
Transportation Committee

HB 2070

Brief Description: Concerning Washington state department of transportation projects.

Sponsors: Representatives O'Ban, Clibborn and Zeiger.

Brief Summary of Bill

- Creates a seven-step required permitting process for all transportation projects undertaken by the Washington State Department of Transportation (WSDOT) that require the preparation of an environmental impact statement (EIS) under the National Environmental Policy Act.
- Requires the Department of Ecology to undertake rule-making and convene a work group regarding local permitting of transportation projects under the Shoreline Management Act.
- Directs the WSDOT to continue using the multiagency permit program and places various requirements upon the staff and the program.
- Requires the WSDOT environmental staff to develop all environmental documentation and oversee project work in order to insure environmental compliance.
- Creates various training, design, and funding requirements related to environmental permitting.
- Requires the WSDOT to seek approval for specific project changes and specifies the process for how project changes are approved.
- Sets baselines for staffing levels in the highway construction program and for the ferry vessel terminal construction program.
- Requires the WSDOT to submit a report to the Governor and the Transportation Committees of the Legislature on the progress made towards delivery of all projects and activities subject to the bill.
- Creates expert review panels for the Alaskan Way Viaduct project, the State Route 520 Bridge project, and the Columbia River Crossing project.

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.

- Requires the WSDOT to use available technologies to minimize permit delays for, inform and interact with interested parties regarding, and optimize effectiveness of compensatory mitigation projects.
- Requires the WSDOT to consider the correction of fish-passage barriers on city streets and county roads within the same watershed as a proposed project for compensatory mitigation and requires that the WSDOT submit a report to the Legislature regarding the use, effectiveness, and suggested improvements to the mitigation option by December 1, 2014.
- Requires the WSDOT to submit a report to the Legislature on engineering errors in excess of \$500,000.
- Defines the concept of right-sizing and recognizes that the WSDOT is utilizing this concept in their Safety Analyst Program.
- Requires the WSDOT to submit a report to the Legislature on right-sizing by January 1, 2014.

Hearing Date: 2/4/14

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Background:

Transportation Permitting.

The Legislature and the Governor formed the Blue Ribbon Commission on Transportation (Commission) in 1998 to: assess the local, regional, and state transportation system; ensure that current and future money was spent wisely; make the system more accountable and predictable; and prepare a 20-year plan for funding and investing in the transportation system. The Commission consisted of 46 members representing business, labor, agriculture, tribes, government, ports, shipping, trucking, transit, rail, environmental interests, and the general public. The Commission made 18 recommendations to the Governor and the Legislature.

Transportation Permit Efficiency and Accountability Committee.

Recommendation 11 directed the Washington State Department of Transportation (WSDOT) to work toward a goal of one-stop environmental permitting for transportation projects. Pursuant to this recommendation, in 2001 the following projects were made eligible for a streamlined environmental permitting process: designated pilot projects, transportation projects of statewide significance, and projects selected for a programmatic approach by the Transportation Permit Efficiency and Accountability Committee (TPEAC) created in that same act.

The TPEAC was required to assess the application of then current environmental standards and integrate those standards where appropriate. The TPEAC was also required to designate three pilot projects and use a streamlined process for permitting those projects. An interim process for permitting transportation projects of statewide significance applied until the TPEAC adopted integrated standards and best management practices. This process was optional for the WSDOT and specified a multi-step process including: early involvement of affected agencies, identification of permit requirements, selection of preferred alternatives, coordinated reviews and

hearings, and timelines for completing reviews and decisions. The legislation establishing the TPEAC and the various environmental permitting processes described above expired in 2006.

The Shoreline Management Act.

The Shoreline Management Act of 1971 (SMA) governs uses of state shorelines. The SMA enunciates state policy to provide for shoreline management by planning for and fostering "all reasonable and appropriate uses." The SMA prioritizes public shoreline access and enjoyment and creates preference criteria listed in prioritized order that must be used by state and local governments in regulating shoreline uses. The SMA involves a cooperative regulatory approach between local governments and the state. At the local level, the SMA regulations are developed in city and county shoreline master programs that regulate land use activities in shoreline areas of the state. Each local government is charged with establishing a program for the administration and enforcement of a shoreline permit system. While the SMA specifies standards for local governments to review and approve permit applications, the administration of the permit system is performed exclusively by the local government. Local governments, however, must notify the Department of Ecology (DOE) of all the SMA permit decisions.

The SMA requires a property owner or developer to obtain a substantial development permit for substantial developments within shoreline areas. "Substantial developments" are defined to include both developments with a total cost or fair market value exceeding \$5,718 and developments materially interfering with normal public shoreline or water use. Certain exemptions to the substantial development permit requirement are specified in statute.

The permit review and approval standards generally specify that a local permit system must include provisions to assure that construction on a project may not begin or be authorized until 21 days from the date of filing, which is defined as the date of receipt by the DOE of the local government's decision, or until all review proceedings are terminated.

The Section 603 Process.

The Transportation 2003 (Nickel) Act was passed in 2003, increasing the fuel tax rate by 5 cents. A bond bill was also enacted, supporting a \$4.2 billion program of projects over the course of 10 years and underwritten by Nickel Act revenues. In 2005 the Legislature enacted the Transportation Partnership Act (TPA) providing an increase in the motor vehicle fuel tax rate of 9.5 cents, phased in over several years. Like the Nickel package, the TPA was enacted along with a bond bill that allowed for the early spending of \$8.5 billion in capital projects over 16 years. For both the Nickel and the TPA packages, the funds were appropriated by project, by amount, and by fund type.

Section 603 of Engrossed Substitute House Bill 2190 (2012) was put in place to allow the WSDOT a limited amount of flexibility to assist in the delivery and completion of all Nickel and TPA projects. Section 603 allows the Director of the Office of Financial Management (OFM) to authorize a transfer of appropriation authority between projects funded by either the Nickel or TPA accounts. The WSDOT may make transfers between projects without the OFM's approval if the transfer does not exceed \$250,000 or 10 percent of the total project, whichever is less.

Expert Review Panels.

In 2006 the Legislature expert review panels (ERP) for the Alaskan Way Viaduct project and the State Route 520 (SR 520) Bridge project, and required the respective panels to report their

findings by September 1, 2006. In 2011 the Legislature authorized an ERP to reconvene for the Alaskan Way Viaduct project. This ERP is currently authorized through a budget proviso.

Wetland Mitigation.

Both the state and federal governments require a proponent of a project that will diminish the function of an existing wetland to mitigate that loss of function. This duty is called compensatory wetland mitigation. The project proponent has a number of options available to him or her for mitigating wetland loss; however, any mitigation plan must be approved by the state (primarily through the DOE) and the United States Army Corps of Engineers.

Projects that disturb wetlands are expected to undergo a sequencing review. Actual compensation for wetland loss does not occur unless the loss cannot be avoided or minimized through project planning. Once mitigation requirements are triggered, a project proponent must develop a mitigation plan that either restores the damaged wetland, creates new wetland functions at a new site, enhances an existing wetland, or preserves an at-risk wetland.

The WSDOT is required to develop a uniform methodology, in consultation with relevant environmental regulatory authorities, for submitting proposed mitigation measures to the relevant environmental regulatory authorities. The WSDOT is allowed to coordinate with the DOE or the Department of Fish and Wildlife and pair the mitigation investment made by the project proponent with the funding needs of one of three existing state programs: the Forestry Riparian Easement Program, the Riparian Open Space Program, and the Family Forest Fish Passage Program.

Change Orders.

A change order happens when the WSDOT determines it is necessary to make a change to a contract during the performance of the contract. Typically, change orders are initiated in the following circumstances: (1) as a response to unexpected conditions; (2) if there are plan deficiencies, such as errors or omissions; (3) extra or unanticipated necessary work is required; or (4) there are design criteria changes. There is a detailed change order process that the WSDOT must follow outlined in the WSDOT Construction Change Order Process Guide manual. This manual includes provisions on contracting implications, negotiating agreed prices and timing, required documentation, and so forth.

The WSDOT differentiates between minor and major change orders. A minor change is defined as a change value of \$15,000 or less, or any change in working days of 10 days or less, whereas a major change is defined as variations in quantity up to 25 percent above or below proposal quantities. Minor changes follow the regular change order process outlined in the manual. In the case of major overruns, renegotiation of price is available to either party and only units measured in excess of 125 percent of the proposal quantity are eligible for renegotiation.

There is currently no statutory requirement that the WSDOT report errors.

Right-Sizing.

"Right-sizing" is a term the Washington State Transportation Commission (WSTC) has used to describe a lean, metric-based approach to determining project investments. The goal is to find a "best fit" transportation solution for the context that meets the expectations of decision makers, the state, stakeholders, and the community. It entails compromise between project cost and

design, incorporating community needs, desired outcomes, and available funding. The WSTC indicates that right-sizing would include a peer review to assess scope and scale against objectives and cost.

The WSDOT's safety program has recently begun to apply the concept of right-sizing, utilizing software called "SafetyAnalyst," which automates statistical approaches to improve the identification and programming of site-specific highway safety improvements. A complete root causes analysis and evaluation is conducted, options and countermeasures are assessed, and solution options are identified according to cost and benefit.

Summary of Bill:

Transportation Permitting.

An environmental review and approval process for the WSDOT is created for any transportation project that requires the preparation of an environmental impact statement (EIS) under the National Environmental Policy Act, which consists of the following seven steps:

1. Public and Agency Involvement in Defining the Purpose and Scope of Environmental Review. The first step in the process requires notice to the public, an invitation to provide input to various parties, and a 30-day comment period. Input from the parties must be considered in finalizing the purpose and scope of environmental review.
2. Identify Participating Agencies and Convene Meeting with an Interdisciplinary Team. This step requires the identification of any governmental agencies with an interest in the project and an invitation to these agencies to serve as participating agencies, in order to provide input on various aspects of the review. This step also requires the formation of interdisciplinary teams consisting of participating agency staff and the WSDOT technical specialists which must convene during each subsequent step.
3. Participating Agency Involvement During the Screening of Alternatives. This step is initiated by providing notice to participating agencies that the screening of project alternatives has begun. Within 30 days of receiving notification, participating agencies must identify: the specific features that the agency considers significant with respect to the agency's role in environmental reviews, permits, or other approvals for the project; the reasons these features are significant; and any concerns the agency may have about the alternative because of potential significant adverse impacts of these features on resources or social policies within the agency's jurisdiction. For each feature for which an agency raises concerns, they must identify: recommendations on how the potential adverse impacts could be avoided, minimized, and mitigated; and an assessment of the relative ranking of each alternative with respect to whether and to what extent these concerns apply; and other information the participating agency requests the WSDOT to consider in deciding whether, when, where, or how to proceed with the project.
4. Participating Agency Involvement During the Identification of Environmental Permits and Approvals, Application Procedures, and Decision Standards. For this step, the WSDOT, in consultation with the participating agencies, must identify all permits and other approvals the agencies might require for each project alternative. Also, after consulting with all participating agencies, the WSDOT completes this step by compiling a list of all environmental permits and approvals it believes are needed for the project under each alternative being considered.
5. Complete an Environmental Analysis and Issue a Draft Environmental Impact Statement. The WSDOT initiates this step by providing notice of the availability of the draft EIS to

participating agencies, tribal governments, and the public. Notification must include posting on the State Environmental Policy Act (SEPA) register. State, county, and city agencies must, and federal agencies are encouraged to, provide written comments on the draft EIS no later than 45 days after the WSDOT posts notice in the SEPA register.

6. Develop a Final Environmental Impact Statement. The WSDOT must work with the federal lead agency to consider and respond to all substantive comments received during the comment period. The WSDOT must also evaluate public and agency comments on the draft EIS to determine if the statement sufficiently identifies and analyzes the impacts and mitigation of the proposed action. The WSDOT must engage participating agencies in refining alternatives and completing the environmental review.
7. Issue a Final Environmental Impact Statement. The final EIS must contain: the WSDOT's final recommendation and preferred alternative, a summary of the comments received on the draft EIS and the response, and a description of the procedures required to ensure that mitigation measures are implemented. The WSDOT must provide notice of the final EIS and the federal lead agency's record of decision in the SEPA register.

Washington State Department of Transportation Requirements.

The WSDOT:

- is required to invite affected tribes to participate in the review process and make reasonable efforts to engage with tribes that choose not to participate;
- is directed to continue using the multiagency permit program, which must provide early project coordination, expedited project review, project status updates, technical and regulatory guidance, and construction support. The multiagency permit program staff is required to assist with project mitigation and assessments, establish programmatic agreements, develop permit application guidance, and perform quality assurance regarding these functions. The multiagency permit program staff is also required to collaborate with federal staff from various agencies to develop, implement, and maintain complete permit application guidance;
- environmental staff, or consultants hired by the WSDOT, are required to develop all environmental documentation, conduct prebid meetings for environmentally complex projects, review environmental considerations with the selected contractor, and oversee project work in order to insure environmental compliance. These staff must notify the WSDOT project engineer of noncompliance with permit conditions or environmental regulations and notify regulatory agencies of noncompliance. Upon notification, the WSDOT project engineer must order the contractor to halt nonconforming work and bring the project into compliance; and
- is also required to provide training in environmental procedures and permit requirements, require wetland mitigation sites to be designed by a qualified interdisciplinary team, develop an environmental compliance data system, continue to implement the environmental compliance assurance procedure, and report noncompliance.

Department of Ecology Requirements.

The DOE is directed to update the rules for integrating national environmental policy documents into SEPA decisions and for rule-based categorical exemptions for transportation maintenance activities. The DOE is also directed to convene a work group to identify clearer procedures for local permitting of transportation projects under the SMA, with a report due to the Legislature by December 1, 2013.

The bill creates a new chapter in Title 47. Nothing in the chapter created by the act creates a private right of action or review.

The Section 603 Process.

A process is created for limited project changes and fund transfers for projects funded in the Connecting Washington revenue package and allows the WSDOT flexibility to deliver projects in an efficient and expeditious manner. Under this bill, the WSDOT must submit project changes to the OFM as they arise for approval. The WSDOT must submit a quarterly report to the Legislature detailing changes that were submitted and approved by the OFM. The following project changes are subject to the approval process outlined in the bill if: (1) the most recent engineer's estimate differs from the previous one by 10 percent or \$250,000 (whichever is greater); (2) there is a material change to the scope of a project; and (3) there is a change to the capital delivery plan schedule.

It is the intention of the Legislature that the WSDOT develop a management approach that minimizes the need for additional permanent engineering or other professional staff in any of the capital construction programs. The bill specifies the following baselines for staffing levels: (1) for the highway construction program, the level is based on the Secretary of the WSDOT's (Secretary) business plan for the end of fiscal year 2015; and (2) for the ferry vessel and terminal construction program, the level is the positions at the end of fiscal year 2012.

Beginning January 1, 2015, the WSDOT is required to submit a report to the Governor and the Transportation Committees on the progress made toward the delivery of all projects and activities subject to this bill. The Secretary is required to certify the completion of the project package subject to this bill. This section will expire January 30, 2023, or the date the Secretary certifies completion, whichever is later.

Expert Review Panels.

The WSDOT is required to convene three ERPs of no more than three members to provide independent financial and technical review for the development of a finance plan and project implementation plan for the Columbia River Crossing project, the SR 520 Bridge project, and the Alaskan Way Viaduct project. The ERPs must report their findings annually to the Legislature until the projects are operationally complete.

Wetland Mitigation.

The WSDOT is required to use available technologies to minimize permit delays for, inform, and interact with interested parties regarding, and optimize the effectiveness of proposed compensatory mitigation projects. The WSDOT is also required to consider the correction of fish-passage barriers on city streets and county roads within the same watershed as a proposed project for compensatory mitigation. The WSDOT must report to the Legislature on the use, effectiveness, and suggested improvements to the new mitigation option by December 1, 2014.

Change Orders.

The WSDOT is required to submit a report to the Legislature detailing engineering errors on highway construction projects resulting in errors in excess of \$500,000. An initial report must be submitted within 30 days of an error occurring and a full report must be submitted within 90 days. The full report must include how the error happened, the department of the responsible employee or employees, what corrective action was taken, and what action the Secretary

recommends to avoid similar errors. The Legislature is authorized to take additional correctional action if necessary.

The WSDOT is required to submit a report within 90 days of the bill's effective date of engineering errors on projects currently under construction.

Right-Sizing.

The WSDOT is required to work with the WSTC to submit a report to the Transportation Committees of the Legislature on right-sizing by January 1, 2014. The report must include when and where the concept has been applied within the WSDOT and must also include an assessment of the feasibility of extending the concept to all capital programs.

Appropriation: None.

Fiscal Note: Available.

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