

# SENATE BILL REPORT

## ESSB 6406

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As Passed Senate, March 5, 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:** Senate Committee on Energy, Natural Resources & Marine Waters (originally sponsored by 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].

**Passed Senate:** 3/05/12, 27-21.

### Brief Summary of Engrossed Substitute Bill

- Establishes Hydraulic Project Approval (HPA) fees and exemptions 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 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.

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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.*

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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.

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 a 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.

Municipal Storm Water General Permits. The federal Clean Water Act (CWA) establishes the National Pollutant Discharge Elimination System (NPDES) permit system to regulate wastewater discharges from point sources to surface waters. NPDES permits are required for storm water discharges from certain industries, construction sites of specified sizes, and municipalities operating municipal separate storm sewer systems that meet specified criteria. The Department of Ecology (DOE) administers permits, including municipal storm water general permits, under the CWA.

On January 17, 2007, 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, DOE must extend the phase II permits for a term of one year and without modification. Additionally, DOE must issue updated phase II permits, which become effective on August 1, 2013.

**Summary of Engrossed Substitute Bill:** Establishes a System of HPA Fees and Exemptions. DFW 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. 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.

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 DFW 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 DFW'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.

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 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 updating the checklist, including climate change and greenhouse gasses.

By December 31, 2013, 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.

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. The types of development that may 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.

Commercial development up to 65,000 square feet, excluding retail development, is made eligible for the infill development categorical exemptions where consistent with planning and environmental review criteria.

New categorical exemptions are established for certain nonproject actions including amendments to development regulations: required to ensure consistency with comprehensive plans; required to ensure 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, DOE must extend for an additional one year, for a total of two years, and without modification the phase II municipal storm water general permit for Eastern Washington municipalities. Additionally, 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, 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. 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:** 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 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.

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 Gadbaw, 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.