure consistency with comprehensive plans and shoreline master programs.

Makes Other Changes to SEPA and Local Development Provisions. Other changes to SEPA and local development provisions include:

- authorizing a lead agency using an environmental checklist to satisfy the requirements of the checklist by identifying instances where the questions on the checklist are adequately covered by a local ordinance or other legal authority under certain conditions;
- authorizing money in the Growth Management Planning and Environmental Review Fund to be used to make loans, in addition to grants, to local governments for specified purposes;
- requiring DOE to accept electronic submittal of all required notice filings from lead agencies; and
- 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.

Definitions are provided and amended. Technical changes are made.

**EFFECT OF CHANGES MADE BY ENERGY, NATURAL RESOURCES & MARINE WATERS COMMITTEE (Recommended First Substitute):**

- Establishes a process by which DFW and a city or county may enter into a voluntary memorandum of agreement (MOA) for purpose of integrating state and local permitting of specified HPA project types conducted above the ordinary high water line, and sets standards for and required content of the MOAs;
- Authorizes the Director of DFW to delegate specified permitting and civil enforcement authority to direct reports;
- Removes the required study by the Office of Regulatory Assistance on specified regulatory programs and the protection of fish life above the ordinary high water line;
- Expands a DFW reporting requirement relating to fee impacts and permit streamlining to also include a summary of the MOA process and potential efficiencies with regards to HPAs above the ordinary high water line, as well as a review of specified regulatory programs for protection of fish life above the ordinary high water line;
- Expires most provisions relating to HPA permitting July 1, 2016;
- Removes provisions transferring the authority to issue a notice of conversion under the Forest Practices Act from DNR to local governments;
- Provides that if the integration of HPA and FPA permitting does not occur by the statutory deadline, FPA fees revert to amounts in effect prior to the bill until integration does occur;
- Generally removes provisions in the underlying bill relating to SEPA, and replaces those with new SEPA provisions. However, changes regarding participation standing for appeals to the Growth Management Hearings Board are retained; and
- Makes technical changes and reorganizes language.

**Appropriation:** None.

**Fiscal Note:** Available on Original. New fiscal note requested on February 15, 2012. [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 on Original Bill (Energy, Natural Resources & Marine Waters):** 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 (Energy, Natural Resources & Marine Waters):** 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.

**Staff Summary of Public Testimony on Proposed Second Substitute (Ways & Means):**

PRO: This bill is not changing environmental standards. The bill combines and streamlines existing environmental programs. The use of general permits will help make processing

HPAs better and easier. The integration of the HPA and FPA program will help forest land owners. These streamlining efforts will lead to savings for the state. This is the furthest the state has ever come on getting a coalition of businesses to support fees with these regulatory changes.

There is a study to look at the regulatory gaps and how the Legislature can best address those. This study will help reduce future state spending by better focusing resources. We hope that more work can be done to clarify ordinary high water line.

The bill has fees to help offset the costs of the program. These fees are necessary to help support the work. The removal of public standing from the Growth Management provisions helps save local government money. Local governments spend to defend against groups that do not live in the county and could live far away.

We support the Forest Practices provisions of the bill. The Legislature has been looking to streamline Forest Practices since 1999 and this bill moves in that direction. The fees in the bill have a delicate balance of support and should not be increased.

CON: We agree that it makes sense to integrate environmental and permitting programs but this bill has too many changes. The general permit authority is too vague and needs to have parameters.

The bill is too big and changes too many programs. We want the bill to be smaller. The bill does not provide fiscal relief and it is not about reform. The fees will not cover the costs of the programs. The bill will have short term costs and long lasting environmental impacts. DNR and the DFW have been cut over the past three years. They need funding to do this. It would be better to start out with a pilot of the HPA portion.

The biggest concern is taking away from the rights of citizens to be heard in front of the Growth Management Hearings Board. This is the way that citizens can enforce environmental laws. The absence of enforcement can let environmental degradation occur. This degradation costs the state money to clean up these hazards. This bill undermines the Growth Management Hearings Board.

OTHER: We support the SEPA provisions but the dollars are not in the Governor's budget.

**Persons Testifying (Ways & Means):** PRO: Senator Hargrove, prime sponsor; Josh Weiss, Assn. of Counties; Paul Pearce, WA Assn. of Counties; Darin Cramer, DNR Jeff Davis, DFW; Carl Schroeder, Assn. of WA Cities; Debra Mungia, WA Forest Protection Assn.; Johan Hellman, WA Public Ports Assn.; Brandon Housekeeper, Assn. of WA Business; Tom Davis, WA Farm Bureau.

CON: Clifford Traisman, WA Environmental Council, WA Conservation of Voters; Bruce Swisher, People for Puget Sound; April Putney, Futurewise; Miguel Perez-Gibson, WA Environmental Council, WA Conservation of Voters, olville Tribe; Mo McBroom, WA Environmental Council; Dawn Vyvan, Yakima Nation; Steve Robinson, Umatilla Tribe.

OTHER: Tom Clingman, DOE.