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## Environment & Energy Committee

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### HB 2002

**Brief Description:** Concerning the siting of energy infrastructure necessary for the fulfillment of the state's decarbonization goals.

**Sponsors:** Representatives Fitzgibbon, Berry, Duerr, Peterson, Ryu, Tharinger, Bateman and Lekanoff.

#### Brief Summary of Bill

- Requires lead agencies reviewing a clean energy project under the State Environmental Policy Act to provide the project proponent an opportunity, prior to issuing a threshold determination that a project will have a significant environmental impact, to amend the proposal to mitigate the impacts that would cause a threshold determination of significance.
- Limits the issues and evidence that may be considered in certain clean energy project regulatory decision appeals to the Pollution Control Hearings Board and Shoreline Hearings Board.
- Exempts Critical Electric Infrastructure Information designated under the Federal Power Act from public disclosure under the Public Records Act.
- Prohibits local governments from requiring project applicants to demonstrate the necessity or utility of a project proposed by an electric utility, other than to require the submission of required necessity or utility assessments or approvals from other government regulators.

**Hearing Date:** 1/27/22

**Staff:** Jacob Lipson (786-7196).

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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 part of the legislation nor does it constitute a statement of legislative intent.*

## **Background:**

### State Environmental Policy Act.

The State Environmental Policy Act (SEPA) establishes a review process for state and local governments to identify environmental impacts that may result from governmental decisions, such as the issuance of permits or the adoption of land use plans. The SEPA environmental review process involves a project proponent or the lead agency completing an environmental checklist to identify and evaluate probable environmental impacts. If an initial review of the checklist and supporting documents results in a determination that the government decision has a probable significant adverse environmental impact (threshold determination), the proposal must undergo a more comprehensive environmental analysis in the form of an environmental impact statement. If the SEPA review process identifies significant adverse environmental impacts, the lead agency may deny a government decision or may require mitigation for identified environmental impacts.

Under SEPA rules adopted by the Department of Ecology (Ecology), after the submission of an environmental checklist and prior to a lead agency's threshold determination, an applicant may ask the lead agency to indicate whether it is considering a determination of significance. If the lead agency indicates that a determination of significance is likely, the applicant may clarify or change features of the proposal to mitigate the impacts which led the agency to consider a determination of significance to be the likely threshold determination. If an applicant revises the environmental checklist as necessary to describe the clarifications or changes, the lead agency must make its threshold determination based on the changed or clarified proposal.

### Administrative Procedure Act—Adjudicative Hearings and Judicial Appeals.

The Administrative Procedure Act (APA) sets the process that state agencies must use when the agency takes administrative action. Agencies offer administrative hearings that are quasi-judicial to hear appeals of agency actions. Administrative hearings adjudicate appeals by interpreting agency policy and regulations. Adjudication resembles what a court does but it is less formal. Adjudicative proceedings determine legal rights, duties, or privileges when a hearing is required by law or by the Constitution.

Individuals appealing agency actions under the APA must generally exhaust their administrative remedies with the agency prior to seeking judicial review in superior court. Under the APA, judicial review of new evidence and issues are limited as follows:

- issues not raised before the state agency may not be raised on appeal, except in limited circumstances, including if the person raising the appeal did not know and was under no duty to discover or could not have reasonably discovered facts giving rise to the issue; and
- a court may receive evidence in addition to the information contained in the agency record for judicial review, only if it relates to the validity of the agency action, and the information is needed to decide certain types of disputed issues, including the unlawfulness of procedure or of a decision-making process.

### Public Records Act.

The Public Records Act (PRA) exempts from public disclosure certain information held by state agencies that relates to specified types of security information, including records related to criminal terrorist acts, certain records shared by federal agencies that are not disclosable under federal law, and vulnerability assessment information.

#### Environment and Land Use Hearings Office.

In 2010 the Environmental and Land Use Hearings Office (ELUHO) was created as the single administrative agency to administer the Growth Board, the Pollution Control Hearings Board (PCHB), and the Shoreline Hearings Board (SHB).

The PCHB is an appeals board with jurisdiction to hear appeals of certain decisions, orders, and penalties issued by Ecology and several other state agencies. The PCHB's jurisdiction includes the appeal of the issuance, modification, or termination of any permit, certificate, or license by local air pollution control authorities established under the Clean Air Act or by Ecology, and of solid waste permits by the Department of Health. Parties aggrieved by a PCHB decision may obtain subsequent judicial review.

The SHB hears and decides appeals of shoreline building and construction permits or penalty orders issued by local or state government agencies under the Shoreline Management Act.

PCHB and SHB appeals are conducted in a manner consistent with the APA's provisions for adjudicative proceedings by state agencies.

#### Critical Energy Infrastructure Information.

Under the Federal Power Act, certain Critical Electric Infrastructure Information (CEII) submitted to or generated by the Federal Energy Regulatory Commission (FERC) is subject to special procedures for submission, designation, handling, sharing, and dissemination. CEII includes information related to critical existing or proposed electrical infrastructure whose incapacity or destruction would have negative effects on national security, economic security, or public health and safety, and includes specific engineering, vulnerability, or detailed design information about critical infrastructure that:

- relates to details about energy production, generation, transportation, transmission, or distribution;
- could be useful in planning an attack on critical infrastructure;
- is exempt from mandatory disclosure under the federal Freedom of Information Act; and
- does not simply give the location of the critical infrastructure.

Procedures under federal regulations establish the process for the claiming and designation of FERC-generated information, United States Department of Energy-generated information, or information submitted to federal agencies as CEII. In certain circumstances, FERC or the United States Department of Energy will designate submitted information that has been claimed as CEII to meet the criteria of CEII.

#### Local Project Review.

Legislation enacted in 1995 required counties and cities planning under the Growth Management Act (GMA) to establish an integrated and consolidated development permit process for all projects involving two or more permits and to provide for no more than one open record hearing and one closed record appeal. Other jurisdictions may incorporate some or all of the integrated and consolidated development permit process. The 1995 legislation specified the permit process must include a determination of completeness of the project application within 28 days of submission. A project permit application is determined to be complete when it meets the local procedural submission requirements even if additional information is needed because of subsequent project modifications. Within 14 days of receiving requested additional information, the local government must notify the applicant whether the application is deemed complete. The determination of completeness does not preclude the local government from requesting additional information if new information is required or substantial project changes occur. A project permit application is deemed complete if the GMA jurisdiction does not provide the determination within the required time period.

#### Clean Fuels Program.

Ecology has been directed to adopt a rule establishing a Clean Fuels Program (CFP) limiting the greenhouse gas (GHG) emissions attributable to each unit of transportation fuel (carbon intensity) to 20 percent below 2017 levels by 2038. The rule adopted by Ecology to implement the CFP must include standards for assigning levels of GHG emissions attributable to transportation fuels based on a lifecycle analysis that considers emissions from the production, storage, transportation, and combustion of the fuels, and associated changes in land use. Ecology must establish separate carbon intensity standards for gasoline and its substitutes and diesel and its substitute.

#### **Summary of Bill:**

##### Provisions Applicable to Clean Energy Projects.

For certain clean energy projects, a lead agency under the State Environmental Policy Act (SEPA) must notify a project proponent if it has submitted an environmental checklist that indicates a proposal is likely to cause significant environmental impacts. Prior to issuing a determination of significance under SEPA, the lead agency must give the project applicant the option of withdrawing and revising its application and environmental checklist to mitigate the impacts that were the basis for the lead agency's anticipated determination of significance. The lead agency must make its threshold determination on the basis of the clarified or changed proposal.

The Pollution Control Hearings Board (PCHB) or Shoreline Hearings Board (SHB) may only consider new issues to the same extent that courts may consider new issues when reviewing agency decisions under the Administrative Procedure Act (APA), and may only consider new evidence to the same extent that courts can consider new evidence when reviewing agency decisions under the APA, for:

- appeals to the PCHB of clean energy projects of permits or certificates issued by the Department of Ecology or local air authorities, or solid waste permits issued by the

- Department of Health; and
- appeals of permits issued under the Shoreline Management Act or master program approval decisions by the Department of Ecology under the Shoreline Management Act.

The clean energy projects to which these provisions apply are:

- electric power lines and utility poles;
- facilities to produce electricity in a manner that does not result in the emission of greenhouse gases as a by-product of energy generation; and
- facilities that primarily or exclusively manufacture products or product components, including zero emission vehicles, charging and fueling infrastructure for zero emission vehicles, renewable or green hydrogen, clean transportation fuel anticipated to have a carbon intensity that would allow it to generate credits under the clean fuels program, equipment and products to produce electricity from alternative energy resources, and certain energy storage equipment.

Provisions Applicable to Electric Utility Activities.

During a local project review of a project proposed by an electric utility, a local government may not require a project proponent to demonstrate the necessity or utility of the project, other than to require as part of the completed project application the submission of documents demonstrating the receipt of required approvals or assessments by federal or state regulators, including Federal Energy Regulatory Commission (FERC) or the Utilities and Transportation Commission.

Information that has been designated as Critical Electric Infrastructure Information under the Federal Power Act by the FERC or the United States Department of Energy is exempt from disclosure under the Public Records Act.

An intent section and severability clause are included.

**Appropriation:** None.

**Fiscal Note:** Requested on January 18, 2022.

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