

MEMORANDUM

DATE: February 2, 2016

TO: Allison Satter, Senior Planner, City of Bremerton

FROM: Lisa Grueter, Manager, BERK Consulting

RE: State Environmental Policy Act Rules and Proposed Amendments

Purpose

The City of Bremerton is updating its Growth Management Act Comprehensive Plan and development regulations by June 30, 2016. Part of the City's development regulations address proposals subject to the State Environmental Policy Act (SEPA).

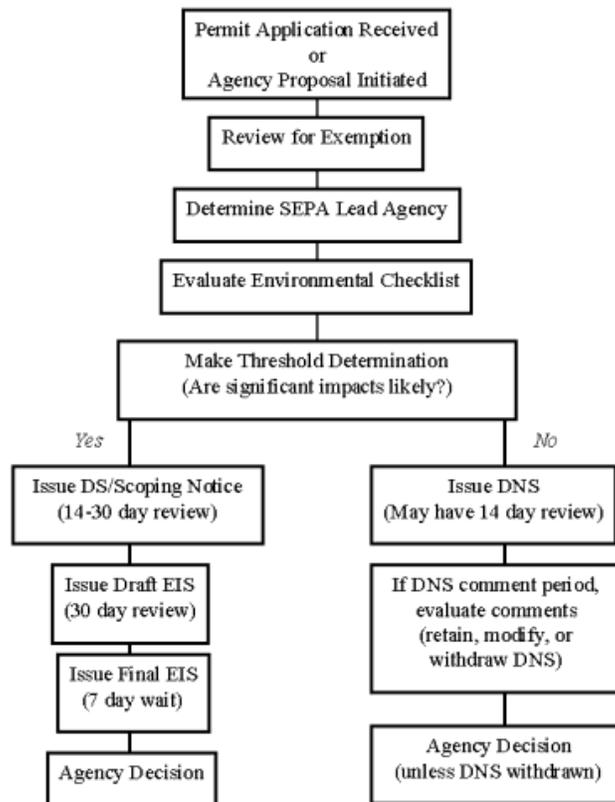
SEPA provides a review process to consider the potential physical impacts to the natural and built environment as a result of projects and future development allowed by plans and policies (non-project actions). The process allows the City to identify potential impacts and mitigation measures and to solicit agency and public review and comment on the proposals before actions are taken (e.g. approval of permits or ordinances).

Most proposals are exempt or only need Determination of Non-Significance, which involves a shorter review process and comment period than an environmental impact statement (EIS). Some proposals require an EIS to explore alternatives and potential mitigation measures.

The typical review process is illustrated in Exhibit 1. SEPA Review Process. Not shown in the chart is an appeal process because a local appeal process is voluntary.

The City of Bremerton's environmental review procedures are consistent with the requirements of RCW 43.21C (SEPA) and implementing rules (WAC 197-11). However, there are some unclear procedures for the review and potential appeal of environmental determinations. This is particularly the case for legislative proposals (plans, codes, zoning of newly annexed land, area-wide rezones) that are considered by the Planning Commission and City Council. On the other hand, project permits (e.g. building permits, site development permits, subdivisions, conditional uses, shoreline substantial development permits, site-specific rezones authorized by the Comprehensive Plan, etc.) are handled by City staff and the Hearing Examiner. Currently the City regulations would require that a SEPA appeal be heard by the Hearing Examiner. However this is awkward for legislative proposals that are ultimately approved by the City Council after Planning Commission recommendations. Clarifying the SEPA review and appeal requirements would be beneficial for future legislative approvals.

Exhibit 1. SEPA Review Process



Source: Ecology Handbook, 2003

This memo provides the following sections:

- Administrative Appeal Requirements and Options
- Recommended Amendments

Administrative Appeal Requirements and Options

Local governments such as the City of Bremerton offer administrative appeals to allow other agencies, property owners, and interested residents to appeal determinations regarding environmental review under SEPA. Appeals may be about the conditions applied to a project under SEPA, denial of a project under SEPA, the procedures the City followed in issuing SEPA determinations, and the adequacy of final SEPA documents. The City is not required to offer administrative appeals, and may offer some administrative appeal opportunities and not others. Judicial appeal is an avenue in any case. The bullet list below summarizes state allowances and requirements for offering SEPA appeals. More detail is found in the Attachment.

Summary of State Allowances and Requirements

- Lead agencies may offer an administrative (internal) appeal of SEPA procedural or substantive actions. However, the appeal procedures need to be specified by ordinance, resolution, or rules. Most agencies do so in their SEPA rules. Lead agencies may also choose to not offer administrative appeals, but must specify that in rules.
- Appeal procedures may allow some kinds of appeals but not all types.

- Per the SEPA Handbook¹ final threshold determinations and substantive decisions (conditions, denial on the basis of SEPA) are appealable locally: *The only decisions that may be appealed at the agency level are a final threshold determination or EIS (including a final supplemental EIS), and SEPA substantive decisions. Other decisions, for example the applicability of categorical exemptions, may only be appealed to the courts.*
- SEPA appeals must be consolidated with a hearing or appeal on the underlying action (e.g. permit application), except for:
 - An appeal of a **determination of significance**;
 - **An agency proposal** – An appeal of a procedural determination made by an agency when the agency is a project proponent, or is funding a project, and chooses to conduct its review under SEPA, including any appeals of its procedural determinations, prior to submitting an application for a project permit. Subsequent appeals of substantive determinations by an agency with jurisdiction over the proposed project shall be allowed under the SEPA appeal procedures of the agency with jurisdiction.
 - An appeal of a procedural determination made by an agency on a **nonproject action**; and
 - Appeal of a **substantive decision** to local legislative bodies: An appeal to the local legislative authority under RCW 43.21C.060 [Conditioning or denial of governmental action] or other applicable state statutes.
- The SEPA handbook includes the following guidance on who should hear the appeal of SEPA prior to the decision on the action – the ultimate decision maker: *Procedural and substantive SEPA appeals in most instances must be combined with a hearing or appeal on the underlying governmental action (such as the approval or denial of a permit). If a SEPA appeal is held prior to the agency making a decision on the underlying action, it must be heard at a proceeding where the person(s) deciding the appeal will also be considering what action to take on the underlying action.*
- A decision maker in SEPA is defined as: "Decision maker" means the agency official or officials who make the agency's decision on a proposal. The decision maker and responsible official are not necessarily synonymous, depending on the agency and its SEPA procedures (WAC 197-11-906 and 197-11-910). (WAC 197-11-730)

Options

Many agencies allow administrative appeals for substantive determinations (conditions, denial) or procedures (determination of significance, determination of nonsignificance, and Final EIS).

Some send all appeals to a Hearing Examiner where a record is created, and others distinguish appeals of SEPA associated with legislative items as going to the City Council or Board of County Commissioners (e.g. Clark County, City of Covington). Some allow administrative appeals of SEPA determinations and procedures only for project permits and not for legislative items (e.g. City of Kenmore). Some allow no administrative appeals, and instead appellants may use the judicial process (e.g. City of Sumner).

¹ <http://www.ecy.wa.gov/programs/sea/sepa/handbk/hbch11.html#11.1>

Recommended Amendments

The proposed amendments, as seen in Attachment I of the Planning Commission's February packet, address editorial items such as correcting references to State laws and rules, and clarifying the appeal process for project permits and legislative proposals. Two appeal options are under consideration: Specify administrative SEPA appeals for legislative items are reviewed by the City Council, and allow no administrative SEPA appeals for legislative items (the Clark County versus Kenmore examples). In any case project permit SEPA appeals would continue to go to the Hearing Examiner.

Attachment A: WAC 197-11-680 Appeals.

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(1) **Introduction.** Appeals provisions in SEPA are found in RCW [43.21C.060](#), [43.21C.075](#) and [43.21C.080](#). These rules attempt to construe and interpret the statutory provisions. In the event a court determines that these rules are inconsistent with statutory provisions, or with the framework and policy of SEPA, the statute will control. Persons considering either administrative or judicial appeal of any decision which involves SEPA at all are advised to read the statutory sections cited above.

(2) **Appeal to local legislative body.** RCW [43.21C.060](#) allows an appeal to a local legislative body of any decision by a local nonelected official conditioning or denying a proposal under authority of SEPA. Agencies may establish procedures for such an appeal, or may eliminate such appeals altogether, by rule, ordinance or resolution. Such appeals are subject to the restrictions in RCW [36.70B.050](#) and [36.70B.060](#) that local governments provide no more than one open record hearing and one closed record appeal for permit decisions.

(3) Agency administrative appeal procedures.

(a) Agencies may provide for an administrative appeal of determinations relating to SEPA in their agency SEPA procedures. If so, the procedures must comply with the following:

(i) The agency must specify by rule, ordinance, or resolution that the appeals procedure is available.

(ii) Appeal of the intermediate steps under SEPA (e.g., lead agency determination, scoping, draft EIS adequacy) shall not be allowed.

(iii) Appeals on SEPA procedures shall be limited to review of a final threshold determination and final EIS. These appeals may occur prior to an agency's final decision on a proposed action.

(iv) An agency shall provide for only one administrative appeal of a threshold determination or of the adequacy of an EIS; successive administrative appeals on these issues within the same agency are not allowed. This limitation does not apply to administrative appeals before another agency.

(v) Except as provided in (a)(vi) of this subsection, the appeal shall consolidate any allowed appeals of procedural and substantive determinations under SEPA with a hearing or appeal on the underlying governmental action in a single simultaneous hearing before one hearing officer or body. The hearing or appeal shall be one at which the hearing officer or body will consider either the agency's decision or a recommendation on the proposed underlying governmental action. For example, an appeal of the adequacy of an EIS must be consolidated with a hearing or appeal on the agency's decision or recommendation on the proposed action, if both proceedings are allowed in agency procedures. If an agency does not provide for a hearing or appeal on the underlying governmental action (either a hearing on the agency's recommendation or an agency appeal hearing after the decision is made), the agency may not hold a SEPA administrative appeal, except as allowed under (a)(vi) of this subsection.

(vi) The following appeals of SEPA procedural or substantive determinations need not be consolidated with a hearing or appeal on the underlying governmental action:

(A) An appeal of a determination of significance;

(B) An appeal of a procedural determination made by an agency when the agency is a project proponent, or is funding a project, and chooses to conduct its review under SEPA, including any appeals of its procedural determinations, prior to submitting an application for a project permit. Subsequent appeals of substantive

determinations by an agency with jurisdiction over the proposed project shall be allowed under the SEPA appeal procedures of the agency with jurisdiction;

(C) An appeal of a procedural determination made by an agency on a nonproject action; and

(D) An appeal to the local legislative authority under RCW [43.21C.060](#) or other applicable state statutes.

(vii) If a county/city to which RCW [36.70B.110](#) applies provides for an administrative appeal, any such appeal of a procedural or substantive determination under SEPA issued at the same time as the decision on a project action shall be filed within fourteen days after a notice of decision under RCW [36.70B.130](#) or after other notice that the decision has been made and is appealable. In order to allow public comment on a DNS prior to requiring an administrative appeal to be filed, this appeal period shall be extended for an additional seven days if the appeal is of a DNS for which public comment is required under this chapter or under county/city rules adopted under SEPA. For threshold determinations issued prior to a decision on a project action, any administrative appeal allowed by a county/city shall be filed within fourteen days after notice that the determination has been made and is appealable. Nothing in this subsection alters the requirements of (a)(v) and (vi) of this subsection.

(viii) Agencies shall provide that procedural determinations made by the responsible official shall be entitled to substantial weight.

(b) Agencies providing for administrative appeals shall provide for a record as required by RCW [43.21C.075](#) (3)(c).

(c) If an agency provides an administrative appeal procedure, that procedure must be used before anyone may initiate judicial review of any SEPA issue that could have been reviewed under the agency procedures.

(4) Judicial appeals.

(a) SEPA authorizes judicial appeals of both procedural and substantive compliance with SEPA.

(b) When SEPA applies to a decision, any judicial appeal of that decision potentially involves both those issues pertaining to SEPA (SEPA issues) and those which do not (non-SEPA issues). RCW [43.21C.075](#) establishes time limits for raising SEPA issues, but says that existing statutes of limitations control the appeal of non-SEPA issues. The statute contemplates a single lawsuit.

(c) If there is a time limit established by statute or ordinance for appealing the underlying governmental action, then appeals (or portions thereof) raising SEPA issues must be filed within such time period.

(d) The notice of action procedures of RCW [43.21C.080](#) may still be used. If this procedure is used, then the time limits for judicial appeal specified in RCW [43.21C.080](#) shall apply, unless there is a time limit established by statute or ordinance for appealing the underlying governmental action. If so, the time limit for appeal of SEPA issues shall be the time limit in the statute or ordinance for the underlying governmental action. If the proposal requires more than one governmental decision that will be supported by the same SEPA documents, then RCW [43.21C.080](#) still only allows one judicial appeal of procedural compliance with SEPA, which must be commenced within the applicable time to appeal the first governmental decision.

(e) If the time limit established by statute or ordinance for appealing the underlying governmental action is less than fifteen days, then the notice of action in RCW [43.21C.080](#)(1) may be given by publishing once within that shorter time period, in a newspaper of general circulation in the area where the property that is the subject of the action is located, and meeting the other requirements of RCW [43.21C.080](#).

(f) If there is no time limit established by statute or ordinance for appeal, and the notice of action provisions are not used, then SEPA provides no time limit for judicial appeals. Appeal times may still be limited, however, by general statutes of limitation or the common law.

(g) For the purposes of this subsection, "a time limit established by statute or ordinance" does not include time limits established by the general statutes of limitation in chapter [4.16 RCW](#).

(5) Official notice of the date and place for commencing a judicial appeal.

(a) Official notice of the date and place for commencing an appeal must be given if there is a time limit established by statute or ordinance for commencing an appeal of the underlying governmental action. The notice shall include:

(i) The time limit for commencing appeal of the underlying governmental action and SEPA issues, and the statute or ordinance establishing the time limit; and

(ii) Where an appeal may be filed.

(b) Notice is given by:

(i) Delivery of written notice to the applicant, all parties to any administrative appeal, and all persons who have requested notice of decisions with respect to the particular proposal in question; and

(ii) Following the agency's normal methods of notice for the type of governmental action taken.

(c) Written notice containing the information required by subsection (5)(a) of this section may be appended to the permit, decision documents, or SEPA compliance documents or may be printed separately.

(d) Official notices required by this subparagraph shall not be given prior to final agency action.