

The Statute
43.21C

LEGISLATIVE HISTORY
OF SSB 3006 (SEPA AMENDMENTS)

Need for Legislative History

Most legislation in Washington state has scarce, if any, legislative history explaining a bill. Legislative intent, even of major laws, is usually difficult to find.

SEPA is one example. Legislators, public officials, citizens, and the courts have relied on the legislative history of the National Environmental Policy Act (NEPA) to help interpret the state law since 1971.

The diverse groups and individuals concerned about SEPA felt strongly that our state act should have its own legislative history, particularly after a comprehensive two-year study of 10 years of state and local experience with the act. The Commission's review was undertaken, in part, to reexamine and to articulate legislative intent in many important areas, in order to reduce some of the controversy and confusion about the law's purposes.

Legislative intent for SEPA aids people in interpreting and complying with a law that is written in broad, sweeping terms. It assists agencies in writing SEPA rules, policies, and procedures; it assists legislators in reviewing rules and in considering any future amendments; and it assists courts in interpreting SEPA when language or rules may be ambiguous.

Over the past decade, there has been considerable debate over SEPA's intent. The Commission's review produced a remarkable consensus about the act's intent. It was felt important to document these understandings about previously controversial issues to establish a legislative history for our state law and to provide renewed foundation for SEPA's second decade.

A Conscious Effort to Clarify Legislative Intent

This final report compiles and publishes the key documents in SEPA's current legislative history. It does not reprint the various proposed amendments that failed in committee and on the floor, which also provide insight into legislative intent, because it was felt that affirmative statements of intent would be more useful to the reader and to those using SEPA on a daily basis.

1. The Commission Report and Rules

The most obvious indicator of legislative intent, other than the words of the statute itself, is the Commission's own report and explanation of its proposals. The chairman and more than half of the members of the Commission were members of the legislature. SSB 3006 was developed by the Commission as part of its review, and the legislation proposed by the Commission in its Initial Report was enacted virtually without amendment.

In addition, the Commission's Initial Report was distributed to all legislators close to the start of the session. This Final Report also describes the purposes of the major reforms (see, for example, the Executive Summary) and reprints the key documents in the legislative history.

The Commission also felt strongly that rule recommendations should be published along with proposed legislation, so that the nature of the improvements to the SEPA process being authorized by SSB 3006 could be known and considered prior to enacting the legislative amendments. The rule recommendations themselves, therefore, contribute to an understanding of legislative intent. This may not be typical for legislation, but the process leading to SSB 3006 was unusually long and deliberative for state legislation. (See the description at the end of this section on the relationship between the legislation and rules.)

2. Section by Section Summary of SSB 3006

Because of the complex and comprehensive nature of the bill, legislative sponsors and leaders placed great emphasis on having a detailed Section by Section Summary of SSB 3006. This detailed summary was periodically revised and accompanied the bill throughout the legislative process.

The Section by Section Summary deserves special explanation to those who may be unfamiliar with its purpose and role. This is not necessarily a typical document in state legislative history, but, as noted above, there was a determined effort to have an adequate record of legislative intent on the bill. The fact that this document was referred to in testimony and floor debate also indicates the importance of its role in the legislative deliberations.

Individual copies of the Section by Section Summary of SSB 3006 (in Part Two of the Initial Report) were distributed to the members of the Senate and House committees responsible for the bill before the bill was considered. It was also distributed to the members of both caucuses before floor consideration and debate on the measure.

The Section by Section Summary was revised after the Senate action to reflect the clarifications of text and intent adopted in Senate committee and on the floor. The summary was revised again after House action to reflect the clarifications of intent reflected in the carefully-prepared House floor colloquy (see explanation of Qs & As on SSB 3006 below). The Section by Section Summary of SSB 3006 printed in this Final Report is the same as the one included with and mailed to all agencies after the enactment of the bill, so that the detailed summary of the legislation would be available as soon as possible to SEPA practitioners.

3. Qs & As on SSB 3006

There was concern that the Commission's Report and the Section by Section Summary alone might not command sufficient attention as legislative history because the courts or future law clerks might not be familiar enough with these documents to use them to interpret SEPA. Likewise, there was concern that people who were not familiar with the 1981-1983 SEPA review, including

public and private counsel in future years, might not know about these resources to cite them to their clients or to the courts.

Therefore, floor colloquies in both the Senate and the House were felt to be essential to underscore the intent of some of the provisions about which concern had been expressed at public hearings.

Unlike some floor colloquies, which may reflect impromptu responses or personal opinions, considerable thought was given to the Qs & As on SSB 3006. As is evident from the proceedings, from the content of the exchange, and from the participants in the colloquies, the Qs & As represented a bipartisan consensus.

It should be noted that the four Senate Qs & As were originally planned to be read into the Journal of the House, as well as into the Journal of Senate. The House members viewed both sets of Qs & As as completely consistent with one another, with the House Qs & As in no way at variance with the Senate's. Because of the time limitation at the end of the session (SSB 3006 was passed by the House on the final day of the cutoff), the leadership requested that the floor colloquy be as brief as possible, and the Senate Qs and As were not repeated for the House journal. Copies of the complete set of Qs & As were distributed with the Commission's Memorandum to Agencies and are reprinted in this report.

The Senate Qs and As were exchanged between Senator Ted Bottiger (D-Tacoma), Senate majority leader, and Senator Alan Bluechel (R-Kirkland), sponsor of the bill. The House Qs & As were exchanged between Representative Roger Van Dyken (R-Lynden), a member of the House committee majority reporting the measure, and Representative Lorraine Hine (D-Des Moines), a member of the House leadership and a mayor with considerable experience with SEPA legislation and administration. All of the legislators had experience with SEPA over a number of years and spent considerable time at learning the details of the bill as its floor leaders. House leadership felt so strongly that the floor colloquy should be considered reliable by the courts that Rep. Van Dyken even spent time introducing Rep. Hine and her credentials before initiating the Qs & As (this was unnecessary in the Senate, where the Commission chairman, Senator Bluechel answered the questions).

4. Memorandum to Agencies and Interim Guidance

Immediately after the Governor signed SSB 3006, the Commission prepared a "Memorandum to Agencies", enclosing "Interim Guidance on SEPA Implementation" (May 1983).

The memorandum and guidance was intended to alert the entities responsible for SEPA implementation (notably government agencies, although the material received wider circulation) to the statutory changes and to provide guidance and information on the new law. The guidance would encourage agencies, courts, and other concerned parties to interpret and administer SEPA revisions in a uniform and consistent manner until the new state and local rules are adopted, which would take between six months and a year.

The memorandum highlights aspects of SEPA compliance that require immediate attention in light of the changes that went into effect on April 23. Guidance on how to handle new requirements, such as scoping, is included. The memorandum and guidance covers two especially crucial items:

- o a simple chart illustrating the appeals process, along with detailed explanation of the revised process; and
- o the key aspects of the legislative history: the act, the Section by Section Summary, and the Qs & As.

The memorandum and guidance were circulated to the Commission members and approved by them prior to distribution.

5. Bluechel Memorandum (April 11, 1983)

During the legislative debate in the House, a number of questions were raised about specific terms or concepts in the bill. Senator Bluechel sent a memorandum, dated April 11, 1983, to Representative Dennis Dellwo on SSB 3006 addressing several subjects. The memorandum notes that the Commission and its advisory committee had considered the questions and subjects raised.

Because this material is part of the legislative history and may be helpful background for the reader, it is included in this report.

BACKGROUND ON SEPA

Introduction

The State Environmental Policy Act of 1971 ("SEPA," Chapter 43.21C RCW) was enacted during the 1970 and 1971 sessions, at the beginning of an extraordinary decade of environmental legislation. SEPA, modeled after the National Environmental Policy Act of 1969 (NEPA), may have been the most significant piece of environmental legislation to emerge from those legislative sessions. Although NEPA has legislative history, the initial passage of SEPA was accomplished with little opposition or comment. There was scarce legislative history, as noted in the previous section of this report.

The lack of controversy over SEPA disappeared rapidly. Numerous court decisions and the absence of clear statewide procedures interpreting SEPA prompted the legislature to amend the act, particularly in 1973, 1974 and 1977. Administrative guidelines were adopted in 1975 (they went into effect in January 1976) and were slightly amended in 1977. After a decade of experience with SEPA and piecemeal adjustment, the legislature created the Commission on Environmental Policy in 1981 and directed this comprehensive review of the act and guidelines. This section of the Commission's report provides an overview of SEPA by briefly reviewing the act, guidelines, and major statutory amendments before 1983.

1. State Environmental Policy Act

SEPA's purpose is to: declare a state policy encouraging productive and enjoyable harmony between people and the environment; promote efforts to prevent or eliminate damage to the environment; stimulate human health and welfare; and enrich the understanding of the ecological systems and natural resources important to the state and nation.

As originally enacted, SEPA was almost an exact copy of the National Environmental Policy Act (NEPA). Both use the "detailed statement" (environmental impact statement or EIS) as the principal "action forcing" mechanism to bring environmental factors to the attention of decisionmakers. Both require that environmental values be given "appropriate consideration" in planning and making decisions. There are a few differences between SEPA and NEPA as they were originally adopted.

SEPA contains a stronger declaration of environmental rights than NEPA. RCW 43.21C.020(3) provides that each person has a fundamental and inalienable right to a healthful environment. This was the original text of NEPA, but it was altered during passage to state that "... each person should enjoy a healthful environment" The significance of this difference, if any, is unclear, but it has created controversy which the Commission addressed in its review. NEPA's EIS requirement refers to the "human environment", while SEPA uses the term "environment" in RCW 43.21C.030(2)(c). NEPA applies to federal agencies, while SEPA applies to all branches of government in the state, including state agencies, municipal and public corporations, and counties. SEPA tends to cover much smaller agencies and actions. Both NEPA and SEPA apply to government approvals of proposals by private applicants.

The original act did not define some of its basic terms, nor spell out how the environmental review process would work. The Washington courts were required to interpret the Act and develop the framework for SEPA implementation, based in large measure on federal administrative guidelines and court interpretation of them. By 1973, the courts had established that SEPA applies to virtually all discretionary governmental approvals of private as well as public activity, as with federal and other states' administrative and judicial precedents. The "threshold determination" concept was emphasized by the courts. This required state and local agencies to evaluate environmental information and determine whether an environmental impact statement (EIS) would be required before the first discretionary governmental decision on a proposal is made. The judiciary emphasized that SEPA's procedural requirements would be enforced.

The new procedures caused considerable concern among land developers, builders, and agencies because the requirements were not uniform or clearly set out. The legislature responded in 1974 by commissioning the Council on Environmental Policy.

2. SEPA Guidelines

During the 1974 legislative session, the act was amended to create the Council on Environmental Policy (RCW 43.21C.100) for the purpose of adopting state-wide SEPA guidelines (RCW 43.21.110). The guidelines were intended to provide for full implementation of SEPA:

... in a manner which reduces duplicative and wasteful practices, establishes effective and uniform procedures, encourages public involvement, and promotes certainty with respect to the requirements of the Act. (Chapter 179, Section 6, Laws of 1974, Extraordinary Session)

The guidelines (197-10 WAC) defined "actions" subject to SEPA. These generally include public projects and the licensing of private projects that modify the physical environment. Nonproject "actions" which require governmental approval, such as ordinances and regulations controlling the use of the physical environment, are also considered "actions." Next, the guidelines contain a listing of activities exempted from the EIS requirement. For those proposals not exempted, the agency responsible for SEPA compliance, the lead agency, makes a "threshold determination." An EIS must be prepared if the proposal is found to have a potential significant adverse impact on the environment. The lead agency is responsible for preparation of a draft EIS intended to "transmit information concerning a proposed governmental action and the alternatives to that action to public officials, project sponsors, and interested citizens" (WAC 197-10-405). After circulation and review of the draft EIS, a final EIS is completed before the agency may take action on the proposal.

The SEPA guidelines were written to govern the content of rules to be adopted by other units of government, including state agencies, counties, cities, and special districts. Although many of the guidelines provisions are mandatory, some flexibility is allowed in areas such as designation of "responsible official," exemptions, intragency appeals, and timing of certain procedural requirements.

It is therefore necessary to refer to the guidelines in conjunction with the applicable agency regulations.

The Council on Environmental Policy, which adopted the Guidelines in December 1975, expired in June 1976. RCW 43.21C.100 provided that authority to amend the guidelines was transferred to the Department of Ecology (DOE). In response to petitions for change and a series of public hearings, DOE adopted some guideline amendments in December 1977. No further amendments have been adopted.

3. Legislative Amendments to SEPA

The legislature first amended SEPA in 1973 in response to concerns expressed by state and local agencies and proponents of private development. In 1973, certain development permits for single family residences were exempted from the EIS requirement (RCW 43.21C.070), and "substantial weight" was given to the threshold determination of a governmental agency and its determination of adequacy on an EIS (RCW 43.21C.090). The optional "notice of action" and statute of limitations provisions were established in 1973 and amended in 1974 and 1977 (RCW 43.21C.080). The 1977 amendment reducing the time period for challenging private projects under SEPA from 60 to 30 days.

The 1974 amendments creating the Council on Environmental Policy and directing the adoption of SEPA guidelines also included a number of other sections on reporting and interagency coordination.

The 1977 amendments focused on the exercise of substantive authority (which is based upon RCW 43.21C.020, 030(1), and 060). In revising RCW 43.21C.060, the legislature acknowledged the substantive authority of SEPA and required certain agencies relying on SEPA to condition or deny proposals to specify the adverse environmental impacts leading to the decision, although there remained arguments over legislative intent. Local governments were required to adopt policies governing the exercise of SEPA's substantive authority. Finally, people could appeal a decision by a nonelected official to condition or deny a proposal to the local legislative authority.

In addition to the 1973, 1974, and 1977 amendments, SEPA has been amended very infrequently for specific legislative exemptions, some of which have been controversial: the Hood Canal Bridge restoration, in 1979 and 1980 (RCW 43.21C.032, now repealed); codification of the forest practices exemption, in 1981 and 1983 (RCW 43.21C.037); drought emergencies, in 1981 (RCW 43.21C.210); emergency work at Mt. St. Helens, in 1982 and 1983 (HB 3519, RCW 43.21C.500 containing a 1988 sunset clause); incorporation of a cities or towns, in 1982 (RCW 43.21C.220; also see RCW 36.93.170); school closures, in 1983 (Section 1, Chapter 109, Laws of 1983, HB 719); and the Washington State Housing Finance Commission's adoption of its housing plan (Section 29, Chapter 161, Laws of 1983, SB 3245).

This report covers the 1981 and 1983 amendments to SEPA creating the Commission on Environmental Policy (technically "environmental policy commission") and enacting the Commission's recommendations.

SEPA IN THE 1983 LEGISLATURE

Introduction

The Commission proposed legislation (SSB 3006) in its initial report in January 1983. The legislation was subsequently enacted with three minor amendments, described below, which did not change the intent of the bill's substantive provisions. SSB 3006 was passed by large majorities in both houses and was signed by Governor Spellman on April 23, 1983.

The chronology of the enactment of SSB 3006 is printed at the end of this section.

The Legislative Process

Although the legislation was developed as part of the Commission's lengthy study, the legislature's chronology began in December 1982. At its December 13 meeting, the Commission unanimously recommended a draft bill, as well as draft SEPA rules. Senate Bill No. 3006 was prefiled for introduction on December 22, 1982, initiating the legislative process for the 48th Legislature.

The Commission had been planning public hearings across the state on its recommendations. In order to be consistent with RCW 34.04, the hearings were held after at least 20 days notice. The Commission held public hearings in Seattle, Olympia, Yakima, and Spokane during the first three weeks in January 1983. As a result of public comments to the Commission, particularly from environmental and citizen groups, several important changes and clarifications were made to the bill resulting in Senate Substitute Bill No. 3006. SSB 3006 was the proposed legislation included in the Commission's Initial Report to the Legislature.

Three aspects of the legislative process deserve special mention: the public hearings, the Senate substitute bill, and the three amendments made during committee and floor action.

1. Public Hearings

In addition to the Commission's four statewide public hearings mentioned above, the Senate Parks and Ecology Committee and the House Environmental Affairs Committee held five public hearings on SSB 3006. The Senate committee also had lengthy debates in executive session at which several amendments were rejected. The House committee had two lengthy executive sessions at which amendments were rejected. The committees' executive sessions were open to the public to attend.

Senate Committee Chairman Jerry Hughes (D-Spokane) stressed that the committee would hear from all those who wanted to speak, and that the committee would have full public hearings on the bill, notwithstanding the fact that the measure had been developed by several members of the committee and enjoyed considerable support from an extraordinary consensus of diverse interests.

Likewise, House Committee Chairman Nancy Rust (D-Seattle) stressed that the committee would hear public comment, and the committee extended its second hearing until nearly midnight to allow interested persons to speak. The number and length of the public hearings and committee meetings, all of which were well-attended by committee members, reflected serious consideration of the bill by the legislature.

2. Senate Substitute Bill

As noted above, the Commission received constructive comments on its recommendations as a result of its four public hearings in January. In addition to those testifying at the hearings, many phone calls and comment letters were received. As a result, the chairman and many Commission members felt that changes and clarifications were needed in the original prefiled draft bill (SB 3006).

The chairman directed the Commission's Drafting Committee to meet with Commission members, staff, participants in the Commission process, and commenters in an effort to revise the bill and resolve the problems identified. The Drafting Committee held several meetings in mid-to-late January and produced a substitute bill. The chairman consulted with Commission members and received a consensus that the substitute bill should be put forward as the Commission's proposal and replace the original prefiled draft.

This first Senate substitute bill (SSB 3006) was therefore included in the Commission's Initial Report, along with the detailed Section by Section Summary. At the first Senate committee public hearing on January 31, it was clearly explained that the measure before the committee was SSB 3006.

The principal changes in the substitute bill focused on the appeals section, including the attorneys fees provision (section 4), and on the contents of the state rules, especially on clarifying the intent of the provisions dealing with "socioeconomic" impacts and categorical exemptions (section 7). These provisions are explained elsewhere in this report.

Perhaps the most important point to emphasize here is that those unfamiliar with the Commission's review took out of context and attributed highly exclusionary intent to the types of impacts reviewable under SEPA as a result of the Commission's original draft which stated that "The list of elements of the environment shall not include socioeconomic impacts. It shall include public services, ... housing, ... [etc.]". The Commission's intent was simply to eliminate a confusing and mischievous term from the lexicon, and replace it with an affirmative statement and clearer definition of the types of impacts related to growth and the built environment that must be considered. (See, for example, the Section by Section Summary of SSB 3006 and Qs & As on SSB 3006).

The Commission hopes that the unfortunate impression left by the original draft will not encourage neighborhood groups or developers to try to push the law to the extreme by arguing, on the one hand, that environmental analysis under SEPA must include impacts on the social or economic environment (as compared with the physical environment), or, on the other, that SEPA ex-

cludes urban physical deterioration or impacts on the natural resource base caused by population or land use changes.

Readers may be interested to know that the day after the legislature sent SSB 3006 to the Governor, the United States Supreme Court rendered a unanimous decision interpreting the term "human environment" in NEPA as meaning the "physical environment". Metropolitan Edison v. People Against Nuclear Energy, 51 LW 4371, 103 S. Ct. 1556 (April 19, 1983). The Court continued to include environmental health as one element of environmental quality, as does SSB 3006 (Sec. 7(1)(f)). In an opinion similar to the discussion in this report and in the Section by Section Summary of SSB 3006, the Supreme Court stated:

The theme of Sec. 102 is sounded by the adjective "environmental": NEPA does not require the agency to assess every impact or effect of its proposed action, but only the impact or effect on the environment. If we were to seize the word "environmental" out of its context and give it the broadest possible definition, the words "adverse environmental effects" might embrace virtually any consequence of a governmental action that someone thought "adverse." But we think the context of the statute shows that Congress was talking about the physical environment--the world around us, so to speak. NEPA was designed to promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment.

51 LW at 4373 (emphasis in original).

3. Legislative Amendments to SSB 3006

There were three minor amendments to SSB 3006, two in the Senate committee and one on the floor of the Senate. They were:

- (i) Adding a sentence to Section 7(1)(a) on categorical exemptions stating: "The types of actions included as categorical exemptions in the rules shall be limited to those types which are not major actions significantly affecting the quality of the environment." (lines 20-22).
- (ii) Adding the phrase "in the aggregate" to the attorneys fees provision in Section 4(9)(line 2).
- (iii) Amending language in Section 7(1) and deleting proposed section 10, in order to maintain the existing law which gives authority for SEPA rules adoption to the department of ecology (DOE), rather than temporarily transferring such authority to the Commission, as initially proposed in SSB 3006.

The first two amendments emphasize the existing intent of the legislation, as stated in the Commission's Initial Report. These two amendments, which dealt with substantive provisions of the bill were not controversial and were sponsored (in the case of the Section 7(1)(a) floor amendment) and co-sponsored (in the case of the Section 4 committee amendment) by the Commission chair-

man, Senator Bluechel. The third amendment was procedural in nature and did not affect the bill's substantive provisions.

The phrase "in the aggregate" amending the attorneys fees provisions was included to be certain that the overall award for any case, even if multiple parties or appeals are involved, does not exceed one thousand dollars.

The amendment on categorical exemptions was drafted essentially to insert a definition of "categorical exemption" into the statute and is consistent with the statutory amendment in Section 1 of SSB 3006 (RCW 43.21C.031) stating that categorically exempt actions do not require environmental review. The amendment was intended to clarify and emphasize the legislative intent since 1974 and upheld by the courts that the categorical exemptions in the rules are limited to types of actions that do not have significant impacts. The legislative history and the rejection of proposed committee amendments make clear that agencies are not required to examine whether a given proposal has a significant impact if the proposed activity properly fits within the type of activity categorically exempted in the rules, even though some recent cases have implied that agencies might have to do so (the reason for having a system of categorical exemptions is to eliminate the need for individual environmental review). The courts may continue to review such an agency determination and may review whether a type of activity is validly exempted by the rules.

The committee amendment to retain rulemaking authority in DOE was sponsored by Senator Al Williams (D-Seattle), a member of the Commission. Senator Williams expressed concern, based on prior rulemaking experiences, that the governmental body responsible for final adoption of the rules should be composed of officials of an existing department subject to traditional checks and balances, rather than a special commission composed of citizens (SSB 3006 would have removed the legislative members of the Commission from acting in a rulemaking capacity to prevent potential separation of powers problems).

The amendment explicitly allows DOE to "utilize proposed rules developed by the environmental policy commission" (line 31), and authorizes DOE to adopt modifications as a result of its public hearing process, which occurs under the state administrative procedure act not less than 20 days after proposed rules are published in the Washington State Register. The amendment emphasizes DOE's responsibility under the administrative procedure act to hold public hearings, consider comments on their merits, and assure consistency and implementation of legislative intent (the phrase "preservation of protections afforded by this chapter" (line 10) would apply to the wide range of protections afforded to all parties under SEPA). Committee members emphasized they did not intend to disavow the Commission's rulemaking proposals by this amendment, but were concerned only with the method of adopting the final rules.

Relationship Between Legislative Intent and Proposed Rules

The legislature has become increasingly concerned about whether agency rules are consistent with legislative intent. Recent amendments to the state administrative procedure act have required agencies to address legislative intent in

their rulemaking process and have established a way for the legislature to review rules.

The SEPA process over the past two years is unusual in the intimate connection between the development of new SEPA rules and the development of SEPA legislation. The Commission took an extraordinary approach in developing this 1983 amendatory legislation.

As explained in Summary of the Commission Meetings and in the next part of this report on the proposed rules, the Commission found that the statute was basically sound and that changes should occur mainly in the administrative rules implementing the statute. In addition, because most of the improvements would occur through the rules, the Commission felt that a clear indication of the likely rule changes would be both desirable and necessary to have a consensus on statutory amendments and the intent of the changes being authorized by SSB 3006.

The rule revisions and the proposed statutory changes were therefore developed simultaneously as part of the Commission's comprehensive review. As a general observation on the Commission's process, rule revisions were developed prior to the drafting of the proposed legislation. The Commission published a set of draft rules in its Initial Report, so that the administrative reforms authorized by SSB 3006 could be generally considered in the legislative process. The briefings to the legislative committees, caucuses, and floor included descriptions of the overall package of improvements, including key reforms in the rules (such as the environmental checklist, mitigated DNS, better EISs, use of existing environmental documents through adoption, and so on).

Other 1983 SEPA Amendments

In addition to SSB 3006, the legislature enacted three other amendments to SEPA in 1983. The amendments exempted SEPA compliance for Mt. St. Helens emergency work (SB 3519), for the State Housing Finance Commission's housing plan (SB 3245), and for school closures (HB 719). The Commission did not develop or review these other amendments.

The Commission had endorsed a categorical exemption in the rules for school closures (but not for demolition or reuse of a facility), and recommended that a process be established for public review of school closures. The Commission rejected a proposal to exempt the state Energy Facility Site Evaluation Council (EFSEC) from SEPA, concluding that its activities could be efficiently integrated with SEPA; although proposed in the previous session, an EFSEC exemption was not enacted in 1983.

Legislative Chronology

The following chronology lists the committee hearings, meetings and legislative action on SSB 3006 and relevant Commission meetings. Although the bill was developed over time through the Commission's deliberations, as explained above, this chronology begins on December 22, 1982, when the Commission's draft bill was prefiled for introduction.

LEGISLATIVE CHRONOLOGY

1982

December 22 SB 3006 prefiled for introduction

1983

January 5 Commission public hearing in Seattle
January 6 Commission public hearing in Olympia
January 10 First reading, referred to Senate Parks and Ecology
January 18 Commission public hearing in Yakima
January 25 Commission public hearing in Spokane
late January Commission Initial Report published, proposing SSB 3006
January 27 Senate Parks and Ecology meeting: briefing by
Kenneth S. Weiner, Commission Special Counsel
January 28 Senate Parks and Ecology meeting: briefing by
Kenneth S. Weiner, Commission Special Counsel
January 31 Senate Parks and Ecology public hearing
February 7 Senate Parks and Ecology public hearing
February 16 Senate Parks and Ecology public hearing
February 21 Senate Parks and Ecology executive session;
SSB 3006 reported with two minor amendments;
majority: 1st substitute bill be substituted, do pass
minority: do not pass
February 23 Passed to Rules committee for second reading
March 16 Briefings to Senate caucuses
March 24 Placed on second reading calendar by Rules committee;
Senate debate; Passed with one clarifying amendment;
Placed on third reading; Floor colloquy (Qs & As);
Read third time and passed by a vote of 42-6
March 26 First reading, referred to House Environmental Affairs
March 31 House Environmental Affairs meeting: briefing by
Kenneth S. Weiner, Commission Special Counsel
April 7 House Environmental Affairs public hearing
April 11 House Environmental Affairs public hearing
April 12 House Environmental Affairs executive session
April 13 House Environmental Affairs executive session;
SSB 3006 reported without amendment;
majority: do pass; minority: do not pass
April 15 Briefings to House caucuses;
Placed on second reading calendar by Rules committee
April 17 House debate; Passed without amendment to Rules committee
for third reading;
April 18 Placed on third reading; Floor colloquy (Qs & As);
Read third time and passed by a vote of 85-13;
President of the Senate and Speaker of the House signed
SSB 3006 and delivered to the Governor
April 23 Signing ceremony in Governor's office;
Governor signed SSB 3006 as passed;
May 1983 Commission issues Memorandum to Agencies and
Interim Guidance, distributing Summary and Qs & As
June 20 Commission's final meeting; recommends proposed rules to
DOE

OUTLINE of SEPA and SSB 3006

No Change

.010	Purpose
.020	Declaration of state environmental policy and environmental right
.030	"Action-forcing" procedures (EIS, etc.)
.035	Fifty cubic feet irrigation project exemption
.040	Report on agency authority
.050	SEPA not detract from pollution laws (Muskie-Jackson compromise)
.080	Notice of action
.087	DOE list of notice of action filings
.090	Decision of agency accorded substantial weight
.130	Model ordinances
.135	Local SEPA procedures
.150	Use of NEPA EIS
.160	SEPA/ECPA coordination
.170	Council on environmental policy (recodified from .100)
.175	Council on environmental policy personnel (recodified from .105)
.165	Challenge to consistency of SEPA rules
.210	Exemption for drought emergencies under RCW 43.06.210
.220	Exemption for incorporation of cities and towns
.550	Exemption for Mt. St. Helens emergency recovery
.900	Short title
.910	Severability

New Sections

.031	Significant Impacts
.075	Appeals
.095	State SEPA rules to be accorded substantial weight

Amended Sections

.037(3)	Forest practices exemption
.060	Substantive/supplementary authority
.110	Content of SEPA rules
.120	State and local rule revisions

Repealed Sections

.032	exemption for Hood Canal bridge reconstruction (completed)
.085	limitation on rule challenges (covered by new section .075)
.140	study required in 1972 (completed)

Decodified Sections

.070	establishment of single family exemption (completed in 1973)
.200-204	sections dealing with the Commission on Environmental Policy after its expiration in July 1983

(Decodification still allows historical notes and remains in the legislative history; since these provisions would be relevant to legislative intent, but are no longer functional, they should be decodified rather than repealed.)

SECTION-BY-SECTION SUMMARY
of
S.S.B. 3006

Passed by the Senate (42-6) on March 24, 1983
Passed by the House (85-13) on April 18, 1983
Signed By the Governor on April 23, 1983

Introduction

Background

The State Environmental Policy Act (SEPA) was enacted in 1971 in response to the environmental awakening across the nation and in the state. Closely patterned after the National Environmental Policy Act of 1969 (NEPA), many of SEPA's provisions are identical to those of the federal law.

One of the original purposes of SEPA and NEPA is to incorporate environmental values into decisions of public officials, which were frequently dominated by economic and technical considerations. The law, therefore, requires that "unquantified environmental values and amenities will be given appropriate consideration in decisionmaking along with economic and technical considerations." RCW 43.21C.030(2)(b).

Over the past decade, SEPA has contributed to making environmental considerations a routine part of agency decisionmaking. Public agencies, private firms, and citizens are much more competent about and sensitive to environmental issues than a decade ago. The importance of giving timely and appropriate consideration to environmental factors, and of taking actions to preserve environmental quality, is no less valid today than a decade ago. This fact has been brought home in recent weeks and months, for example, by news of our region's air pollution, toxic waste sites, and threats to watersheds and wilderness.

Balancing

SEPA is designed to provide a way for public officials to balance competing considerations and resource demands in order to achieve a "wide sharing of life's amenities" and a "productive harmony" between people and nature. RCW 43.21C.020. SEPA requires certain environmental analyses to occur, including the use of the environmental impact statement as a tool to aid decisionmakers. SEPA does not require the impact statement to be the only decisionmaking document, nor does it dictate the particular result of the balance to be struck by decisionmakers in individual cases. There may be many considerations--economic, legal, social,

political, technical, to name a few--which the responsible public officials may wish to weigh in making a decision which involves taxpayer dollars or the use of public regulatory authority.

Authority

Prior to SEPA, however, some agencies claimed that they lacked the authority to protect the environment as they carried out their jobs. SEPA makes environmental protection the business of every agency in the state, by supplementing agencies' existing authorities. RCW 43.21C.020, .030(1), .060. This applies to decisions on private projects for which government approvals are required, as well as public proposals. SEPA is intended to help public officials make decisions that are based on an understanding of environmental consequences and to take actions that protect, restore, and enhance the environment.

Tempered by a "rule of reason" and a recognition of the "balancing" judgments inherent in decisionmaking, SEPA requires that "to the fullest extent possible the policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth" in the Act, and that all agencies of the state "use all practicable means, consistent with other essential considerations of state policy" to carry out the Act's policies.

In essence, the statute requires that the state's environmental policies be interpreted consistent with other essential considerations of state policy. If there is no conflict with other considerations, it is assumed that the course of action which most furthers the state's environmental policy, as set forth in SEPA, will be taken. There may be conflicts or inconsistencies, however. In these situations, the state environmental policy helps to articulate standards and criteria and serves as a guide. SEPA does not dictate a particular result, but, rather, by considering environmental values, assists public officials, private applicants, and citizens to make the tough choices about actions they propose or which would affect them.

Administration of SEPA

The legislature has also recognized that SEPA's emphasis on substantive actions and better environmental decisions should not be diluted by unnecessary or ambiguous procedural and paperwork requirements. In 1974, the legislature directed a set of state guidelines be prepared to establish uniform procedures, encourage public involvement, reduce duplicative practices, and promote certainty on the Act's requirements. Although the administration of the Act has improved as a result, some problems were not solved and additional problems have arisen over the past eight years.

In 1981, the legislature created an environmental policy commission to examine the statute and guidelines "to establish methods and means of providing for full implementation of the Act in a manner which reduces paperwork and delay" and to resolve problems and to promote greater certainty and uniformity. RCW 43.21C.200.

The principal objectives of the bill are:

1. Reducing unnecessary paperwork, duplication, and delay.
2. Simplifying the state rules and making the process more predictable.
3. Improving the quality of environmental decisionmaking.

The commission found that the statute is fundamentally sound, but that many administrative practices should be improved. Public officials should be able to condition or deny proposals based on environmental impacts, but need to follow certain rules in doing so. Public officials also have an important role in reducing excess paperwork and avoiding duplication and delay. Applicants such as private project proponents deserve earlier and less costly environmental review and greater certainty regarding SEPA's requirements. Citizens should be able to participate more effectively in the process and know what mitigation measures result from a decision. Everyone should have shorter and more readable environmental documents which discuss the significant environmental impacts, supported by the necessary analysis.

The statutory reforms, therefore, clarify the law and direct and authorize that the statewide rules governing SEPA compliance be improved in specified ways, in order to fulfill the Act's legislative intent.

Section 1

Section 1 would add a new section, RCW 43.21C.031, to SEPA in order to make clear that an environmental impact statement (RCW 43.21C.030(2)) is required only when a proposed action, which is not exempted by the SEPA rules under RCW 43.21C.110(1)(a), has a probable significant adverse environmental impact. This section would also make clear that an impact statement is required to discuss and analyze only those environmental impacts which are likely to occur ("probable") and could degrade environmental quality ("adverse"). An environmental impact statement may discuss probable significant beneficial environmental impacts. Furthermore, if an impact statement is required, it should be organized in a sensible fashion and need not discuss the items listed in RCW 43.21C.030(2)(c) in separate sections.

Under existing law, environmental impact statements (EISs) are required under RCW 43.21C.030(2)(c) only when a proposal has "significant" environmental effects. The purpose of this section is to emphasize that the system of categorical exemptions in the rules can be relied upon; it does not prohibit judicial review (see summary of section 7). This section simply reaffirms the existing system of categorical exemptions and makes clear that an action shall be considered not to have a significant environmental impact (and therefore does not require environmental review or an EIS) if it is categorically exempted in the state SEPA rules under RCW 43.21C.110(1)(a).

The existing standard for putting a type of action in the rules as a "categorical exemption" would remain as stated under RCW 43.21C.110(1)(a), which has been upheld and relied upon by agencies and the courts. The types of actions included as categorical exemptions in the rules are limited to those which are not major actions significantly affecting the quality of the environment. The courts may still decide if a categorical exemption contained in the rules meets this criterion (see RCW 43.21C.110(3)). The courts may also decide whether a specific proposed action fits within a given categorical exemption.

The existing law is currently interpreted as meaning that EISs are required to discuss only "significant" impacts. The statute does not clearly say this, however. As a result, EIS preparers have written long statements which are sometimes filled with irrelevant information and may fail to focus on the key issues. This legal defensiveness and "kitchen sink" approach to EISs does not aid decisionmakers, applicants, or the public in considering serious environmental concerns. In addition, other agencies and the public often do not have an opportunity or responsibility to help identify the impacts and alternatives early enough in the planning and environmental review process.

This section states unequivocally that EISs are required to analyze only "significant" impacts. EISs may, but are not required to, discuss probable impacts which are not significant and adverse, if doing so would be helpful to integrate SEPA with environmental review requirements under other laws for example. It is intended that any discussion of nonsignificant impacts and accompanying mitigation measures would be very brief and summary in nature. This section would also require every agency to determine the scope of every environmental impact statement by consulting with agencies and the public. If a proposal only has two or three significant impacts, such as traffic or drainage, the EIS would only be required to analyze these impacts. This would encourage shorter, focused EISs.

By requiring scoping, the section is intended to promote early identification and resolution of potential problems. The

actual methods and nature of the scoping process and requirements would be established in the rules, so that statutory amendments would not be required in order to make any improvements in scoping which may become needed as the agencies gain experience with this kind of process. It is expected that an agency could further specify the scoping process and methods it wishes to use in its SEPA procedures, and that these methods may vary with each particular proposal.

"Probable" refers to impacts which are reasonably likely to occur, in contrast to impacts which are merely possible or remote or speculative. This is not meant as a strict probability test. An impact may be significant if its chance of occurrence is not great, but where the resulting environmental impact would be severe (as in a serious nuclear reactor accident).

In addition, this section authorizes agencies to write environmental impact statements in a more logical and readable fashion by combining the various subjects which the statute requires to be discussed in an impact statement. Currently the statute requires certain items to be covered in environmental impact statements in RCW 43.21C.030(2)(c). This section does not alter these requirements, but makes clear that these sections may be consolidated or included in those sections of an EIS where the responsible official decides they logically belong. This should eliminate unnecessary duplication and excess paperwork.

In addition, the subjects listed in RCW 43.21C.030(2)(c) have frequently been confusing to people who prepare and read EISs. This section clarifies the intent of those subsections by indicating that those subsections are meant to be read in their plain and logical meaning. For example, the requirement to discuss the "relationship between local short term uses of man's environment and the maintenance and enhancement of long term productivity" is another way of saying that the impact statements must discuss significant short term and long term environmental impacts. Similarly the discussion of "irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented" is intended to refer to significant irrevocable commitments of natural resources, and "adverse environmental impacts which cannot be avoided should the proposal be implemented" refers to significant environmental impacts which will not or cannot be avoided or substantially mitigated.

Consideration was given to revising or eliminating some of these categories altogether, in order to ensure that they were not treated as separate sections simply for the purpose of producing an adequate environmental impact statement. However, it was felt that this would be unnecessary, and that use of their common meaning and their consolidation or inclusion as applicable in the

relevant sections of an EIS would be a preferable way to clarify the existing requirements.

Section 2

This section would delete the sunset clause on the exemption contained in RCW 43.21C.037 regarding Class I, II, and III forest practices.

This section recognizes that there is continuing debate on the complex and technical subject of what forest practices should be subject to SEPA. This section acknowledges the appropriateness of continuing permanent exemptions for Class I, II, and III forest practices from the requirement of RCW 43.21C.030(2)(c) and intends that the Forest Practices Board continue to meet its ongoing responsibilities under the Forest Practices Act, including determining what practices should be included in Class I, II, and III forest practices, and what practices should be subject to RCW 43.21C.030(2)(c) as Class IV forest practices.

Section 3

Section 3 would enact certain amendments concerning aspects of SEPA's "substantive authority". SEPA's substantive authority is contained in several provisions, most notably: the declaration of a substantive state environmental policy in RCW 43.21C.020 (which the state courts have held contains sufficiently definite standards to be interpreted and enforced); the requirement in RCW 43.21C.030(1) to interpret and administer state law in accordance with those policies; and the supplementary mandate provision of RCW 43.21C.060, which states that the policies and goals set forth in the Act are supplementary to those set forth in agencies' existing authorizations.

Despite various state court decisions, there has been substantial controversy over the past ten years concerning whether SEPA was intended to have substantive effect, and whether SEPA does or should have substantive effect (in contrast to whether SEPA should be viewed as an essentially procedural statute or disclosure law).

The intent of this section, among other things discussed below, is to settle this issue and affirm that SEPA is more than a disclosure law and that it grants agencies authority over public and private proposals. This corresponds with existing case law, such as the Polygon v. City of Seattle case, 90 Wn.2d 59 (1978), which upheld and applied SEPA's substantive and supplementary authority. This section clearly grants agencies the authority to mitigate their own proposals or to condition or deny proposals of

applicants. The section clarifies how agencies may condition or deny proposals based on the environmental impacts, following specified rules and safeguards. The process for conditioning or denying a proposal under this section would require that:

1. An agency must identify policies which will serve as a possible basis for conditioning or denying proposals under SEPA.
2. These policies must be formally designated by the agency or, for local governments, by the local legislative body, within six months of the effective date of the revised SEPA rules.
3. If an agency conditions or denies a proposal, the agency must identify the environmental impacts in its environmental documents.
4. The agency must state any conditions in writing.
5. An agency may condition a proposal to avoid or reduce ("mitigate") environmental impacts.
6. In order to deny a proposal under SEPA, an agency must find that: (1) the proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under SEPA; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact.

The phrase "capable of being accomplished" maintains the existing law. SEPA currently requires agencies "to use all practicable means, consistent with other essential considerations of state policy" to preserve and enhance environmental quality. The dictionary defines the word "practicable" as "capable of being accomplished." This determination is made by the government agency, which is the entity responsible for SEPA compliance. An agency can deny a project, as noted above, if the impacts cannot be sufficiently mitigated.

The term "possible basis" is used because a particular proposal may or may not be conditioned or denied, and if it is, the particular environmental impact may involve one or another policy for protecting the environment. The section requires that agencies formally designate the policies which will be used as potential bases for the exercise of this authority. This section gives agencies enough latitude to articulate policies broadly enough that they need not predict every future environmental problem or concern. It is expected that agencies will prepare a document which contains their SEPA policies, so that members of the public and applicants know what these policies are. This section is not intended to allow agencies to adopt policies which conflict with the state's environmental policy as set forth in SEPA.

The section requires the agencies to identify these policies in any form, whether regulation, plan or code, which has the force of law and serves a regulatory function for the agency. In the case of local government, the appropriate legislative body is required to make this designation. The term "identify" is used to clarify that the agency need not have created or developed the policy as long as it formally designates the policy as a possible basis for the exercise of authority under the Act. The section does not specify the level of detail for these identified SEPA policies. It is intended that this be left to each agency, as long as they are formally designated and identified for the public to know.

Some of the major differences between this amendment and the existing law (which was last amended in 1977) include: (1) Limitations and requirements for the exercise for substantive authority apply to all local officials (the 1977 amendments and existing law apply mainly to actions not requiring a legislative decision); (2) The section makes clear that agencies may condition proposals to mitigate specific adverse impacts which are identified in the environmental documents prepared under SEPA, but may only deny a proposal if these impacts are significant and if they cannot be sufficiently mitigated. This determination will be made by the governmental agency. The existing law does not distinguish between conditions and denials or require an agency to make any findings in denying a proposal; (3) Mitigation measures which are required for a proposal shall be reasonable and capable of being accomplished. This follows the rule of reason and makes clear that mitigation must be reasonably related to a proposal's identified adverse environmental impacts and be technically or otherwise capable of being carried out. This requirement is consistent with SEPA's directive to use "all practicable means and measures" to implement its policies (RCW 43.21C.020). The state rules would additionally clarify the principles for the exercise of substantive authority and mitigation measures (see RCW 43.21C.110(1) in Section 7 below); (4) The section would retain an appeal to locally elected officials, but would allow the local legislative authority to eliminate such an appeal (the appeal to the local legislative authority was originally desired in 1977 as a check on nonelected officials).

Section 4

This section specifies general principles and specific requirements for appeals under SEPA, especially regarding the time periods for commencing an appeal under SEPA.

Current case law has not recognized a statutory right of appeal under SEPA. Instead, the courts have fallen back on other

statutes or inherent constitutional review power to hear SEPA cases. The first part of this section makes clear that SEPA provides a basis for challenging whether governmental action is in compliance with substantive and procedural provisions of the Act, and that any appeals brought under SEPA must be linked to a specific governmental action. The reason for this section is to make clear that SEPA's purpose is to combine environmental considerations with public decisions, and therefore that these two elements should be integrated not only in the environmental review process itself, but also in the appeals process. It also clarifies that the right to a healthful environment, contained in RCW 43.21C-.020(3), relates to SEPA compliance for specific governmental action. This section would not restrict courts from requiring agencies to enforce their substantive SEPA determinations, including permit conditions or mitigation measures for public or private proposals.

As noted above, the bill expressly provides for the right to challenge substantive and procedural compliance with the act. The existing right to a healthful environment is not amended. Conditions to mitigate environmental impacts are governmental actions under section 3 of the bill, and lawsuits may be brought under section 4 to ensure that they are enforced.

Consequently, this subsection (2) sets forth two general rules:

1. Appeals under SEPA are of the governmental action together with its accompanying environmental determinations; and
2. Appeals of environmental determinations must be commenced within the time required to challenge the governmental action which has been the subject of environmental review.

Although these two general rules are applicable to most situations, including essentially all agency administrative appeals, there are some special circumstances which need to be taken into account. The remainder of this section deals with how to implement these two principles and the exceptions to them.

Subsection (3) deals with agency administrative appeals. Subsection (4) requires appellants to use an agency appeal if available prior to seeking judicial review. Subsection (5) deals with the time for commencing judicial appeals, where statutes or ordinances specify time limits on appeal. Subsection (6) deals with the record on judicial appeal. Subsection (7) allows the parties in a judicial appeal to remove the SEPA issues to the administrative setting of the Shorelines Hearings Board if they wish. Subsection (8) contains definitions for this section. Subsection (9) allows the court in its discretion to award attorney fees under certain limitations. It is intended that time period for appeals are not commenced until after the rele-

vant decision has been made and notice has been given of the time and place to appeal such decision.

Subsection (3) specifies five items which must be included in agency appeal procedures, if an agency decides to establish an administrative appeals process. This section does not require an agency to establish an appeals procedure. The purpose of these provisions is to streamline local agency and state agency appeals, reduce multiple layers of appeal, and consolidate the substantive and procedural issues as much as possible under the State Environmental Policy Act, consistent with other applicable state law. Subsection (4) requires the exhaustion of administrative remedies if such are available and is intended to make clear that agencies may not limit standing for judicial review through their own agency appeal procedures under subsection (3).

Subsection (5) deals with the application of time periods in which judicial appeals may be brought under SEPA. SEPA itself does not contain a mandatory time limit for commencing an appeal, in part because of the wide variety of fact situations to which the law applies. Instead, the legislature enacted RCW 43.21C.080 in 1973 (and subsequently amended this provision in 1974 and 1977), allowing an optional "notice of action" to be filed. If the "notice of action" is used, it then creates a mandatory time limit within which SEPA appeals must be brought on that proposed action.

Some statutes and ordinances contain time periods for challenging governmental actions which are subject to environmental review under this chapter, such as local land use approvals. (The action which is subject to SEPA review is commonly referred to as the "underlying governmental action".) In these cases, there may be a conflict between the time limits contained in the notice of action provision (RCW 43.21C.080) and the time limits for appealing the underlying governmental action.

In addition, even if there are no conflicts with RCW 43.21C.080 (because, for example, the optional notice of action is not used), it was felt inequitable to require a judicial appeal under SEPA to be filed within the time limit for appealing the underlying action -- if this time limit were less than 30 days. One reason is that it takes some time to review environmental documents and decide whether to bring an appeal. In addition, some courts have held that appeals under SEPA should be taken within the same time period as would be required for appealing the underlying governmental action (for those actions which have time limits for appeal and for which the notice of action time period did not apply). This means that the time period for appeal may be much shorter than 30 days.

As a result, the bill states that an appeal to the courts must be commenced within 30 days if there is a time period in statute or ordinance for appealing the underlying governmental action. This guarantees a 30 day period to file a lawsuit if time periods for appeal are set by another statute or ordinance. Subsection (5)(a) also requires the appellant to submit to the agency a notice of intent to file a lawsuit within the time period for commencing an appeal on the underlying governmental action, if there is such a period, in those cases where there has already been an agency administrative appeal and there is formal notice to the parties of record. This requirement was included in order to allow agencies and applicants to have greater certainty of the status of their proposals at the time the appeal on the underlying action expires. This requirement also maintains consistency with the general principle of commencing appeals in the time required by the underlying action, although only a notice would be required.

If those cases where there has not already been an agency appeal, however, it was felt unfair to impose the early notice requirement because parties of record for notice purposes would often not have been identified. It is also intended to be sufficient for the appellant to submit one notice of intent to commence a lawsuit to the agency, even though there may be multiple underlying actions.

Subsection (5)(b) allows the notice of action to be used and its publication requirements to be met within the time period for commencing an appeal on the underlying action, if there is one. As a practical matter, this will mean that the newspaper notice requirements of RCW 43.21C.080 could be compressed in time or frequency and would be legally allowed.

By governing appeals under this chapter (and their relationship with any other time periods for appeal as may exist), this section is written to avoid modifying any other statute of limitations under state law. This section is not intended to create a statute of limitations on SEPA appeals other than that already in RCW 43.21C.080 or as specified in subsection (5) of this section, where the underlying governmental action has a time period for appeal established by statute or ordinance.

This section also requires appeals on the record, consistent with other applicable law, and allows an optional appeal to the Shorelines Hearings Board and then to an appellate court if the parties to an appeal wish to do so. Several definitions are specified for purposes of this section and the notice of action section.

Subsection (9) allows a court to award attorneys fees under specified circumstances. They are: (1) a court may in its discre-

tion award attorneys fees; (2) the court must find the legal position of a party to be frivolous and without reasonable basis (in order to protect the parties from potential harassment and expensive litigation over the awarding of attorneys fees themselves, such findings are intended to be based on the legal merits and the record and not on discovery and evidentiary proceedings concerning the parties); (3) because SEPA litigation is often related to other causes of action, the attorneys fees award is limited to issues arising out of this chapter; (4) the prevailing party may include a governmental agency; (5) an award for any given lawsuit is limited to reasonable attorneys fees up to one thousand dollars in the aggregate, regardless of multiple defendants or multiple appeals, which may be awarded at the trial court level; (6) the award under this section relates to attorneys fees only; any costs which may otherwise be allowed to be awarded by the court are not governed by this section and are not included in the dollar limitation for attorneys fees.

Section 5

This section would be similar to the existing RCW 43.21C.090, by requiring that the state SEPA rules adopted under RCW 43.21C-.110 be accorded substantial deference in the interpretation of SEPA. There has been concern raised over the past several years about whether the courts adequately review and consider the state SEPA administrative rules before interpreting the State Environmental Policy Act. As a result of comprehensive review and revision of these rules, it was felt extremely important that the courts should first turn to the administrative rules to see if they interpret a provision involved and should give substantial weight to such interpretation.

Section 6

This section would recodify the existing authorization for the currently expired Council on Environmental Policy. The various interests concerned with SEPA felt that there was much merit in having a high level state Council on Environmental Policy, similar to the White House Council on Environmental Quality, which oversees NEPA. Recognizing the state's current fiscal situation, it was felt that it would be difficult for such a council to be funded and operational at this time. However, it was felt important not to repeal or decodify this section, but rather to continue a latent authority for the entity known as the Council on Environmental Policy in the statute, so that the legislature might reactivate the council promptly in the future, without causing the misperception that an entirely new agency was being invented.

Section 7

This section specifies the content of the state SEPA rules. Under the bill, the revised rules would be issued and adopted under the administrative procedure act process by the Department of Ecology, which may utilize the rules prepared by the environmental policy commission (RCW 43.21C.204).

Subsection (1) would change the term "guidelines" to "uniform rules", which would be mandatory statewide rules for the SEPA process. The intent of using the term "rules", rather than guidelines, was to emphasize that the rules are intended to be regulatory, and not advisory (which is sometimes implied by the use of the term guidelines). The term "rules" was added throughout this section to maintain consistency. The word "guidelines" was not deleted in subsection (1) because the Department of Ecology may find it useful to issue guidelines in addition to rules for certain matters (such as evolving areas of environmental assessment methods for which strict regulation would be inappropriate or premature).

Paragraph (a) continues the existing authorization for categorical exemptions enacted in 1974. Categorical exemptions are just that: types of activities which do not have significant environmental impacts. Under state law, rules, and practice for more than seven years, if an agency concludes that a particular proposal fits within a categorical exemption in the state rules, individual environmental review on that proposal is not conducted (also see section 1). This paragraph maintains the status quo and adds an additional protection by noting that the rules shall provide for certain circumstances where routinely exempt actions would require environmental review (such as a segment of a series of actions which together have a significant impact, or certain actions in designated "environmentally sensitive" areas).

Some confusion has arisen in situations where courts have been confronted with proposals having significant impacts, but an agency asserts the proposal is categorically exempt. In such cases, the courts are faced with two questions (the answer to the first will usually resolve the issue): (1) does the proposal fit within the asserted exemption, including taking into account that the rules provide for certain circumstances in which potentially exempt actions would not be exempt; and if so, (2) does the type of action exempted by the rules result in significant adverse environmental impacts. If the answer to the second question is affirmative, the exemption in the rules would be overbroad. Judging by the tone (not the results) of a few judicial opinions, the state courts have not always recognized that the importance of a reliable and efficient system of categorical exemptions is such that it would be better in the rare instance to find an exemption overbroad, than to require individual case-by-case environmental

review on every governmental activity. Such individual review would defeat the very purpose of having categorical exemptions and would create an immense paperwork, bureaucratic, and cost burden on government and taxpayers.

Paragraph (c) makes clear that the rules are applied to the preparation of environmental documents under SEPA and not to just environmental impact statements. The new rules would cover the overall environmental review process, and shift emphasis from exclusive preoccupation with environmental impact statements to emphasis on an overall environmental review process better integrated with planning and decisionmaking. Thus other environmental documents besides impact statements would be important to the overall implementation of SEPA's procedural requirements and the efficient function of the environmental review process, including the timing of environmental review.

The phrase "timing of environmental review" was added to make clear that the environmental process frequently involves judgments as to the most appropriate timing for environmental review by lead agencies, and that the rules may provide for agencies and applicants to rely on previous or future environmental reviews for their SEPA compliance. This would authorize important administrative procedures such as phased review and adoption, for example. This paragraph also requires that the public be involved in the scoping process and in the review of draft environmental impact statements. This public review has been the practice over the past decade, but is not explicitly stated in other sections of the Act (i.e., RCW 43.21C.030(2)(d)). This section would make clear that such public participation is required.

Paragraph (d) reiterates subsection RCW 43.21C.031, requiring environmental impact statements to analyze only reasonable alternatives and probable adverse environmental impacts which are significant. Environmental impact statements are not necessarily limited to discussing only those alternatives and impacts (for example, beneficial environmental impacts may be discussed). The intention of this section is that EISs are only required to discuss reasonable alternatives and their probable significant, adverse environmental impacts, however, and that any other discussion is not intended to be a basis for finding an environmental impact statement to be inadequate for purposes of meeting the EIS requirement.

Paragraph (f) requires the establishment of a list of elements of the environment, which is the method for defining what is appropriately considered within the term "environment." This section makes clear that environmental analysis may only be required under SEPA for those subjects listed as elements of the environment. Environmental documents may include other information, consistent with the statute and the rules, but this

information is not required under SEPA. The bill would not prohibit the inclusion of any impacts in an EIS.

This section also clarifies considerable confusion which resulted from a recent court decision involving so-called "socio-economic" impacts. The court misconstrued the phrase in SEPA which requires the state's environmental policy to be carried out in a way which will "promote the general welfare...and fulfill the social, economic, and other requirements of present and future generations of Washington citizens." RCW 43.21C.020(1)(c). This statutory phrase refers to factors which decisionmakers consider in weighing and balancing final decisions. It was not intended to require that "environmental" impact statement documents discuss every social, economic, or other consideration which might relate to the general welfare. To do so would substantially broaden the existing scope and interpretation of SEPA's environmental analysis requirements.

This section would clarify the issue by listing those urban-type impacts which have traditionally been important and included in environmental documents. The impacts of most significant concern, for example, involve the nature and cost of infrastructure and growth impacts, such as public services, including utilities, water, sewer, schools, fire and police protection; transportation; environmental health; and land and shoreline use, including housing and a description of the relationships with land use plans and designations (which may include shoreline plans and population changes which may have an impact on other elements of the environment). Environmental health refers to human health and the health of all living things. Housing includes low income housing affected by a proposal.

Traditional areas of concern which would clearly be covered by this section include the need and cost of public services as a result of new development; the impacts of major infrastructure investments, such as highways, sewers, and airports, on neighborhoods which they traverse or affect; and the problems of blight of downtown and urban areas which would be caused by proposed actions.

The list of elements of the environment would be divided into two groups: the natural and the built environment. The natural environment would relate to natural resources, and the built environment would relate to more urban elements. The term "built" environment was used to avoid conveying the impression that these elements are present only in already urbanized areas.

The bill specifies the major headings, and the Department of Ecology would still be able to list subheadings in the statewide SEPA rules. The rules recommended by the Commission on Environmental Policy, which was created by the legislature in 1981, would

include noise, aesthetics, housing, recreation, historic and cultural preservation, among other things, as subheadings under "land and shoreline use." Environmental impacts in these areas would be required to be considered under SEPA. Although other items cannot be required under SEPA, a local government or other agency has the option to include analysis of any impact in an environmental impact statement.

As noted above, the term "socioeconomic" was not used because of the lack of any common understanding of its meaning. This term "socioeconomic" is extremely vague and has never been defined by court decisions, federal rules, or state or local rules sufficiently to provide any real certainty or clarity for the SEPA process. Furthermore, it gets confused with the "general welfare" considerations involved in the ultimate balancing by decision-makers, as noted above. It was felt that use of this term confused, rather than aided, the preparation of adequate environmental analyses.

In short, this section takes the approach of specifically requiring the consideration of those important items which have been included in environmental impact analysis for a decade in this state. These elements relate to human interaction with the physical or natural world. They pertain to growth, infrastructure, and urban impacts, but avoid creating a wide open liability for the adequacy of discussing impacts which are not environmental in nature.

Thus, analysis of economic competition, how proposals are financed, data on race, creed, religion or education, and similar information are examples of the type of material which is not appropriate to require in environmental impact statements. Requiring the inclusion of every possible kind of "impact" would dilute SEPA's environmental protection mandate and encourage the abuse of SEPA by using the statute for purposes for which it was not intended. Although some gray areas will no doubt continue to exist, as human activities do not always fit into neat categories, the rules would further elaborate these factual situations to increase certainty in SEPA requirements. In addition, it is expected that the scoping process will help to identify the relevant, environmentally significant impacts.

Paragraph (j) authorizes rules for better analysis for nonproject proposals, such as plans and policies, and for encouraging better interagency coordination and integration between SEPA and other laws. Similarly, paragraph (l) authorizes rules for improving use of environmental documents and planning decision-making and implementing SEPA substantive policies and appeal procedures. An index to the proposed rules is attached.

Section 8

This section requires that state and local agencies update their own SEPA procedures when there are revisions in the state-wide SEPA rules and requires them to adopt their own SEPA policies under RCW 43.21C.060 and their own SEPA procedures within 180 days of the effective date of the state rules or after the establishment of an agency whichever shall occur later. This provision ensures that state and local agencies continue to update their own rules as rule revisions are made or as new agencies or local governments are established. In addition, this section provides that the existing SEPA procedures--not SEPA policies--continue to be effective until the new ones are adopted, as long as the new ones are adopted within the 180 day period specified by this section.

This section does not restrict or alter the ability of agencies to update, amend, or adopt new SEPA policies or procedures at any time.

Section 9

Section 9 requires the Department of Ecology to conduct annual statewide workshops and to publish annually a SEPA handbook or supplement to assist people in carrying out the act and rules. One of the problems which was identified in the SEPA process was the development of bad habits and practices by agency staff, applicants, citizens and others affected by SEPA. Misinterpretation, confusion, and bad habits can undermine the effectiveness and intent of the reforms included in the legislation and implementing rules. This section is essential to following through on the improvements in the law and to making SEPA work as intended. The failure to do this on an annual basis would jeopardize the entire reform effort.

Section 10

Section 10 specifies three sections in the existing law to be repealed. Section RCW 43.21C.032 contains a provision exempting the restoration of the Hood Canal Bridge, which was enacted in 1979 and is now completed and is no longer needed in the law. RCW 43.21C.085 which was enacted in 1974 contains a provision on the time limits for challenging rules adopted by agencies. This provision is now encompassed by the new section RCW 43.21C.075 (Section 4 of this bill). RCW 43.21C.040 required a report to be submitted to a prior legislature, and this section has since ceased to have any effect and should be repealed as well.

Section 11

This section would decodify four sections of SEPA. Section RCW 43.21C.070 directed the Department of Ecology to issue rules exempting individual single family residences. This was accomplished in 1973 and this provision should be decodified. Similarly Sections .200, .202, and .204 regarding the Environmental Policy Commission should also be decodified upon the expiration of the Commission. These four provisions are being decodified rather than being repealed, so that their legislative intent continues to remain on the books, are available in the legislative history, and apply to the rules under RCW 43.21C.110. Because their mandates have been or will have been completed, their presence in the codified law tends to be unnecessarily confusing.

Section 12

This section recodifies RCW 43.21C.100 as 43.21C.170 for the reason explained in Section 5 above on the Council on Environmental Policy.

Section 13

This section recodifies RCW 43.21C.105 as 43.21C.175 for the reason explained in Section 5 above on the Council on Environmental Policy.

Section 14

This section is a standard section indicating that section headings are not part of the law, although they will be included as part of the codification of the law.

Section 15

This section provides for the effective date of the various sections of the law. Section 3 regarding the conditioning and denying of proposals based on SEPA policies and section 4 regarding appeals apply prospectively only. This is to avoid affecting the rights and remedies of any project currently under way and in the midst of decisionmaking and appeal procedures. Sections 1, 5, 6, 7 and 8 of the Act make important improvements in the interpretation of the law. Agencies may be in the midst of the environmental review process for certain proposals at the current time and may wish to avail themselves of these interpretations immediately. As a result, agencies may, but are not required, to apply these sections retrospectively. As a practical matter, only section 1 will be relevant for retrospective application, as the remaining sections deal mainly with new rulemaking and statutory codification (which have yet to occur).

Section 16

This section is a severability clause.

Section 17

This section contains an emergency clause, so that important clarifications and legislative direction can take effect immediately, including direction to the Department of Ecology regarding the state rules. This section also postpones the effective date of Section 3 of the Act until for 180 days after the new rules are effective, so that state and local agencies have time to prepare for formally designating their SEPA policies.

Source: Commission on Environmental Policy

Qs & As on S.S.B. 3006 (SEPA)

Note: S.S.B. 3006 passed the Senate on March 24, 1983 (42-6) and the House on April 18, 1983 (85-13). On April 23, 1983, the Governor signed SSB 3006 as passed by the legislature. The following questions and answers were exchanged in order to reaffirm the intent of the measure. The Senate Qs and As were exchanged between Senators Bottiger and Bluechel. The House Qs and As were exchanged between Representatives Van Dyken and Hine.

CATEGORICAL EXEMPTIONS (Senate)

Q: Does the bill eliminate judicial review of categorical exemptions?

A: No. The bill makes it clear that people can rely on a system of categorical exemptions established by the rules. A categorical exemption is a type of action which does not significantly affect the environment. The courts may still decide if a categorical exemption contained in the rules meets this criterion. The courts may also decide whether a specific proposed action actually fits within a particular categorical exemption in the rules.

PROBABLE (House)

Q: Does the term "probable" change the existing law?

A: No. The state supreme court has consistently stated that an environmental impact statement is required "whenever more than a moderate effect on the quality of the environment is a reasonable probability." This is not meant as a strict statistical probability test. An impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred.

CAPABLE OF BEING ACCOMPLISHED (House)

Q: Does the phrase "capable of being accomplished" in section 3 maintain the existing law?

A: Yes it does. SEPA currently requires agencies "to use all practicable means, consistent with other essential considerations of state policy" to preserve and enhance environmental quality. The dictionary defines the word "practicable" as "capable of being accomplished." This determination is made by the government agency, which is the entity responsible for SEPA compliance. Section 3 provides that an agency can deny a project if the impacts cannot be sufficiently mitigated.

ENFORCEMENT OF MITIGATION MEASURES (House)

Q: Does the bill continue the right of private citizens to bring SEPA lawsuits and to seek judicial enforcement of mitigating conditions?

A: Yes. The bill expressly provides for the right to challenge substantive and procedural compliance with the act. The existing right to a healthful environment is not amended in this bill. Conditions to mitigate environmental impacts are governmental actions under Section 3 of the bill, and lawsuits may be brought under Section 4 to ensure that they are enforced.

ATTORNEYS FEES (Senate)

Q: Does the bill impose attorneys fees in every case; what protection is there against harassment of plaintiffs; can a court award more than one thousand dollars in a lawsuit; for example, because of multiple defendants?

A: The bill does not impose attorneys fees. It allows a court in its discretion to award up to a maximum of one thousand dollars in fees if the court makes certain findings. The findings are findings of law, not of fact or intent; they are intended to be as objective as possible and to prevent expensive and harassing discovery of a party's motivations and group affiliation if any. Although an award may be made at the trial court level, the total liability for attorneys fees for a lawsuit under this act is one thousand dollars, regardless of whether there are multiple defendants or appeals.

SOCIOECONOMIC IMPACTS (Senate)

Q: Does the bill include analysis of the impacts of a project upon urban areas, communities and neighborhoods?

A: Yes. The bill specifies that impacts on the "built" environment and on the "natural" environment must be analyzed. This includes the impacts upon, and the quality of, our physical surroundings, whether they are in wild, rural, or urban areas. The term "socioeconomic" does not have a uniform meaning and has caused a great deal of uncertainty. Rather than using a vague and confusing term, the bill specifies the traditional areas of urban environmental concern, such as public services, transportation, environmental health, and land and shoreline use, including housing, noise, aesthetics, and so on.

ENVIRONMENTAL HEALTH AND HOUSING (House)

Q: Section 7(1)(f) refers to "environmental health" as an element of the environment; does this include human health? Also, this provision refers to "housing"; does this include low income housing?

A: Yes. Environmental health is a broader category which includes human health and the health of all living things. Housing includes low income housing affected by a proposal.

ELEMENTS OF THE ENVIRONMENT (House)

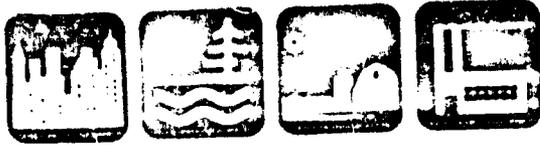
Q: The bill lists certain elements of the built environment and examples of items to be included as subheadings in the rules. Some people call these "socioeconomic" elements. It is my understanding that the bill clarifies but does not overrule the result in the Barrie II case and would require consideration of subheadings such as noise and aesthetics to continue to be included. It is also my understanding that agencies, which would include local government, may discuss any types of impacts in EISs, including impacts which may not be environmental in nature. Is this correct?

A: Yes. The bill specifies the major headings, and the Department of Ecology would still be able to list subheadings in the statewide SEPA rules. The rules recommended by the Commission on Environmental Policy, which was created by the legislature in 1981, would include noise, aesthetics, housing, recreation, historic and cultural preservation, among other things, as subheadings under "land and shoreline use." Environmental impacts in these areas would be required to be considered under SEPA. Although other items cannot be required under SEPA, a local government or other agency has the option to include analysis of any impact in an environmental impact statement.

AGENCY RULE REVISIONS (House)

Q: Sections 3 and 8 require government agencies to adopt certain policies, rules, and regulations not later than 180 days after the effective date of the statewide rules to be adopted under Section 7. Can they later update, amend, or adopt new ones?

A: Yes.



Washington State Legislature

Commission on Environmental Policy

101 Public Lands Building • Olympia, Washington 98504 • 753-1839

April 11, 1983

MEMORANDUM FOR REP. DENNIS DELLWO

FROM: SEN. ALAN BLUECHEL

SUBJECT: SSB 3006

Mr. Peter Eglick made a number of comments, on behalf of neighborhood groups, in his testimony Friday before the House Environmental Affairs Committee. It may be helpful for you to know that over the past two years, the Commission on Environmental Policy and its technical committees considered the questions and subjects raised by Mr. Eglick. Some of the matters were analyzed and discussed in considerable detail. A number of these points are addressed in the Commission's initial report and in the section-by-section summary of the bill.

"Probable" (secs. 1 and 7, pages 1 and 10)

Mr. Eglick said that the term "probable" differs from existing law. This is incorrect.

The state supreme court has stated in at least five cases that a significant impact exists and an EIS is required "whenever more than a moderate effect on the quality of the environment is a reasonable probability". ASARCO v. Air Quality Coalition, 92 Wn.2d 685, 601 P.2d 501 (1979). See also the Sisley, Marino, Swift, and Norway Hill cases.

The term "probable" is used so that the EIS requirement is not applied simply to impacts which will definitely occur -- which would be a far too narrow test -- but also to impacts which could occur. One purpose of preparing an EIS is to learn what the impacts are, and how severe they would be.

The use of this word also follows existing law by requiring discussion of those impacts which might well occur -- and not merely those which are possible, remote, or speculative. The supreme court has repeatedly stated that discussion of remote or speculative impacts is not required under SEPA. See, e.g., Cheney v. Mountlake Terrace, 87 Wn.2d 338, 552 P.2d 184 (1976). Also see Initial Report of the Commission on Environmental Policy (1983), part one at 2-3 (CEP Initial Report).

A question was raised about nuclear accidents (severe impacts with a statistically low probability of occurrence). The case law covers this situation under the term "significant", which requires consideration of an impact's intensity

Senator Alan Bluechel, Chairman • Senator W.H. "Bill" Fuller • Senator Margaret Hurley • Senator Al Williams
Representative Richard "Doc" Hastings • Representative Homer Lundquist • Representative Eugene V. Lux
Representative Georgette Valle • Judith M. Runstad • James W. Summers • Chris Smith • Norman L. Winn
Jim Whiteside • Isabel Hogan

Final Report
Page 55

John Woodring, Staff Counsel • Ed McGuire, Staff Counsel • Carol Holmes, Administrative Assistant

(severity) and unknown risks to public health and safety. See, e.g., CEP Initial Report, part three at 58. (Also see the extensive rulemaking and case law on inclusion of Class 9 accidents and Table S-3 by the Nuclear Regulatory Commission.) This is a well-established interpretation of the act, and nothing in the bill would change it.

We received some comments in our public hearings requesting the revised rules to mention expressly, in the definition of "significance", those situations where an impact may not be statistically great but would be very severe if it occurred. This is the normal and appropriate function for SEPA rules (as you may know, the statute does not define "significance", but directs the rules to do so). I would expect such a recommendation from the Commission to DOE.

In short, SSB 3006 codifies -- it does not alter -- the existing law regarding "probable".

Scoping Notice (Sec. 1, page 2)

Mr. Eglick suggested adding the phrase "upon adequate notice" to the scoping requirement. SSB 3006 and the Commission's recommendations currently cover this. The suggestion is redundant with the meaning of scoping.

Scoping itself is defined in term of giving notice and opportunity to comment. CEP Initial Report, part three at 57.

Even after the technical committees made their initial recommendations, the Commission itself spent over two months defining the scoping process and how it would work, prior to unanimously adopting the recommendation on July 27, 1982. The Commission's report states:

The scoping requirement would involve giving notice (the determination of significance) to other agencies and the public that an EIS is being prepared and would invite comments on its scope.

CEP Initial Report, part one at 3 (emp. supp.). The draft rules recommended by the Commission would require agencies to give notice under the same provision as notice for environmental impact statements.

The section-by-section summary of SSB 3006 states that the rules will establish the actual methods and procedures for scoping (page 4).

Thus, SSB 3006 would amend RCW 43.21C.110(1)(a)(SSB 3006, page 9) to require the rules to include procedures for public participation in scoping. This section has served the state well since 1974 and should be adequate to ensure that the rules contain proper notice provisions.

The suggested amendment is unnecessary. Furthermore, it is mischievous because it does not specify what constitutes adequate notice (this is what the rules are for).

Time to Adopt Policies

Mr. Eglick complained that six months was too short a period for agencies to designate their SEPA policies. The Washington Environmental Council comments on SB 3006 requested 120 days (January 5, 1983 public hearing comments, page 2). SSB 3006 extended the time by two more months to 180 days. (See Sec. 8, pages 11 and 12 of SSB 3006.)

The requirement to have SEPA policies is not new. It was enacted in 1977. Many agencies currently have them, and the bill would not require redesignation. CEP Initial Report, part three at 75.

Mr. Eglick also did not point out to the committee that the six month period begins after the effective date of the new rules, which would be at least 3 months after the bill would go into effect. (SSB 3006, page 11, line 30 and page 12, line 10.)

Concern was voiced that agencies be able to revise these policies over time. This is precisely the intent of the amendments to RCW 43.21C.120 (Sec. 8 of SSB 3006), which make the section self-perpetuating, and would clearly extend SEPA's requirements to new agencies or localities which may be created. Revisions in statewide and agency policies and procedures can be made without the need for future statutory amendment to this section. See page 16 of SSB 3006 section-by-section summary.

Mr. Eglick also asked the consequences of an agency's failure to adopt policies. If this occurs, the agency would be violating SEPA and would be acting illegally if any actions subject to SEPA were taken. There are, for example, several federal court cases where the courts directed and supervised laggard agencies' adoption of NEPA procedures immediately. The likely consequence is any discretionary actions taken by the agency in the absence of SEPA policies could be declared invalid. County and city attorneys and chief executives are not likely to subject their agencies to this.

"Capable of Being Accomplished" (Sec. 3, page 4, line 12)

Mr. Eglick suggested deleting the phrase that mitigation measures must be capable of being accomplished.

Since SEPA's enactment, this has been the operative phrase in the statute for requiring mitigation. RCW 43.21C.020 (unchanged by SSB 3006) requires agencies to use "all practicable means, consistent with other essential considerations of state policy" to preserve and enhance the environment.

The dictionary defines "practicable" as "capable of being accomplished or effected". This is in accord with existing case law and with the existing 1975 state guidelines (see, e.g., WAC 197-10-440(11)(c), page 8 of section-by-section summary of SSB 3006). Each agency continues to be responsible for deciding what mitigation conditions are reasonable and feasible to require of applicants. RCW 43.21C.060; SSB 3006, Sec. 4.

This phrase does not alter existing law at all.

Enforcement of Mitigation Measures (Sec. 4, page 4)

Concern has been voiced about whether the request for an appeal to be linked to a governmental action precludes a citizen lawsuit to enforce mitigation commitments. It would not.

As you may know, some interests have long advocated that SEPA is merely a disclosure law and should not be used to condition or deny projects. The Commission examined this issue in great detail over several months, hearing presentations from diverse interests. The Commission concluded that SEPA should have "substantive" effect and reaffirmed its conclusion by recommending that the bill add explicit authority to the existing statute for agencies to "mitigate" impacts. See page 6 of SSB 3006 section-by-section summary and CEP Initial Report, part one at 5 .

SSB 3006 adds a statutory right in SEPA to challenge whether governmental action complies with SEPA's requirements. This includes the substantive requirement in RCW 43.21C.030(1) -- not changed by SSB 3006 -- that: "to the fullest extent possible, the policies, regulations, and laws of the State of Washington shall be interpreted and administered" in accord with SEPA.

Since 1977, any mitigation measure imposed under SEPA must be identified in the relevant environmental documents and stated in writing as a condition by the agency. RCW 43.21C.060. By the very terms of SEPA itself, a mitigation condition is a governmental action.

The bill merely states: "The State Environmental Policy Act is not intended to create a cause of action unrelated to a specific governmental action." SSB 3006, Sec. 4(1), page 4, lines 34-36. Since mitigation conditions are specific governmental actions, such a lawsuit will obviously be related to a "specific governmental action."

Thus, the requirement to have SEPA challenges linked to governmental actions does not eliminate a citizen's right to challenge an agency's: (1) lack of imposing a mitigation measure at all; (2) determination that a mitigation measure is adequate for the impact; or (3) enforcement of the mitigation measure as a condition. This intent is unequivocally stated in the section-by-section summary of SSB 3006 (page 8).

Appeal Period (Sec. 4, page 5)

Mr. Eglick suggested that section 4 be amended to impose a 30 day SEPA statute of limitations. Because this amendment would reduce citizens' abilities to challenge SEPA compliance, the Commission rejected this approach.

SEPA does not contain a mandatory statute of limitations. Instead, it creates an optional "notice of action" which, if used, sets a time limit for appeal. RCW 43.21C.080. SSB 3006 section-by-section summary at 9.

Many decisions made under SEPA are never subject to time limits for filing challenges. Most governmental actions do not currently have a statute of limitations, and agencies often do not use the optional "notice of action". The common law of laches applies (a reasonable time under the circumstances). Courts have heard SEPA cases filed 11 months after a rezone decision. Hayden v. Port Townsend, 93 Wn.2d 870, 613 P.2d 1164 (1980).

You previously asked about the ability to bring a lawsuit to enforce mitigation measures. As you know, mitigation measures may take several years to implement, and any environmental damage from noncompliance may occur years later. A flat 30 day limit for any type of SEPA appeal, if that is what was suggested, would be too short and inflexible and would undermine substantive protections.

SSB 3006 simply guarantees a 30 day period to file a lawsuit in those situations where another applicable law already sets a statute of limitations. SSB 3006 section-by-section summary at 9-10. The Commission believed that the existing law of laches provided adequate protection for all parties for other situations. SSB 3006 intentionally does not establish a mandatory statute of limitations for all SEPA challenges, because this could undermine SEPA's purposes and policies.

Mr. Eglick also questioned whether the section was understandable. One of the difficulties in dealing with SEPA appeals is that SEPA is an "overlay" on other laws, and great care must be taken to avoid inadvertent and inconsistent alteration of these other appeal procedures. This section was reviewed by a wide cross-section of people who felt it was adequate, and that the rules and DOE handbook would be able to explain it more graphically and at greater length. The Commission spent more than two months on the appeals process to try to avoid mistakes. Suggestions which may sound simple, such as a flat 30 day appeal limit, can cause serious harm to the act and citizens' rights.

Typed Transcript (Sec. 4, page 7)

Mr. Eglick complimented the acceptance of a taped transcript for administrative hearings and suggested forcing judges in the courts to use tapes as well. While this may be commendable from a cost standpoint, it is impractical to tell judges that they cannot have written transcripts of proceedings.

SSB 3006 includes provisions encouraging judges to use tapes and thus lower court costs: "A taped or written transcript may be used". SSB 3006, sec. 4, page 7, line 2. If a judge still wants a written transcript, the bill would encourage transcription of only those portions which are necessary, in order to reduce costs. This provision incorporates existing court rules and case law and should lead to lower costs than at present.

The Commission felt it was inappropriate to tell a judge that he or she had to listen to tapes (of varying quality) and simply could not have a written transcript of the relevant portions of the record.

Attorneys Fees (Sec. 4, page 8)

Mr. Eglick suggested the provision be deleted as unnecessary. This provision received careful examination by the Commission and was limited in SSB 3006 to a very narrow set of circumstances. CEP Initial Report, part 2 at 10-11.

Public agencies and private applicants have expressed concern that, for a small filing fee (e.g. \$75), a lawsuit can delay or halt a multimillion dollar project because of inflation or loss of financing. Citizens and environmental groups have expressed concern that restricting access to the courts is unacceptable because SEPA relies on citizen on judicial enforcement.

The Commission agreed that restricting judicial access should not be included in the bill. There are no limitations on standing or any bonding requirements, both of which have been sought by industry. CEP Initial Report, part one at 6.

SSB 3006 reflects agreement that some financial responsibility would be appropriate if a court in its discretion made specific findings under an objective standard that a suit was both frivolous and without reasonable basis. SSB 3006 section-by-section summary at 11. In discussions on this provision, Mr. Eglick and Mr. Leed said that their lawsuits at the trial court level cost on the order of \$15,000-\$20,000. They cannot seriously argue that a limit of \$1000 including any appeals, if awarded at all, would have a chilling effect (assuming, for argument's sake, that a court found they brought a frivolous suit without reasonable basis).

This provision is also far narrower than other attorneys fees bills now moving through the legislature, unopposed by many of those objecting to SSB 3006.

Elements of the Environment (Sec. 7, page 10)

Mr. Eglick suggested distinguishing between the "natural" environment and the "human" environment. This conflicts with both NEPA and SEPA. It would be even more confusing than the current situation.

NEPA uses the term "human environment" in the statute. 42 USC 4332(2)(C). In contrast, SEPA uses only the term "environment". RCW 43.21C.030(2)(c).

The NEPA regulations do not define the "human environment" in two parts, as Mr. Eglick suggested, nor do they use a list of elements of the environment.

Since the mid-1970s, SEPA has used a list of elements of the environment to bring some certainty to those subjects which must be analyzed in EISs. This approach is different and more specific than the federal approach because of the vast number of local actions under SEPA, which required a simpler and more

certain method than NEPA. While the approach is different, the same types of environmental impacts have been included under both laws. See SSB 3006 section-by-section summary at 14-15.

Much effort has been made to attribute exclusionary intent to SSB 3006. The intent, quite simply, was to be logical.

Under the current SEPA guidelines, the list is divided into two parts: the "physical" and the "human" environment. This is illogical. The physical elements (earth, air, water, wildlife, energy) all involve extensive human interaction. These elements are our "natural" resources.

The human elements all involved human interaction with physical change, from public services and transportation to land use, housing, aesthetics, and historical/cultural preservation. The "built" (human-made) environment, a term used in the NEPA rules, is a more accurate description. 40 CFR 1502.16(g); CEP Initial Report, part three at 29, 31-32.

Under the NEPA regulations, the entire environment is the "human environment", and it means human interrelationships with the natural or physical world. 40 CFR 1508.14. The applicable federal case law plainly state that "relating project impact to the effect on the physical environment, such as air, water, and ecosystems, implements the intent of Congress in enacting the statute. [citations omitted.] The reference point of physical environmental effects serves also to confine scarce resources for EIS preparation to those cases where they are most needed, a goal our circuit has identified as an appropriate one." Goodman Group v. Dishroom, 679 F.2d 182, 185 (Ninth Cir., 1982).

NEPA does not treat "human environment" as separate and distinct from the natural or physical environment. The federal courts have rejected the idea that human environment means those things affecting humans: "The fallacy of the plaintiffs' expansive definition of 'human environment' is apparent from the statement in their brief that 'Congress obviously intended by its use of the phrase 'human environment' to require an EIS in all situations where a major Federal action has a significant effect on humans.' Since nearly all major Federal actions significantly affect humans, plaintiffs presumably would require environmental impact statements for every major Federal action. This certainly goes far beyond the Congressional intent in enacting NEPA." Nat'l Assoc. of Gov't Employees v. Rumsfeld, 418 F. Supp 1302, 1305-6 (1976), aff'd 523 F.2d 1051 (emp. supp.).

The problem with simply amending SSB 3006 to add "human environment" as a subset of "environment" would be precisely the implication suggested above: that any impact upon humans -- not environmental impacts -- would require SEPA analysis. This conflicts with existing law and policy under both SEPA and NEPA.

There are many reasons for being concerned about the suggested amendment. It would signal a radical expansion of SEPA, making it an impact statement requirement for every human activity, from tax equity to rate equity to racial equity. Any private or governmental proposal could be held up on virtually any

ground, and the size of impact statements and the public resources for staffing them could be staggering.

Continued confusion and litigation will result unless the law sets some parameters -- both a required minimum (floor), as well as a limit (ceiling) on what is required to be included in EISs.

There were more than 60 cases dealing with the confusing phrase 'socioeconomic' under the former 1973 federal guidelines. The number has dropped to about 9 under the new rules adopted in 1978.

We can continue the current protections and contents of EISs and have certainty. But to do so requires saying what we mean, not leaving things open to illogical categories, confusing terms, and years of litigation.

Retroactivity (Sec. 15, page 13)

Mr. Eglick suggested that this process would render pending cases moot. This is extremely unlikely. The bill clearly states that the appeals and substantive authority sections (secs. 3 and 4) are prospective only. The Commission stated that this is "to avoid affecting the rights and remedies of any project currently underway and in the midst of decisionmaking and appeal procedures." CEP Initial Report, part two at 16.

The only provisions which an agency may apply retrospectively deal with the codification or recodification of existing law (secs. 1 and 6) or with rule-making (secs. 5, 7, and 8). It is hard to see how the only retrospective section changing the statute directly, rather than through new rules, would pose a problem. It simply allows an agency to do scoping or to organize an EIS logically (sec. 1).

Conclusion

The Commission examined these and hundred of other issues in the course of the past two years. Recommendations were not made lightly and were based on many viewpoints through an extraordinarily open public process.

Some helpful clarifications have been suggested which are appropriate for inclusion in the rules.

In most, if not all, instances there is no debate over intent. This should be evident from the discussion in the Commission's report and bill summary. SSB 3006 provides ample authority for the rules to explain and interpret the act further. I would be glad to work with you or any member of the committee who may be concerned about whether some of these points will be covered in the Commission's final report and the rules, so that the intent is unequivocal. Many of us also have no hesitation to seek corrective legislation if the courts depart from the stated intent of this bill.

(ab627)

At this juncture in the legislative session, and after exhaustive Senate debate, possible amendments should be carefully scrutinized, for they are likely to delay and jeopardize the bill's enactment. I am not asking you to share my enthusiasm for the bill or the process which created it, though I hope you would. I do hope that when you have had an opportunity to review these items, you will conclude that they have been adequately addressed.



Washington State
Legislature

Commission on Environmental Policy

101 Public Lands Building • Olympia, Washington 98504 • 753-1839

May 1983

MEMORANDUM TO AGENCIES

SUBJECT: SEPA Legislation (SSB 3006)

Purpose of this Memorandum

The Governor signed legislation into law on April 23, 1983, which amends SEPA. A copy of SSB 3006 is enclosed.

This memorandum is intended to alert you to the new statutory changes and to provide guidance and information on the new law, in order to assist your agency to carry out its responsibilities under SEPA and SSB 3006. Because new state and local rules will take between six months and a year to be adopted, this guidance is being issued to encourage agencies, courts, and other concerned parties to interpret and administer SEPA revisions in a uniform and consistent manner.

Many of the new statutory provisions give direction to the Department of Ecology (DOE) regarding revised rules. Most of the reforms in the SEPA process will therefore occur through revised rules.

The state Commission on Environmental Policy, created in 1981, developed SSB 3006 and is now completing its final report and its recommendations to DOE on the rules. New rules will probably be adopted by DOE in the fall, following rulemaking proceedings under the administrative procedure act. DOE public hearings will probably occur in July or August, shortly after DOE receives the Commission recommendations.

Once the new rules are adopted, each state agency and local government will have six months to designate its SEPA policies (if it has not already done so) and to revise its SEPA procedures.

Specific Provisions of SSB 3006

SSB 3006 is effective immediately (except for section 3 governing substantive authority, which goes into effect in 180 days). Perhaps the major effect of SSB 3006 on agencies' existing SEPA practice is found in section 4 on the appeals process. This sec-

Senator Alan Bluechel, Chairman • Senator W.H. "Bill" Fuller • Senator Margaret Hurley • Senator Al Williams
Representative Richard "Doc" Hastings • Representative Homer Lundquist • Representative Eugene V. Lux
Representative Georgette Valle • Judith M. Runstad • James W. Summers • Chris Smith • Norman L. Winn
Jim Whiteside • Isabel Hogan

Final Report

John Woodring, Staff Counsel • Ed McGuire, Staff Counsel • Carol Holmes, Administrative Assistant

Page 64

tion creates a more uniform appeals process and governs agency administrative appeals as well as judicial appeals under SEPA. This section is explained in some detail in the attached guidance, in order to promote uniform interpretation and avoid confusion in a difficult area of law.

The other section which affects your agency now is section 1. This section codifies existing law and practice and encourages environmental impact statements to be focused and organized logically. The section states that: (1) EISs are required and are written on environmental impacts which are probable, adverse, and significant; (2) individual environmental review is not required on proposals which are categorically exempt (this does not eliminate judicial review of categorical exemptions contained in the rules, however, as the bill summary and enclosed set of questions and answers explains); (3) agencies must consult with other agencies and the public to identify and focus on the relevant impacts; and (4) EISs can be organized logically.

The existing guidelines (WAC 197-10) encourage concise and useful environmental documents and public participation. Many agencies and applicants have not fully implemented these provisions for fear of being challenged procedurally. SSB 3006 is intended to provide support to agencies to administer SEPA's valuable substantive and procedural protections with less paperwork and cost for all concerned.

Conclusion

During the comprehensive review which has occurred over the past two years, a broad consensus emerged that SEPA and its environmental review process is very important and can be improved, particularly in the way the law is administered. We sincerely hope that state agencies, municipal and public corporations, and counties will work with each other and with concerned citizens, environmental, and business interests to build on the this consensus and to improve the SEPA process as an important tool in planning and decisionmaking.



Senator Alan Bluechel
Chairman

Enclosures:

Interim Guidance on SEPA Implementation
Attachment 1 Appeals Process
Attachment 2 Qs & As on SSB 3006
Attachment 3 Section by Section Summary of SSB 3006
Attachment 4 SSB 3006



Washington State Legislature

Commission on Environmental Policy

101 Public Lands Building • Olympia, Washington 98504 • 753-1839

MAY 1983

INTERIM GUIDANCE ON SEPA IMPLEMENTATION

Substitute Senate Bill No. 3006 (SSB 3006), amending the State Environmental Policy Act (SEPA), was signed by the Governor and went into effect on April 23, 1983. SEPA applies to all agencies of the state, including state agencies, municipal and public corporations, and counties (hereafter, agencies). RCW 43.21C.020.

SSB 3006 does not affect most of the existing SEPA statute (RCW 43.21C). SSB 3006 leaves 17 provisions untouched; amends four provisions (two relate to rulemaking which has yet to occur, and one continues the existing forest practices provision by deleting a sunset clause); and repeals, recodifies, or decodifies nine provisions for housekeeping purposes. It also adds four new sections. These are described in the Attachment 3.

Because of the lack of legislative history on SEPA, the Commission and the Legislature made a conscientious effort to provide legislative history in its comprehensive review of the act. The two principal documents are a set of Questions and Answers exchanged on third reading in the Senate and House (Attachment 2) and the Section by Section Summary of SSB 3006, which was revised accordingly from the Commission's Initial Report and which accompanied the bill through both Houses and will be printed in the Commission's Final Report (Attachment 3).

Effective Date

Because SSB 3006 is effective immediately (except for section 3 governing substantive authority), this interim guidance is being issued to assist agencies meet their responsibilities in carrying out the act.

A major purpose of the two year comprehensive review leading up to statutory and rule changes is to make the SEPA process simpler, more uniform, and administered better. This interim guidance is intended to promote uniform interpretation and implementation of SEPA and SSB 3006 until there are new statewide SEPA rules.

Section 3 of SSB 3006 -- which amends existing provisions for agency conditioning or denying of proposals on environmental grounds under SEPA -- does not go into effect for six months (October 23, 1983). Please note, however, that agencies are

not be required to designate SEPA substantive policies or adopt revised SEPA procedures until six months after the effective date of the new statewide SEPA rules to be issued by the Department of Ecology (DOE). This provision is explained in more detail below.

SSB 3006

SECTION 1 - Significant Impacts

When EIS Required. Section 1 reaffirms existing law by stating that EISs are required when environmental impacts are probable, adverse, and significant. EISs are required to analyze only such impacts in order to focus on important environmental issues. EISs may, but are not required to, discuss beneficial environmental impacts or impacts which are not significant.

Probable. "Probable" refers to impacts which are reasonably likely to occur, in contrast to impacts which are merely possible or remote or speculative. An impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred (as in a serious nuclear reactor accident). This section also allows discussion of the required contents of EISs to be consolidated and logically organized.

Scope and Consultation. Section 1 requires agencies to consult with other agencies and the public to identify the significant impacts and limit the scope of EISs. The existing SEPA guidelines encourage this (see, for example, WAC 197-10-405,410), and many agencies have developed their own methods for agency and public consultation. SSB 3006 requires the new state rules to specify the procedures for "scoping" (section 7(1)(c)). Therefore, in the interest of minimizing administrative disruption, we believe that agencies may continue to use their existing consultation processes and rules until the new procedures are adopted.

Agencies should at the least announce that an environmental impact statement is being prepared and that the public and other agencies may comment on its scope. "Scope" consists of the range of actions, alternatives, and impacts to be analyzed. This may be done by press release, published notice, newsletter, signs, mailings, or other methods which an agency may wish to use. Agencies may, but are not required to, have procedures or meetings for scoping until and unless specified by the new statewide rules, which have yet to be adopted.

Retrospective Option. Agencies may, but are not required to, apply the provisions of section 1 -- such as scoping and focused

and logical EISs -- to SEPA compliance or environmental reviews currently in process (section 15). Otherwise, the provision applies to SEPA reviews commenced after April 23, 1983, which is the effective date of the act.

SECTION 2 - Forest Practices

SSB 3006 deletes the sunset clause from the existing forest practices provision (RCW 43.21C.037). This means that the existing provision remains in the law. The existing provision contains, among other things, a statutory exemption for Class I, II, and III forest practices but not for Class IV forest practices.

SECTION 3 - Supplementary Authority

Section 3 amends the provisions relating to conditioning or denying governmental action under SEPA. The Section by Section Summary of SSB 3006, which was prepared by the Commission and accompanied SSB 3006 through the legislative process, is appended in Attachment 3. Although the summary explains the changes in this section, several points should be emphasized.

Deadlines. The section contains two time deadlines:

1. Effective date of the section: The requirement to make findings.

The section goes into effect in six months, at which time agencies cannot deny proposals under SEPA unless significant adverse impacts are identified in an EIS and reasonable mitigation measures are insufficient to mitigate the identified impact. In other words, after October 23, 1983, agencies must make the two findings specified in the section if and when they deny a proposal under SEPA. Conditions or denials may be based upon current SEPA policies until the deadline for "formal designation" (see # 2 below). Agencies may, of course, deny a proposal under other available authority.

2. Deadline for formal designation: The requirement to designate SEPA policies for conditions or denials.

All agencies must formally designate their SEPA policies no later than six months after the effective date of the new statewide SEPA rules. This will be later than October 23, 1983 and will coincide with the date by which all agencies

must adopt their own revised agency SEPA procedures (section 8). It will probably be sometime in early 1984.

Agencies would be well-advised to begin the process of identifying their SEPA policies now, in order to avoid problems with the statutory deadline. The failure to meet the deadline could have two consequences: (1) agencies may not be able to use SEPA's substantive authority to control environmental impacts; and (2) any discretionary actions taken by the agency could be declared invalid because the agency would be in violation of SEPA (RCW 43.21C.060 and .120).

Agency SEPA Policies. Several points should be noted:

1. Sections 3 and 8 are written so that agencies are not required to designate or redesignate SEPA policies if agencies have already done so. SSB 3006 merely requires that policies be designated by a certain date.
2. SEPA policies must be identified by every agency. The policies must be incorporated into regulations, plans, or codes. In the case of local government, formal designation means designation by the appropriate legislative body.
3. The deadline for designating SEPA policies and revising agency SEPA procedures is the same -- six months after the effective date of the new state rules. Agencies may adopt their policies and procedures at the same time or in the same document if they wish.
4. Sections 3 and 8 would not prevent agencies from updating, revising, or adding policies in the future, after initial designation.
5. This section does not specify or change the level of detail for agency SEPA policies from that in the existing law, enacted in 1977 (RCW 43.21C.060). This section is intended to give agencies sufficient latitude to articulate policies broadly enough that they need not predict every future environmental problem or concern. It is expected that some agencies will be more specific than they have been in the past and that agencies will develop substantive standards. The intent of this requirement is for agencies to prepare a document which contains agency SEPA policies, so that applicants and members of the public know what these policies are and can, along with agency decisionmakers, actually find, read, and use these policies. This section is not intended to allow agencies to adopt policies which conflict with the state's environmental policy set forth in SEPA.

SECTION 4 -- Appeals

This section includes a statutory right of appeal: a basis for challenging whether governmental action is in compliance with the substantive and procedural provisions of SEPA (sec. 4(1)).

Any appeal under SEPA must be linked to specific governmental action (this includes lack of a SEPA determination which may be required). In addition, as a general rule, SEPA appeals must treat the underlying governmental action (such as a decision to approve or reject a project or plan) together with any accompanying environmental determinations under SEPA (such as the existence or vailidity of environmental documents or mitigation conditions imposed under the authority of SEPA). As a general rule, SEPA appeals must be brought at the same time as appeals on the underlying governmental action subject to SEPA compliance.

The appeals process specified by SSB 3006 is explained in further detail in Attachment 1. The time limits for commencing lawsuits under SEPA are illustrated in Figure 1 in Attachment 1.

SECTION 5 - Deference to State Rules

Section 5 states that the rules to be promulgated by DOE as a result of SSB 3006 shall be accorded "substantial deference" by the courts in the interpretation of SEPA (the rules are binding on agencies). Because the major reforms are being made in the rules, rather than in statute, this provision was included to ensure that citizens and courts look to the rules for interpreting SEPA and providing a much-needed sense of uniformity and consistency. This doctrine has had a salutary effect in the implementation of the federal reform rules under NEPA.

SECTION 6 - Council on Environmental Policy

Section 6 continues the provision for the Council on Environmental Policy, which expired in 1976, in the statute. Because of the state's fiscal situation, it was felt to be an inopportune time to reestablish the Council, so it remains essentially a latent authority which may be reactivated in the future.

SECTION 7 - Content of State SEPA Rules

Section 7 directs DOE to issue new statewide "uniform rules" on SEPA. It authorizes DOE to utilize the proposed rules developed by the Commission on Environmental Policy, which was established in 1981 to review SEPA. The section requires DOE to follow the rulemaking provisions of the administrative procedure act, including public hearings and consideration of comments.

The remainder of the section describes subjects which DOE must include in the rules. These items are described in the attached Section by Section Summary of SSB 3006 and in the Questions and Answers on SSB 3006 exchanged on the floor of the Senate and House, which is appended in Attachment 2.

As noted in the cover memorandum, the Commission will be making its final recommendations to DOE prior to July 1, 1983. DOE expects to adopt rules in the fall, following the rulemaking procedures of the administrative procedure act and the direction specified in SSB 3006.

SECTION 8 - Agency Rules

Section 8 requires agencies to designate SEPA policies and to revise their own SEPA procedures, as discussed above in section 3. This section also requires agencies to revise their procedures whenever statewide rules are revised. Agencies may update, revise, or add to their SEPA policies and procedures at any time on their own.

Agencies may adopt their policies and procedures in a single document or in several documents, and at the same time, or at different times. The deadline for designating policies and revising procedures as a result of SSB 3006, however, is 180 days after the effective date of the new statewide rules.

Section 8 adds a requirement that when new agencies or local governments are created, they must adopt SEPA policies and procedures within 180 days of their establishment.

SECTION 9 - DOE Workshops and Handbook

Section 9 directs DOE to conduct annual statewide workshops and to publish and update a SEPA handbook. One of the problems in the past was the lack of continuous oversight and exchange of information and techniques for administering SEPA. A major pur-

pose of this provision is to assist people in improving the implementation of SEPA, so that bad habits can be avoided and better understanding and working relationships can be developed among all those who are interested in SEPA. DOE will work with state and local agencies and concerned citizens to carry out these responsibilities within available resources.

DOE would welcome ideas from all concerned parties on ways to implement these responsibilities.

SECTIONS 10-17 - Statutory Housekeeping

These provisions contain basic technical statutory, or housekeeping, measures. As part of its two-year comprehensive review, the Commission on Environmental Policy identified a number of provisions in SEPA which were no longer functional or should be reorganized. Sections 10-14 accomplish this. These provisions do not affect ongoing agency responsibilities.

Sections 15 and 17 govern the effective date of SSB 3006, as explained in the beginning. Sections 3 and 4 are prospective only, in order to avoid affecting the rights and remedies of any project currently underway and in the midst of decisionmaking and appeal procedures.

Sections 1 and 5-8 may be applied by agencies retrospectively, but, as a practical matter, this should only affect section 1 (because sections 5, 7, and 8 refer to the new rules which have yet to be adopted by DOE).

Section 8 would also expressly allow agencies to designate SEPA policies under RCW 43.21C.060 within the next six months, if they have not done so under the deadline imposed in the 1977 amendments to .060. This is would be irrelevant in any event under the designation requirement in section 3.

Conclusion

This guidance is in memorandum form, and does not purport to be a rule. It is intended to provide advice from a statutory body with special expertise and responsibilities for SEPA oversight. It is being issued so that the objectives of the SEPA reforms can be furthered by government agencies with as much insight, uniformity, and common sense as possible, until new

statewide rules go into effect.

We urge all those concerned with SEPA to turn to the enclosed legislative history of SSB 3006 for additional guidance on interpreting specific provisions of the act. DOE and the Commission on Environmental Policy should be consulted for further information and advice.

We also hope those concerned with SEPA will make an effort to be informed about and participate in the administrative rulemaking process at the state and local level.

Attachments

- Attachment 1 Appeals Process
- Attachment 2 Qs & As on SSB 3006
- Attachment 3 Section by Section Summary of SSB 3006
- Attachment 4 SSB 3006

ATTACHMENT 1
INTERIM GUIDANCE ON SEPA IMPLEMENTATION
Commission on Environmental Policy

APPEALS PROCESS (Section 4)

Right of Review. This section includes a statutory right of appeal: a basis for challenging whether governmental action is in compliance with the substantive and procedural provisions of this chapter (sec. 4(1)). Appeals are to administrative, legislative, or judicial bodies, unless otherwise noted.

Any appeal under SEPA must be linked to a specific governmental action. This includes the lack of a SEPA determination which may be required. This provision is intended to make sure that SEPA's substantive mandate is met by considering environmental factors in the context of agency decisions and actions.

The subsection states that SEPA "is not intended to create a cause of action unrelated to a specific governmental action". This simply echoes SEPA's basic purpose: to make sure that the government gives appropriate consideration to the environment and uses all practicable means, consistent with other essential considerations of state policy, to preserve and enhance environmental quality. RCW 43.21C.020 and .030. This phrase also helps to clarify the time for commencing any appeals.

This section does not alter the existing law on standing or on the standards for judicial review.

Timing of Review. This section codifies the general rule that SEPA appeals should treat the underlying governmental action (such as a decision to approve or reject a project or plan)* together with any accompanying environmental determinations under SEPA (such as the existence or validity of environmental documents or mitigation conditions).

Generally, SEPA appeals must be commenced at the same time as appeals on the governmental action subject to SEPA. The reason for this general rule is to integrate, as much as possible, consideration of environmental factors under SEPA with normal agency planning and decisionmaking.

* The agency action subject to SEPA compliance is commonly referred to as the "underlying governmental action" (sec. 4(5)).

The section specifies exceptions to the general rule, however. It allows agencies to have an appeal on a determination of significance/nonsignificance before making a final decision (sec. 4(3)(a)). This is an individual agency option, and is neither required nor prohibited.

For purposes of judicial review, SEPA determinations and substantive agency action must always be reviewed together (sec. 4(6)(c)). A lawsuit on the underlying governmental action must still be filed within the time period set by the applicable state or local statute of limitation. The SEPA portion of a lawsuit, however, is not required to be filed within the time period for challenging the underlying governmental action.

Instead, SSB 3006 provides a 30-day period for filing the SEPA portion of a lawsuit in those situations where a statute or ordinance set a time limit for appealing the underlying governmental action (sec. 4(5)). The phrase "statute or ordinance" is used because it is intended that the time for filing the SEPA portion of a lawsuit not be shortened as a result of administrative or court rule. Although the time period for appealing the underlying governmental action may be less than 30 days, this provision is included to provide a 30-day period for filing a SEPA lawsuit, in order to allow time to review environmental documents and prepare a lawsuit.

Notice of Intent. There is one additional procedure in section 4, which applies only when there has been an agency appeal proceeding and there is the 30-day time limit for filing a lawsuit discussed above. When the parties have been through an agency SEPA appeal and have been notified of the result of the appeal, a party who wishes to file a lawsuit must inform the agency of this intention.

Section 4(5)(a) requires the party to submit a "notice of intent" to the SEPA responsible official of the intention to bring suit. This notice must be given within the time period for appealing the underlying governmental action. This is a simple notice and does not require lawyers, pleadings, or supporting documents. This notice is a statement of intent, and does not obligate a party to file a lawsuit.

There may be more than one underlying governmental action, such as several permits or approvals for a project, each having a time limit for commencing a lawsuit after the agency appeal proceeding. In that case, the notice of intent should be submitted within the latest of the time periods which apply to the underlying governmental action. As noted in point #5 below, agencies should probably consider the 30-day period for bringing the SEPA portion of a lawsuit to run from five days after the agency mails a notice to the parties of record (or otherwise gives official notice in

accordance with its rules) of the agency's appeal decision and the time limit for commencing judicial review.

The "notice of intent" requirement is included in the law because the vast majority of agency appeals never go to court. This notice would enable agencies and applicants to know whether their proposals will be challenged further or whether they can proceed with their projects without unnecessary delay waiting for an appeal period to expire.

Figure 1 illustrates the procedures and timing of appeals under section 4.

Procedures. The following points are important in understanding the appeal provisions:

1. Agencies are not required to have SEPA administrative appeals. Experience has shown that agency appeals frequently reduce the pressure for lawsuits. If an agency has SEPA appeals proceedings, they must conform to the requirements in this section.

2. Agencies and/or applicants may continue to use the "notice of action" in RCW 43.21C.080. SSB 3006 affects the notice of action as follows: (i) the newspaper publication may be accomplished within the period for appealing the underlying governmental action, which may be shorter than needed to meet the publication requirements of RCW 43.21C.080; (ii) the time period for appeal will continue to be 30/90 days, unless there is a statute or ordinance requiring an earlier appeal of the underlying governmental action, in which case the appeal period will be 30 days (for consistency and uniformity); and (iii) the term "action" cannot simply refer to SEPA procedural determination.

3. Neither SEPA nor SSB 3006 create a mandatory, across-the-board statute of limitation. Rather, they provide for: (1) an optional "notice of action", which, if used, triggers a mandatory time period for challenging agency action and SEPA compliance; this time period is 30 days for private proposals and 90 days for public proposals (RCW 43.21C.080); and (2) the filing of the SEPA portion of any lawsuit within 30 days, if another statute or ordinance already contains a time period for filing a lawsuit on the governmental action (SSB 3006, sec. 4(5)).

4. The common law of "laches" (no unreasonable delay in commencing a lawsuit) would continue to govern the timeliness of bringing SEPA actions when there is no notice of action or no overlapping time period in statute or ordinance for appealing the

underlying governmental action subject to SEPA. This remains unaffected by SSB 3006.

5. Notice of the time to commence an appeal should not be given prior to final agency action, with the exception of sec. 4(3)(a) noted above. For a notice of action, RCW 43.21C.080 specifies the time as the date of last newspaper publication. If there is an agency appeal under sec. 4(3), the time to commence a judicial appeal should probably be considered to run from five days after mailing of notice to the parties of record (or giving of official notice in accordance with agency rules), in order to allow some time for mail delivery or distribution of the notice. This is suggested as a reasonable approach, and the precise procedures should be specified by the rules which DOE will adopt.

6. Section 4(3) directs agencies to minimize multiple levels of appeal and to consolidate procedural and substantive appeals under SEPA. Agencies may continue to have an administrative appeal on each successive SEPA procedural determination, namely, the adequacy of a determination of significance/nonsignificance and, later, the adequacy of a final EIS. This section does not allow a separate appeal on other aspects of SEPA procedural compliance, such as scoping or draft EISs. It was felt that such additional "interlocutory" appeals would disrupt the environmental review process and would not be ripe until the final EIS was issued.

7. Section 4(7) allows the parties on mutual consent to take their appeal to the state Shorelines Hearings Board in Olympia. This includes agency as well as judicial appeals. The purpose of this provision is to allow parties to use non-judicial ways to resolve disputes, which may prove faster and less expensive. This section would require a superior court to certify the Board's final order to appellate court, further expediting the appeals process.

8. The attorneys fees provisions and other aspects of section 4 are explained in more detail in the enclosed Questions and Answers and Section by Section Summary of SSB 3006 (Attachments 2 and 3).

Attachment/Figure 1

FIGURE 4 : TIMING OF JUDICIAL APPEALS UNDER SEPA

SUMMARY: THE EXISTING NOTICE OF ACTION IN RCW 43.21C.090, IF FILED, ALLOWS 30 DAYS FOR FILING A SEPA LAWSUIT ON PRIVATE PROPOSALS AND 90 DAYS FOR FILING A SEPA LAWSUIT ON PUBLIC PROPOSALS. A NOTICE OF ACTION MAY CONTINUE TO BE USED UNDER SSB 3001. THE MAIN CHANGES UNDER SSB 3006, SECTION 4, ARE:

- (1) THE SEPA PORTION OF A LAWSUIT MUST BE COMMENCED IN 30 DAYS IF THERE IS A TIME PERIOD IN STATUTE OR ORDINANCE FOR JUDICIAL APPEAL OF THE UNDERLYING GOVERNMENTAL ACTION SUBJECT TO SEPA (REFERRED TO BELOW AS "OTHER APPEAL PERIOD").
- (2) IF THERE IS ANOTHER APPEAL PERIOD AND THERE HAS BEEN AN AGENCY APPEAL PROCEEDING - AND A PARTY MAY WANT TO FILE A SEPA LAWSUIT - THE PARTY MUST SUBMIT A "NOTICE OF INTENT" TO FILE A SEPA LAWSUIT TO THE SEPA RESPONSIBLE OFFICIAL WITHIN THE TIME PERIOD FOR FILING A LAWSUIT ON THE UNDERLYING GOVERNMENTAL ACTION.

TIME PERIODS FOR APPEAL	REQUIREMENTS	TIMELINE
1 NOTICE OF ACTION (NOA) / NO OTHER APPEAL PERIOD	TWO CONSECUTIVE WEEKLY PUBLISHED NOTICES, THEN...	
2 NOA / OTHER APPEAL PERIOD AGENCY APPEAL FIRST NO AGENCY APPEAL	AGENCY GIVES NOTICE TO PARTIES OF RECORD AFTER AGENCY APPEAL, THEN: APPELLANT GIVES "NOTICE OF INTENT" WITHIN OTHER APPEAL PERIOD 30 DAYS TO FILE LAWSUIT AFTER LAST PUBLICATION OF NOA 30 DAYS TO FILE LAWSUIT AFTER LAST PUBLICATION OF NOA (NO "NOTICE OF INTENT")	
3 NO NOA / OTHER APPEAL PERIOD AGENCY APPEAL FIRST NO AGENCY APPEAL	AGENCY GIVES NOTICE TO PARTIES OF RECORD AFTER AGENCY APPEAL, THEN: APPELLANT GIVES "NOTICE OF INTENT" WITHIN OTHER APPEAL PERIOD 30 DAYS TO FILE LAWSUIT AFTER AGENCY NOTICE TO PARTIES OF RECORD 30 DAYS TO FILE LAWSUIT AFTER AGENCY GIVES OFFICIAL NOTICE (NO "NOTICE OF INTENT")	
4 NO NOA / NO OTHER APPEAL PERIOD	COMMON LAW OF "LACHES" (NO UNREASONABLE DELAY IN FILING A LAWSUIT)	