Amendments to Natural Resources and Environmental laws Passed in the Last Minutes of the 2012 Legislative Session

In the last minutes of the 2012 Special Legislative Session, **Second Engrossed Substitute Senate Bill 6406** (2ESSB 6406), revising several of the state's most important natural resources and environmental laws, was approved by a vote of 34 to 13 in the Senate and 75 to 23 in the House. Several last minute amendments modified the bill from the version that passed the Senate in the closing days of the 2012 Regular Session. The Governor has not yet acted on the Bill.

The new legislation contains four parts, each of which is summarized below: (1) Hydraulic Project Approvals (2) Hydraulic Project Approval and Forest Practices Integration; (3) State Environmental Policy Act and Local Development Regulations; and (4) Phase II Municipal Storm Water General Permits. The SEPA amendments are discussed first, given their potential importance.

I. State Environmental Policy Act (SEPA) Amendments

A. By December 31, 2012, Ecology must "increase" SEPA's "rule-based categorical exemptions".

- Ecology must "increase the existing maximum threshold levels" for: single-family and multifamily residential projects; most agricultural structures other than feed lots; an office, school, commercial, recreational, service or storage building (including accessory parking facilities); landfilling or excavation activities; and installation of electric facilities other than substations.

- Maximum exemption levels must differ based on whether a proposal is located in: an incorporated city; an unincorporated area within an urban growth area (UGA); an unincorporated area outside of an UGA but within a County planning under the Growth Management Act (GMA); or an unincorporated area within a county not planning under the GMA.

B. By December 31, 2012, Ecology must "update" the environmental checklist in the SEPA Rules.

- The required "update" must "improve efficiency of the environmental checklist."

- The "scope" of the updated checklist must not contain any new subjects, "including climate change and greenhouse gases."

C. By December 31, 2013, Ecology must:

- "update, but not decrease" the "thresholds for all other project actions" not included in the first phase of required rule-making.

- propose methods for integrating SEPA and GMA provisions, including consideration of ways to revise SEPA's provision for avoiding duplicative review of projects that are

adequately analyzed and mitigated under GMA and other regulatory requirements (RCW 43.21.C.240).

- "create categorical exemptions for minor code amendments" that "do not lessen environmental protection."

D. In meeting its new obligations, Ecology must convene an "advisory committee."

- Members must have "direct experience" with SEPA and be broadly representative of specified interests.

- Committee is to assist in both of the mandated rule-making processes.

- Committee is to make recommendations to "ensure" notice to state agencies, tribes, and other interested parties of projects affecting their interests.

E. Until the mandated rule-making processes are completed, cities and counties are to apply the maximum level of categorical exemptions, even if they did not legislatively establish the exemption at the maximum level, unless they legislatively reduce the exemption below the maximum level.

- This provision is located in the subsection on the first phase of mandatory rule-making. However, literally it applies until both phases of rule-making have been completed ("[u]ntil the completion of the rule making required under this section"). Section 301 of 2ESSB 6406 contains the provisions for both phases of the rule-making.

F. SEPA's Planned Action provisions are revised and reorganized.

- New and existing planned action provisions reorganized into a stand-alone section.

- Removal of blanket prohibition of essential public facilities (EPFs) in planned actions, authorizing the inclusion of EPFs "accessory to or part of a residential, office, school, commercial, recreational. service, or industrial development" designated as a planned action.

- New provisions for the mandatory determination of the consistency of proposed projects with a planned action ordinance, allowing the utilization of a "modified checklist" in the SEPA Rules or a "form" designated by the planned action ordinance or state or local agency rules.

- New provision that project level impacts must have been adequately addressed in an environmental impact statement (EIS) unless such review was specifically deferred until project level review.

- New provision that local governments may not require a threshold determination nor additional environmental review for projects determined to be consistent with the development or redevelopment described in a planned action ordinance "except for

impacts that are specifically deferred to the project level at the time of the planned action ordinance's adoption."

- New provision that the determination of consistency between a proposed project and a planned action ordinance and the adequacy of any environmental review specifically deferred in the ordinance are subject to the type of administrative appeal that the local jurisdiction provides for the project itself.

- New authorization for planned actions encompassing an entire county, city, or town.

- New community meeting and notice requirements that differ for planned actions encompassing an entire county, city, or town and those encompassing less than an entire jurisdiction.

G. SEPA's authorization for GMA Cities and Counties to adopt exemptions for infill development is revised.

- New authorization for infill exemption of up to 65,000 square feet of non-retail commercial development.

- New requirement that exempt infill development be consistent with applicable comprehensive plan.

- New provision that the previously prepared environmental impact statement for the jurisdiction's comprehensive plan must have considered the "proposed use or density and intensity of use in the area proposed for an exemption."

- New requirement that the local government "considers the specific probable adverse environmental impacts of the proposed action and determines that the specific impacts are adequately addressed by the development regulations or other applicable requirements of the comprehensive plan, subarea plan..., planned action ordinance, or other local, state, or federal rules or laws."

H. New general authorization of local governments to recover reasonable expenses of nonproject EIS preparation in support of planned actions or infill development exemptions.

- Through loans, as well as grants, from the growth management planning and environmental review fund (RCW 36.70A.490), with an addition to the list of preferred proposals to include environmental review of increased density and development intensity as a result of regional transfer of development rights programs under RCW Ch. 43.362.

- Through private funding.

- A proposed provision that would have authorized funding through the assessment of "latecomer fees" was not included in the bill as finally passed.

I. New statutory SEPA exemptions for specified nonproject actions.

- Amendments to development regulations that are required to ensure consistency with an adopted GMA comprehensive plan that was previously subject to SEPA review in which the impacts associated with the proposed amendments were specifically addressed.

- Amendments to development regulations that are required to ensure consistency with a shoreline master program that was previously subject to SEPA review in which impacts associated with the proposed amendments were addressed.

- Amendments to development regulations, when implemented through project action, that will provide increased environmental protection by increasing protections for critical areas or increasing vegetation retention or decreasing impervious surface areas in the shoreline jurisdiction or critical areas

- Amendments to technical codes adopted by local governments to ensure consistency with minimum standards contained in state law, including building codes, energy codes, and electrical codes.

J. Authorization of lead agencies to identify in environmental checklists where questions are adequately covered by a locally adopted ordinance, development regulation, land use plan, or other legal authority.

- Lead agencies still must consider whether the proposed action would have an impact on the particular element of the environment in question.

- Where the identified legal authority adequately answers a checklist question, the lead agency must explain how the proposed action satisfies the requirements of the identified legal authority.

- Where the identified legal authority adequately answers a checklist question, an applicant may volunteer additional answers to the question.

II. Hydraulic Project Approvals (HPAs)

The new legislation:

- Establishes a generally applicable permit fee of $150 (presently there is no permit fee) for projects at or below the ordinary high water line.

- Exemptions from the permit fee are established for a number of specific categories of hydraulic projects, including pamphlet projects (e.g., removal or control of noxious weeds), applicant funded contracts to pay the costs of processing applications, mineral prospecting and mining activities, and projects on farm and agricultural lands.

- Authority to impose the new fee expires on June 30, 2017.

- Mandate to issue renewable five-year permits to marinas and marine terminals for recurring maintenance activities.

- Mandate that HPA permits contain provisions allowing minor modifications of required work-timing without reissuance of the permits.

- Authorization to issue a single permit for multiple locations, each of which are specifically identified.

III. Integration of Hydraulic Projects and Forest Practices Regulation

The new legislation:

- Establishes a "Forest Practices Hydraulics Project," a hydraulic project included in a forest practices application or notification.

- By December 31, 2013, the Forest Practices Board (FPB) must incorporate fish protection standards from DFW's HPA rules into Forest Practices rules and approve initial "technical guidance" in the FPB Manual to aid implementation of the incorporated fish protection standards.

- Once the FPB has incorporated DFW fish protection standards and approved initial "technical guidance," a hydraulics project requiring a forest practices application or notification is exempt from DFW's HPA rules and is regulated solely under Forest Practices rules.

- The FPB must incorporate into the Forest Practices rules any future change in DFW fish protection standards if applicable to forest practices and consistent with the adaptive management provisions of the 1999 Forest and Fish Report.

- After integration of Forest Practices Hydraulics Projects under Forest Practices rules and regulatory processes, DFW will perform only review and comment functions. DFW may Review and comment on any forest practices application (FPA). DFW must review and either verify such review or comment on FPAs that include Forest Practices Hydraulics Projects in fish-bearing waters or shorelines of the state. DFW also must perform "concurrence review," in accordance with newly mandated DFW Rules (by December 31, 2013), for certain FPAs that include Forest Practices Hydraulics Projects for "water crossing structures"-- specified culverts and bridges, and specified fill projects. DFW concurrence review must be completed within 30 days and prior to DNR review of such hydraulic projects.

- The duration of forest practices applications and notifications is increased from two to three years and may be renewed for three years subject to the Forest Practices rules in effect on the date of renewal applications or notifications.

- Once the FPB has incorporated DFW fish protection standards and provided technical guidance on implementation of the standards, fees for forest practices applications and

notifications, except Class IV General applications, will be tripled from $50 to $150, with a reduced fee of $100 for specified small forest landowners. Fees for Class IV General applications involving conversion to nonforest use or no reforestation because of likely future conversion or location in a designated Urban Growth Area, generally will be tripled from $500 to $1,500.

IV. Phase II Municipal Stormwater General Permits

A. The Western Washington Phase II Municipal Stormwater General Permit:

- will become effective August 1, 2013, but certain requirements may not go into effect until December 31, 2016, or until the later date between then and December 31, 2018 on which the GMA requires local plans and development regulations to be comprehensively updated. The requirements that are deferred are for:

- implementation of "low-impact development principles;" and for

- "increased catch basin inspection and illicit discharge detection frequencies and application of new storm water controls to projects smaller than one acre"

B. The Eastern Washington Phase II Municipal Stormwater General Permit:

- will not become effective until August 1, 2014.