
Ways & Means Committee

ESSB 6406

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

Sponsors: Senate Committee on Energy, Natural Resources & Marine Waters (originally sponsored by Senators Hargrove, Hobbs, Delvin, Hatfield, Tom, Stevens, Regala, Morton, Ranker and Shin).

Brief Summary of Engrossed Substitute Bill

- Establishes Hydraulic Project Approval (HPA) fees for certain project types through June 30, 2016.
- Specifically authorizes general and multiple site HPAs.
- Requires a review of federal, state, and local regulations relating to projects conducted above the ordinary high water line and the protection of fish life.
- Integrates fish protection standards related to 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 other SEPA provisions including those relating to categorical exemptions and local government cost recovery.
- Modifies provisions relating to municipal storm water general permits.

Hearing Date: 3/7/12

Staff: Michael Bennion (786-7118) and Jason Callahan (786-7117).

Background:

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.

Hydraulic Project Approvals.

Before beginning a construction project, a person must obtain a hydraulic project approval (HPA) 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. Hydraulic project approvals are issued by the Washington Department of Fish and Wildlife (WDFW) to ensure the proper protection of fish life.

To receive an HPA, the applicant must provide certain information to the WDFW. This information includes general plans for the overall project, complete plans and specifications for any construction that is proposed to occur within the mean higher high water line (saltwater) or ordinary high water line (freshwater), and complete plans for the proper protection of fish life. There is no fee associated with applying for or receiving an HPA.

With a few exceptions, the WDFW must issue an approval or denial of an HPA application within 45 days of receiving the application. If approved, the HPA is valid for five years, and the applicant is required to demonstrate substantial progress on the construction within two years. If conditions change from the application, both the holder of the HPA and the WDFW can request modifications to the HPA.

The WDFW is statutorily authorized to issue programmatic HPAs for small scale mining and prospecting, and for activities or projects conducted solely for the removal or control of certain aquatic weeds. The programmatic approval is in lieu of an applicant obtaining an individual HPA. Under the programmatic approval process, the WDFW publishes a pamphlet that states the rules for that activity.

A person who unlawfully undertakes a project in violation of the HPA requirements may be prosecuted for a gross misdemeanor. Prosecution is available if a person conducts a project without an HPA, or if a person violates the conditions of the operative HPA.

Forest Practices Applications.

A forest practices application (FPA) must be obtained from the Department of Natural Resources (DNR) prior to conducting a forest practice such as tree thinning, chemical application, forest road building, or tree harvest. The application for an FPA is submitted to the DNR, and, if approved, the FPA is valid for conducting the allowable forest practices for a period of two years from the date of approval. If the permitted forest practices are not completed within that two-year time period, then the applicant must apply for a new FPA.

The Forest Practices Act establishes four classes of forest practices based on the potential for the proposed operation to adversely affect public resources. The Forest Practices Board establishes standards that determine which forest practices are included in each class. The different classes determine the level of DNR involvement in the permitting process and include:

- Class I forest practices. These have no direct potential for damaging a public resource and are free of charge.
- Class II forest practices. These have a less-than-ordinary potential for damaging a public resource and are charged a \$50 application fee that is deposited into the State General Fund.
- Class III forest practices. These are more substantial than Class II forest practices, but less substantial than Class IV forest practices. The application fee is \$50 and deposited into the State General Fund.

- Class IV forest practices. These include activities that have the potential for substantial environmental impacts and require compliance with the State Environmental Policy Act (SEPA). The application fee is \$50 and is deposited into the State General Fund, except for forest practices resulting in a conversion to a non-forestry land use, which are charged a \$500 application fee.

State Environmental Policy Act.

The State Environmental Policy Act (SEPA) applies to decisions by every state and local agency within Washington. The 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.

Categorical exemptions to SEPA review 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 the DOE may not be conditioned or denied (RCW 43.21C.110).

The SEPA permits 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 Growth Management Act. Development consistent with a planned action may not require additional environmental review.

Municipal Storm Water General Permits.

The Department of Ecology (DOE) administers a state program for discharge of pollutants to state waters. State permits are required for anyone who discharges waste materials from a commercial or industrial operation to ground or to publicly-owned treatment plants. State permits are also required for municipalities that discharge to ground.

The federal Clean Water Act (CWA) prohibits the discharge of pollutants in toxic amounts and establishes the National Pollutant Discharge Elimination System (NPDES) permit system to regulate wastewater discharges from point sources to surface waters. The NPDES permits are required for anyone who discharges wastewater to surface waters or who has a significant potential to impact surface waters. The DOE has been delegated authority by the United States Environmental Protection Agency (EPA) to administer NPDES permits.

The EPA storm water regulations established two phases for the NPDES permits to control storm water discharges from certain industries and construction sites, and from municipalities operating municipal separate storm sewer systems. Phase I of the NPDES storm water permit program applies to six local governments (Seattle, Tacoma, and the unincorporated areas of Clark, Pierce, King, and Snohomish Counties) and to the Washington State Department of Transportation facilities within those jurisdictions. The Phase II permit program rules apply to operators of small municipal separate storm sewer systems serving fewer than 100,000 persons.

On January 17, 2007, the DOE reissued the phase I municipal storm water general permit and issued two phase II municipal storm water permits, one for Western Washington and one for Eastern Washington, all with an effective date of February 16, 2007. As a result of 2011 legislation, by July 31, 2012, the DOE must extend the phase II permits for a term of one year and without modification. Additionally, the DOE must issue updated phase II permits, which become effective on August 1, 2013.

Summary of Bill:

Establishes a System of HPA Fees and Exemptions.

The Washington Department of Fish and Wildlife (WDFW) must generally charge an application fee of \$150 for an HPA located at or below the ordinary high water line. Exemptions from the application fee are provided for project types including pamphlet permits, applicant-funded contracts, and mineral prospecting and mining activities. The authority to impose the application fee expires June 30, 2016.

Requires a Review of Certain Regulatory Programs.

The University of Washington (UW) must conduct a review of state, federal, and local natural resources and environmental regulatory programs. The UW must conduct the review in consultation with appropriate stakeholders and must submit a report detailing the review to the Legislature by September 1, 2014. The purposes of the review include:

- identifying programs that regulate work above the ordinary high water line;
- identifying work above the ordinary high water line that potentially use, divert, or affect the bed or flow of state water;
- analyzing the manner and degree to which this work is regulated under these programs; and
- identifying any regulatory gaps that exist in providing for the protection of fish life for work that uses, diverts or affects the bed or flow of state water, and the scale of potential risks to fish life from any gaps.

Specifically Authorizes General and Multiple Site HPAs.

The WDFW 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.

Integrates HPAs for Forestry Activities into the Associated Forest Practices Application (FPA).

By December 31, 2013, the Board must incorporate fish protection standards from current WDFW rules into the Forest Practices Rules, as well as approve technical guidance. Once these

rules have been incorporated, a hydraulic project requiring an FPA or notification is exempt from the HPA requirement and is regulated under the forest practices rules. Future changes in WDFW's fish protection rules relevant to forestry must go through the forest practices adaptive management process, consistent with a provision of the 1999 forests and fish report.

The WDFW 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. The WDFW 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 the WDFW prior to submitting their FPA, and the WDFW 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 applications, are increased from \$50 to \$150. Class IV general applications involving conversion related activities and are increased from \$500 to \$1500.

Requires SEPA-Related Rulemaking.

By December 31, 2012, the DOE must update the rule-based categorical exemptions to SEPA, as well as update the environmental checklist. In updating the categorical exemptions, the 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. The DOE may not include any new subjects in updating the checklist, including climate change and greenhouse gasses.

By December 31, 2013, the DOE must update the thresholds for all other project actions, create categorical exemptions for minor code amendments that do not lessen environmental protection, and propose methods for more closely integrating SEPA with the Growth Management Act.

During these rulemaking processes, a local government may generally apply the highest rule-based categorical exemption level regardless of whether the city or county with jurisdiction has exercised its authority to raise the exemption level above the established minimum.

The DOE must convene an advisory committee that includes interests including local governments, businesses, environmental interests, state agencies and tribal governments. The advisory committee must assist in the rulemaking processes and work to ensure that tribes, agencies, and stakeholders can receive notice of projects through SEPA and other means.

Modifies and Creates New Statutory Categorical Exemptions to SEPA.

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. Tools are specified for the determination of project consistency with a planned action ordinance. Notice and public meeting requirements are provided for planned actions that encompasses an entire jurisdiction or less than an entire jurisdiction.

New categorical exemptions to SEPA are established for certain nonproject actions including amendments to development regulations required to ensure consistency with comprehensive plans; required to consistency with shoreline master programs; and that provide an increase in specified types of environmental protection.

Makes Other Changes to SEPA and Local Development Provisions.

Other changes to SEPA and local development provisions include:

- authorizing local governments to recover certain costs for expenses incurred in preparing a nonproject EIS regarding planned actions and infill development, and establishing processes for imposing and appealing associated development fees;
- 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; and
- authorizing lead agencies to identify within an environmental checklist items that are adequately covered by other legal authorities, although a lead entity may not ignore or delete a question.

Modifies Provisions Relating to Municipal Storm Water General Permits.

By July 31, 2012, the DOE must extend for an additional year, for a total of two years, and without modification the phase II municipal storm water general permit for Eastern Washington municipalities. Additionally, the DOE must issue an updated permit for these Eastern Washington municipalities to become effective on August 1, 2014.

Updated Western Washington phase I and II municipal storm water general permits must become effective August 1, 2013, as under current law. By July 1, 2012, the DOE must publish and provide to the Legislature the final proposed Western Washington municipal storm water general permits. The Legislature may modify the final proposed permits during the 2013 regular session. The DOE may not modify the final proposed permits during the legislative review period, and must issue final permits on July 1, 2013. The final Western Washington permits consist of the final proposed permits and any modifications directed by the Legislature.

Definitions are provided and amended. Technical changes are made.

Appropriation: None.

Fiscal Note: Requested on March 6, 2012.

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