

Washington Journal of Environmental Law & Policy

Volume 3 | Issue 2

11-1-2013

Washington Environmental Law Year in Review

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Recommended Citation

Abigail Pearl & Hunter Elenbaas, Notes and Comments, *Washington Environmental Law Year in Review*, 3 WASH. J. ENVTL. L. & POL'Y 347 (2013).

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WASHINGTON ENVIRONMENTAL LAW YEAR IN REVIEW

Abigail Pearl and Hunter Elenbaas

We are proud to present the first installment of the Washington Environmental Law Year in Review. This feature, which will be published annually in the Fall issue, will track significant developments in the environmental laws and regulations of Washington, and present a summary of these changes organized by topic.

—2012–13 Editorial Board

INTRODUCTION.....	348
FISHERIES AND WILDLIFE	349
HB 1200: Food Fish and Shellfish Labeling	349
SB 5193: Gray Wolf Conflict Management	350
HB 1194: Landowner Liability Shelter for Salmon Habitat Projects	351
Rulemaking: Halibut Fisheries	352
HB 1075: Crabbing Licenses	352
SB 5702: Invasive Aquatic Species Management	353
LAND USE AND PARKS	353
SB 5897: State Parks.....	353
HB 1277: Tribal Conservation Easements.....	354
RENEWABLE ENERGY AND CLIMATE CHANGE	355
SB 5802: Developing Recommendations to Meet the State’s Greenhouse Gas Emission Standards	355
SSB 5400: Classifying Eligible Renewable Energy	356
SB 5369: Geothermal Resources	356
SB 5099: Biofuel Use by State Agencies and Local Governments	358
Rulemaking: Biofuel Use and Procurement	359
SB 5709: Biomass Pilot Project	360
STATE ENVIRONMENTAL POLICY ACT	361
Rulemaking: SEPA Rules.....	361
WASTE DISPOSAL AND POLLUTION	362
Rulemaking: Solid Waste Disposal	362
HB 2079: Environmental Legacy Stewardship Account.....	364
Rulemaking: International Energy Conservation Building Code	365
WATER AND OCEAN	366
Rulemaking: Oil Spill Contingency Planning.....	366
HB1245: Derelict and Abandoned Vessels.....	368

Rulemaking: Sediment Management Standards..... 369

INTRODUCTION

This is an annual publication from the Washington Journal of Environmental Law and Policy intended to be a helpful resource for legal practitioners seeking information about new Washington environmental laws. This Year-in-Review is a snapshot of the environmental developments during the 2013 Washington legislative sessions, including notable laws passed and regulations promulgated between January 1, 2013 and September 1, 2013. In determining what information is included in this publication, the authors reviewed the major developments and significant changes in Washington environmental law for significant changes. The most significant of those changes are discussed below. Unless otherwise noted, any agencies referred to are Washington State agencies.

This year the Washington Legislature and state agencies made progress on a number of pressing environmental issues. Efforts to solve environmental problems included regulations to deal with contingency plans in cases of oil spills, addressing the problem of derelict vessels, creating an Environmental Stewardship Legacy Account to help fund vital cleanup efforts, and passing Washington's first comprehensive legislative scheme for fish and shellfish labeling. The Legislature also took up further study on how to best address climate change in the state, with recommendations slated to come out next year.

Although progress was made on these fronts, legislators faced a potential budget shortfall of over one billion dollars and efforts at lawmaking and regulation seemed tempered by the need to deal with urgent fiscal realities and political gridlock. For example, the legislature took a progressive step by calling on Washington State University (WSU) to study how biofuels might be used to provide heat to public schools, but it did not fund this effort. WSU still needs to find outside funding before the project can move forward.

FISHERIES AND WILDLIFE

HB 1200: Food Fish and Shellfish Labeling

The Legislature addressed the problem of mislabeled seafood by passing HB 1200.¹ Prior to HB 1200, Washington did not have a general seafood misbranding law, although some existing provisions regulated salmon² and halibut³ marketing. Penalties for violating these laws were largely administrative in nature. For fish and shellfish other than salmon and halibut, no labeling laws applied besides those applicable to foodstuffs in general.

HB 1200 creates a comprehensive scheme, requiring species branding for all fish and shellfish, increasing the penalties for violations, and giving the Department of Agriculture (Agriculture) new rulemaking authority related to seafood labeling. It builds on the existing salmon marketing regulations to establish the crime of unlawful misbranding of food fish or shellfish. Unlawful misbranding of food fish or shellfish has three degrees, determined by the wholesale value of the fish or shellfish involved. If the wholesale value is less than \$500, it is unlawful misbranding in the third degree, a misdemeanor; if the value is greater than \$500 but less than \$5,000, it is unlawful misbranding in the second degree, a gross misdemeanor; and, lastly, if the value is \$5,000 or greater, it is unlawful misbranding in the first degree, a class C felony.⁴

HB 1200 makes it unlawful to knowingly sell or offer for sale food fish or shellfish in fresh, frozen, or processed form⁵ that is not identified by its common name.⁶ This applies to all sales, retail and wholesale, with the exception of the sale of fish by a

1. Act effective July 28, 2013, 2013 Wash. Laws ch. 290 (to be codified in various sections of Wash. Rev. Code ch. 69.04).

2. Wash. Rev. Code § 69.04.932–.935 (2012).

3. *Id.* § 69.04.315. (repealed by 2013 Wash. Laws ch. 290 § 9).

4. Act effective July 28, 2013, 2013 Wash. Laws ch. 290 §§ 7–8 (to be codified at Wash. Rev. Code ch. 69.04).

5. This marks an expansion of the existing salmon regulation, which only regulated fresh and frozen fish, though an exemption for salmon that has been “minced, pulverized, coated with batter, or breaded” is retained. Act effective July 28, 2013, 2013 Wash. Laws ch. 290 § 4 (to be codified at Wash. Rev. Code 69.04.933).

6. Act effective July 28, 2013, 2013 Wash. Laws ch. 290 § 4 (to be codified at Wash. Rev. Code 69.04.933).

properly licensed commercial fisher to a fish buyer.⁷ The bill also removes a previously existing exemption for persons who misidentify fish after receiving misleading or erroneous information⁸ (it is unclear whether this exemption had any significant effect, given the requirement of a *knowing* violation under the existing law).

Common names for salmon species are established by statute,⁹ and are retained under HB 1200. For all other shellfish and food fish, Agriculture is given authority to establish common names by rule;¹⁰ any species for which Agriculture has not established a common name must be named according to a list published by the Federal Department of Agriculture.¹¹

Finally, HB 1200 extends additional rule-making authority to Agriculture, authorizing it to adopt rules to establish and implement definitions and identification standards for food fish and shellfish species, and to enforce the new branding requirements.¹² This rulemaking is to be done in consultation with the Department of Fish and Wildlife (Fish and Wildlife).¹³ The rulemaking authority is permissive; Agriculture is not required to promulgate any new regulations.

SB 5193: Gray Wolf Conflict Management

The Legislature also took on the contentious issue of conflicts between the recovering gray wolf population and agricultural interests. SB 5193¹⁴ modifies the existing program to compensate for livestock and crop damages due to wolves, and in doing so expands both the availability of compensation for property owners and the amount potentially recoverable.

Under the prior law, compensation was available for damage to commercial crops or commercial livestock.¹⁵ Compensation

7. *Id.*

8. *Id.* §§ 4, 5 (to be codified, respectively, at Wash. Rev. Code 69.04.933 and .934).

9. *Id.* § 4(6)(a) (to be codified at Wash. Rev. Code 69.04.933).

10. *Id.* § 4(6)(b).

11. *Id.*

12. *Id.* § 6 (to be codified at Wash. Rev. Code 69.04.935).

13. *Id.*

14. Act effective July 28, 2013, 2013 Wash. Laws ch. 329 (to be codified in various sections of Wash. Rev. Code ch. 77.36 and at Wash. Rev. Code §46.17.210).

15. Wash. Rev. Code § 77.36.100 (2012).

was capped to per-animal values defined by statute for various types of livestock.¹⁶

The bill broadens the compensation program in two ways. First, it expands the damages that may be compensated under the program by covering non-commercial livestock (compensation for crop damage is still only available for commercial crops).¹⁷ Second, it increases the amount potentially recoverable by removing the per-animal caps, substituting “the market value of the lost livestock subject to the conditions and criteria established by rule of the commission.”¹⁸ An overall cap of ten thousand dollars, waivable by appeal to the Department of Fish and Wildlife, is retained.¹⁹ The increased costs of the expanded program are partially funded by a \$10 increase in personalized license plate fees.²⁰

HB 1194: Landowner Liability Shelter for Salmon Habitat Projects

Habitat restoration projects pursuant to chapter 77.85 of the Revised Code of Washington are an important tool in salmon recovery. These projects are often built on privately owned land (with the uncompensated landowners’ permission). However, landowners may be unwilling to allow their land to be used in such a way because of the possibility of legal liability resulting from such projects causing damage to adjoining property. In passing HB 1194,²¹ the legislature removed this disincentive by shielding similarly situated landowners from this kind of liability.

The bill shelters landowners from civil liability for property damage caused by habitat projects included on habitat project lists under RCW § 77.85.050. The landowner is protected so long as certain conditions are met and the project sponsor gave the landowner notice that these conditions were met.

16. *Id.*

17. Act effective July 28, 2013, 2013 Wash. Laws ch. 329 § 4 (to be codified at Wash. Rev. Code § 77.36.100).

18. *Id.* § 5 (to be codified at Wash. Rev. Code § 77.36.130).

19. *Id.*

20. *Id.* § 6 (to be codified at Wash Rev. Code § 46.17.210).

21. Act effective July 28, 2013, 2013 Wash. Laws ch. 194 (to be codified at Wash Rev. Code § 77.85.050).

Conditions require that the project is designed by a licensed professional engineer or geologist experienced in river restoration, and designed to both withstand hundred-year floods and to give boaters adequate warning to safely navigate around obstacles. The project cannot be located more than a quarter mile upstream from an established boat launch, and must include durable visible markings on all large logs and root wads placed as part of the project.²² Redressability for injured downstream property owners is preserved as the entities funding and carrying out the habitat projects remain potentially liable for property damage these projects may cause.

Rulemaking: Halibut Fisheries

The Washington Department of Fish and Wildlife (Fish and Wildlife) adopted WAC 220-20-130,²³ after a notice of expedited rulemaking (as authorized under RCW 34.05.353 for regulations that incorporate material changes to federal regulation). The commercial Pacific halibut fishery in Washington is jointly regulated by Fish and Wildlife, the National Marine Fisheries Service (NMFS), and the International Pacific Halibut Commission. The new Fish and Wildlife regulation incorporates by reference NMFS regulations relating to the halibut fishery,²⁴ and adds language to facilitate state enforcement of joint management rules.

HB 1075: Crabbing Licenses

HB 1075²⁵ concerns the number of commercial Puget Sound Dungeness crab licenses that may be carried on one boat: it increases the maximum number of licenses from two to three. This follows less than a decade after legislation was passed making it possible to stack two licenses per boat in 2005.²⁶

22. *Id.* § 1 (5)(a)–(e).

23. 13-06 Wash. Reg. 029 (Feb. 28, 2013, effective Mar. 31, 2013).

24. 50 C.F.R. §§ 300.60–.67 (2012).

25. Act effective July 28, 2013, 2013 Wash. Laws ch. 288 (to be codified at Wash. Rev. Code §§ 77.65.100, 77.65.130).

26. Ch. 82 2005 Wash. Laws (to be codified at Wash. Rev. Code §§ 77.65.100(4)(a), 77.65.130 (5)).

SB 5702: Invasive Aquatic Species Management

SB 5702²⁷ deals with aquatic invasive species management. It modifies an existing documentation requirement for vessels transported by road after out-of-state use. Under the prior law, documentation was required only for vessels that had been used in states or countries designated as sources of aquatic invasive species. The new regulation expands this requirement to watercraft used anywhere outside of Washington; removes a reference to inspection, (instead simply requiring documentation that the vessel is “free of aquatic invasive species”); and requires the Washington Department of Fish and Wildlife to develop and maintain implementing rules, including identifying acceptable documentation that a vessel is free of aquatic invasive species.²⁸ Additionally, SB 5702 adds violation of the section discussed above to a list of fish and wildlife infractions.²⁹ It also eliminates the Aquatic Nuisance Species Committee,³⁰ whose work had become redundant since the establishment of the Washington Invasive Species Council,³¹ and that had recommended its own elimination in a 2012 report.³²

LAND USE AND PARKS

SB 5897: State Parks

SB 5897,³³ passed during the second special session, primarily focuses on funding state parks. Previously, the Washington parks funding model was use-based and was

27. Act effective July 28, 2013, 2013 Wash. Laws ch. 307, (to be codified at Wash. Rev. Code § 77.15.160, amending § 77.12.879, and repealing § 77.60.130).

28. *Id.* § 1 (to be codified at Wash. Rev. Code § 77.12.879).

29. *Id.* § 2 (to be codified at Wash. Rev. Code § 77.15.160).

30. *Id.* § 3 (repealing Wash. Rev. Code § 77.60.130).

31. Act effective June 7, 2006, 2006 Wash. Laws ch. 152 § 2; extended by Act effective July 22, 2011, 2011 Wash. Laws ch. 154 § 2 (codified at Wash. Rev. Code § 79A.25.310).

32. Alan Pleus, Wash. Dep’t of Fish and Wildlife, Aquatic Nuisance Species Committee: Report to the 2012 Legislature, 14 (Jan. 2012).

33. Act effective September 28, 2013, except §§ 5-7, which became effective July 1, 2013, 2013 Wash. Laws ch. 15 (codified at Wash. Rev. Code 79A.80.020, 79A.80.030, 79A.80.080, 82.19.040, 70.93.180, and 79A.05.215; and adding a new section to Wash. Rev. Code ch. 79A.80).

primarily achieved through the sale of day-use permits and the annual “Discover Pass,” one of which is required in order to operate or park a motor vehicle on park land.³⁴ SB 5897 represents a reorganization of the user funding of state parks, and an increase in state funding. The bill removes the requirement of a Discover Pass or day-use permit for vehicles operating on non-gated state park roads,³⁵ provides for discounted bulk sales of Discover Passes and day-use permits,³⁶ and appropriates \$5 million from the state litter tax towards parks annually through 2017.³⁷ The new structure reduces the reliance on user funding by removing the requirement of a pass for use of non-gated park roads. However, it potentially increases funding from users through the bulk sale of passes as the Parks and Recreation Commission is expected to only implement bulk sales if they are likely to increase overall revenue through increased volume.³⁸

HB 1277: Tribal Conservation Easements

HB 1277³⁹ allows federally recognized Indian tribes to hold conservation easements. Under existing law, “any state agency, federal agency, county, city, town, or metropolitan municipal corporation, nonprofit historic preservation corporation, or nonprofit nature conservancy corporation” may hold an interest in real property less than fee simple in order to “protect, preserve, maintain, improve, restore, limit the future use of, or conserve for open space purposes.”⁴⁰ This bill adds federally recognized Indian tribes to the list of entities that may hold such interests.

34. See Wash. Rev. Code §§ 79A.80.020–.030 (2012).

35. Act effective Sept. 28, 2013, 2013 Wash. Laws ch. 15 § 3 (to be codified at Wash. Rev. Code §§ 79A.80.080).

36. *Id.* § 4 (to be codified at Wash. Rev. Code ch. 79A.80).

37. Act effective Sept. 28, 2013, except §§ 5-7, which become effective July 1, 2013, 2013 Wash. Laws ch. 15 §§ 5–7 (to be codified at Wash. Rev. Code §§ 82.19.040, 70.93.180, and 79A.05.215 respectively).

38. Chris Stanley, Wash. Office of Fin. Mgmt., Multiple Agency Fiscal Note Summary, S. SB 5897, State Parks and Recreation Comm. at 3 (May 28, 2013).

39. Act effective July 28, 2013, 2013 Wash. Laws ch. 120 (to be codified at Wash. Rev. Code § 64.04.130).

40. Wash. Rev. Code § 64.04.130 (2012).

RENEWABLE ENERGY AND CLIMATE CHANGE

SB 5802: Developing Recommendations to Meet the State's Greenhouse Gas Emission Standards

To combat climate change resulting from greenhouse gas emissions, the Washington State Legislature passed a set of emissions targets in 2008.⁴¹ The first emissions target is to reduce the state's overall emissions to 1990 levels by 2020.⁴² Despite there being only seven years until this emissions goal is due to be met, Washington does not yet have a comprehensive plan for reducing emissions to this level.

SB 5802, passed during the Legislature's regular session in March, seeks to remedy this by creating a "Climate Legislative and Executive Work Group"⁴³ whose task is to come up with recommendations to reduce greenhouse gas emissions. The Work Group consists of five members, including the Governor and one member from each major caucus in the House and Senate.⁴⁴ The purpose of the Work Group is to recommend a state program of actions and policies to reduce greenhouse gas emissions that "would ensure achievement of the state's emissions."⁴⁵ Recommendations will be made with the assistance of an outside consulting group.⁴⁶

Although the working group's final recommendations are not due to be published until December 31, 2013,⁴⁷ it has contracted with outside consultants in a timely manner⁴⁸ and the group seems to be on-track to make its recommendations public by the end of the year.

41. Wash. Rev. Code § 70.235.020 (2012).

42. *Id.*

43. Act effective April 2, 2013, 2013 Wash. Laws ch. 6 § 2.

44. *Id.*

45. *Id.*

46. *Id.* § 1.

47. Act effective April 2, 2013, 2013 Wash. Laws ch. 6 § 2(8).

48. Brad Shannon, *UPDATE—Gov. Inslee's Climate-Change Work Group Passes 1st Big Hurdle, Picks Consultant Without A Partisan Fight*, *The Olympian* (Jun. 4, 2013, 8:09 PM), <http://blog.thenewstribune.com/politicsblog/2013/06/04/gov-inslees-climate-change-work-group-passes-1st-big-hurdle-picks-consultant-without-a-partisan-fight/>.

SSB 5400: Classifying Eligible Renewable Energy

The Legislature passed SSB 5400,⁴⁹ amending the 2008 Energy Independence Act.⁵⁰ The amendments change the definition of “eligible renewable resource,” allowing utilities serving customers in Washington to receive renewable energy credits when they use renewable energy resources in other states as long as those utilities meet the standards set in § 1(d)(i)-(ii).⁵¹ Previously, utilities were only able to count renewable resources located in the Pacific Northwest. SSB 5400 makes it easier for qualifying utilities to meet their renewable energy targets by allowing them to count the renewable resources used in other states towards their total.

Under Washington’s Energy Independence Act, utilities that serve more than 25,000 customers in Washington are “qualifying utilities”⁵² that must meet energy conservation and eligible renewable resource targets.⁵³ Currently, at least three percent of the total energy load of qualifying utilities must be from a renewable resource or covered by the equivalent renewable energy credit.⁵⁴ This target will increase to nine percent on January 1, 2016.⁵⁵

SB 5369: Geothermal Resources

In April, the Legislature passed SB 5369, amending the State’s geothermal resources law.⁵⁶ The amendment was popular with both public and private stakeholders. It was passed with support of the Department of Natural Resources (Natural Resources) and the Department of Ecology (Ecology), the two main state agencies responsible for managing

49. Act effective July 28, 2013, 2013 Wash. Laws ch. 61.

50. Wash. Rev. Code § 19.285 (2012).

51. *Id.* §1.

52. Wash. Rev. Code § 19.285.030 (2012).

53. *Id.* § .040.

54. *Id.* (2)(a). A renewable energy credit (REC) is a tradeable certificate of proof of at least one-megawatt hour of an eligible renewable resource where the generation facility is not powered by freshwater. Wash. Rev. Code § 19.285.030(19) (2012).

55. Wash. Rev. Code § 19.285.040(2)(a)(ii) (2012).

56. Act effective July 28, 2013, Wash. Laws ch. 274 (amending Wash. Rev. Code §§ 78.60.030, 78.60.040, 78.60.060, adding a new chapter to Wash. Rev. Code. Title 43, creating a new section, repealing RCW 43.140.010, 43.140.020, 43.140.030, 43.140.040, 43.140.050, 43.140.060, and 43.140.900).

geothermal and water resources in the state.⁵⁷ Previously, only geothermal resources that were commercially viable were managed by Natural Resources and Ecology, with Natural Resources regulating drilling and Ecology dealing with water rights issues related to the extraction of geothermal resources.⁵⁸

The bill adopts a definition of geothermal resources that is consistent with federal and other states' laws, as well as removing the commercial viability requirement.⁵⁹ Although geothermal resources are still considered *sui generis*—they are neither a mineral nor a water right—the new definition is broad and includes, “the natural heat of the earth, the energy, in whatever form, below the surface of the earth present in, resulting from, or created by, or that may be extracted from, the natural heat, and all minerals in solution or other products obtained from naturally heated fluids, brines, associated gases and steam, in whatever form, found below the surface of the earth, exclusive of helium or oil, hydrocarbon gas or other hydrocarbon substances.”⁶⁰ Specifically included are: (1) all products of geothermal processes, (2) steam and other gas resulting from fluid introduced to geothermal formations, and (3) heat found in geothermal formations.⁶¹ Additionally, the bill clarifies ownership of geothermal resources, provides for enhanced coordination between agencies relating to the use of water, and allows the alienation of subsurface geothermal energy rights from the surface property.⁶²

The bill also clarifies how the extraction of geothermal resources and water rights impact each other. Under the Water Code,⁶³ authorization by Ecology is generally needed for either consumptive or non-consumptive uses of water.⁶⁴ The

57. Tom Ranken, *Geothermal Law Changes Approved by Legislature*, Washington Clean Technology Alliance Blog (Apr. 24, 2013), <http://wacleantech.org/2013/04/geothermal-law-changes-approved-by-legislature>.

58. See Wash. Rev. Code §§ 78.60.030, .050-.070. (2012).

59. Act effective July 28, 2013, 2013 Wash. Laws ch. 274 §§ 1–3 (to be codified at Wash. Rev. Code §§ 78.60.030, .040).

60. Act effective July 28, 2013, 2013 Wash. Laws ch. 274 § 2(1)(a) (to be codified at Wash. Rev. Code § 78.60.030).

61. *Id.* § 2(1)(a)(i)-(iii).

62. *Id.* §§ 1, 3 (to be codified at Wash. Rev. Code § 78.60.040).

63. See generally, Wash. Rev. Code ch. 90.03.

64. Wash. Rev. Code § 90.03.005. (2012).

bill provides an exception to the authorization requirement when water is: (1) returned or re-injected into the same aquifer or reservoir, (2) used during a temporary failure of a geothermal system, or (3) used to test a geothermal well.⁶⁵

Finally, the bill creates a new “Geothermal Energy Account” in the state treasury.⁶⁶ This account will be funded by revenues received from the Federal Mineral Lands Leasing Act of 1920⁶⁷ and the Geothermal Steam Act of 1970.⁶⁸ The proceeds of the account will be apportioned to Natural Resources for geothermal exploration and to Washington State University for research and development related to geothermal energy.⁶⁹

SB 5099: Biofuel Use by State Agencies and Local Governments

Since 2006, Washington has made efforts to reduce its dependence on foreign oil, reduce carbon emissions, and stimulate local production and use of biofuels by mandating minimum usage levels of bio and alternative fuels in state-owned vessels, vehicles and construction equipment.⁷⁰ Washington continued this effort by imposing stricter minimum biofuel usage levels every few years. For instance, the law required 20% biofuel or electricity usage by 2009, 40% usage by 2013, and 100% by 2015.⁷¹ Washington also extends the biofuel requirements to local-government-owned vehicles and requires them to use 100% biofuel or electricity by 2018.⁷²

This year, the Legislature once again updated the biofuel law to better account for the integration of local governments into its biofuel program. SB 5099 amends Washington’s biofuel law and directs the Department of Commerce to convene an advisory committee of local government representatives to help determine how local governments can practicably achieve

65. Wash. Rev. Code §§ 78.60.060, 90.03.110–.245 (2012).

66. Act effective July 28, 2013, 2013 Wash. Laws ch. 274 § 6.

67. 30 U.S.C. § 191 (2012).

68. 30 U.S.C. § 1001 et seq. (2012).

69. Act effective July 28, 2013, 2013 Wash. Laws ch. 274 § 7.

70. Wash. Rev. Code § 43.19.648 (2012). Original law was first enacted in 2006 as Wash. Rev. Code § 49.13.642, and mandated 20% usage by 2009.

71. *Id.*

72. *Id.*

100% biofuel usage by their vehicle fleets by 2018.⁷³

SB 5099 also outlines some exemptions that significantly soften the biofuel mandate. For instance, the amendments make it clear that engine retrofits are not required where they would void vehicle warranties.⁷⁴ Furthermore, the bill does not require local governments to replace equipment before the end of its useful life, nor does it apply to emergency vehicles.⁷⁵

Rulemaking: Biofuel Use and Procurement

The Department of Commerce (Commerce) adopted new rules concerning the practicability of state agencies using only biofuels or electricity to operate state-owned vessels, vehicles, and construction equipment.⁷⁶ These new regulations also relate to the functioning of Washington's Biofuel Law.

Codified in the new chapter 194-28 of the Washington Administrative Code, the rules explain how Commerce will evaluate whether state agencies have "practicably" achieved 100 percent biofuel usage by 2015.⁷⁷ According to the regulations, the Department will consider it "practicable to procure a [plug-in hybrid electric] or a [plug-in electric] vehicle, light-duty truck, or medium-duty passenger vehicle if: (1) the vehicle is due for replacement; (2) the anticipated driving range or use would not require battery charging in the field on a routine basis; and (3) the lifecycle cost is within five percent of an equivalent [hybrid-electric] vehicle based on the anticipated length of service."⁷⁸

With regard to purchasing biofuels, Commerce will consider it "practicable for agencies to: (i) Use a minimum of twenty percent biodiesel-blend fuel (B20) on an annualized basis when purchasing fuel through the state procurement system [and] (ii) [m]ake good faith efforts to identify sources and procure a minimum of B20 when purchasing fuel on a retail basis."⁷⁹ Similar good faith efforts must be made to identify sources and

73. Act effective July 28, 2013, 2013 Wash. Laws ch. 328 (to be codified at Wash. Rev. Code § 43.19.648).

74. *Id.* § 1(2)(a), (b).

75. *Id.* § 1(2)(b).

76. 13-10 Wash. Reg. 016 Permanent Rules, (Apr. 22, 2013, effective May 23, 2013).

77. *Id.*

78. *Id.*

79. *Id.* (2)(a).

purchase ethanol and renewable natural gas where vehicles use these fuels.⁸⁰ Finally, compressed natural gas, liquefied natural gas, or propane may be substituted for electricity or biofuel if Commerce determines that electricity and biofuel are not reasonably available.⁸¹

SB 5709: Biomass Pilot Project

Following up on recommendations for clean energy opportunities made by Washington State University (WSU) in a December 2012 report, the Washington legislature mandated the creation of a pilot project using biomass fuel to heat public schools.⁸² Biomass was first introduced in Vermont public schools in the 1980's.⁸³ While Montana, Nevada, Idaho, and North Dakota also have schools using biomass heat,⁸⁴ this is the first effort in Washington to experiment with biomass to heat public spaces.

The Bill directs WSU's energy program to create the pilot.⁸⁵ The project must include the replacement of two schools' heating systems with systems that use densified biomass, and measurement of the new heating system in terms of cost and emissions.⁸⁶ A report on the pilot is due to the Legislature by December 31, 2015.⁸⁷ Although the two pilot schools will be ultimately chosen by WSU, the legislature did set out some geographical criteria, requiring that one be located on the west side of the Cascade Mountains and the other be located on the east side of the mountains in a county that borders Canada or Idaho.⁸⁸

It should be noted that the Legislature did not fund this pilot project so whether or not it can be carried out by the statutory deadline will depend on whether if WSU receives

80. *Id.* (2)(b)-(c).

81. *Id.* (2)(c).

82. Act effective Jul. 28, 2013, 2013 Wash. Laws. ch. 308.

83. Anduin Kirkbride McElroy, *Fuels for Schools and Beyond*, Biomass Magazine, <http://biomassmagazine.com/articles/1230/fuels-for-schools-and-beyond> (last visited Nov. 13, 2013).

84. *Id.*

85. Act effective Jul. 28, 2013, 2013 Wash. Laws. ch. 308 § 2.

86. *Id.*

87. *Id.*

88. *Id.*

federal or private funding for the venture.⁸⁹

STATE ENVIRONMENTAL POLICY ACT

Rulemaking: SEPA Rules

At the direction of the Legislature, the Department of Ecology (Ecology) revised chapter 197-11 of the Washington Administrative Code, the State Environmental Policy Act (SEPA) rules.⁹⁰ SEPA requires state agencies to evaluate the likely environmental consequences of their actions before making any decisions that affect the natural and built environment.⁹¹ The SEPA rules set out the process for complying with the Act.

These rule changes took effect January 28, 2013, and are the first phase of a two-part effort by Ecology to revise the SEPA rules to “streamline regulatory processes and achieve program efficiencies.”⁹² Ecology worked with a SEPA Rule Making Advisory Committee consisting of representatives from cities, counties, business, environmental interests, agricultural interests, cultural resource interests, state agencies and tribal governments to promulgate these new rules.⁹³ Additional updates to the SEPA rules are expected in the first quarter of 2014.

Ecology described its goals for the rulemaking as: (1) to increase the efficiency in the SEPA process by updating documentation requirements to reflect current technology and existing regulatory processes; (2) to introduce new categorical exemptions that will not reduce the protection afforded the natural and built environment; and (3) to maintain or improve the public notice for projects exempted from SEPA.⁹⁴

The new rules amend chapter 197-11 of the Washington Administrative Code, sections -315, -800–906, and -960.⁹⁵ The

89. *Id.*

90. 13-02 Wash. Reg. 065 (Dec. 28, 2012, effective Jan. 28, 2013).

91. Wash. Rev. Code § 43.21C.030 (2012).

92. Act of May 2, 2012, Wash. Laws, 1st Spec. Sess., ch. 1.

93. *Id.* at § 301(4)(a).

94. Washington State Department of Ecology, Publication no. 12-06-016, *Concise Explanatory Statement Chapter 197-11 WAC SEPA Rules*, 3, (Dec. 2012), <https://fortress.wa.gov/ecy/publications/SummaryPages/1206016.html>.

95. 13-02 Wash. Reg. 065 (Dec. 28, 2012, effective Jan. 28, 2013).

changes increase the optional SEPA thresholds that local governments may adopt for specified types of minor new construction,⁹⁶ increase the SEPA thresholds for electrical facilities,⁹⁷ and allow lead agencies flexibility in improving the efficiency of the environmental checklist by adopting new technology such as electronic signature and submission.⁹⁸

WASTE DISPOSAL AND POLLUTION

Rulemaking: Solid Waste Disposal

To better regulate the composting and digestion of organic waste, the Washington Department of Ecology (Ecology) amended ch. 173-350 of the Washington Administrative Code, Washington's solid waste handling standards.⁹⁹ In making the amendments, Ecology explained that they were "necessary to protect public health and the environment,"¹⁰⁰ while it also described itself as "fully support[ive]" of composting and anaerobic and aerobic digestion generally.¹⁰¹

The amendments impose new requirements on large-scale composters while also exempting two new categories of solid waste disposal sites from regulation—agricultural composters and mushroom substrate producers.¹⁰² The new requirements for solid waste management facilities include capacity and design improvements and specialized personnel training.¹⁰³ The amendments also require facilities to plan responses to odor complaints, address agricultural pest infestation control measures, and conduct representative sampling and site management.¹⁰⁴

"Representative sampling" refers to scientific tests

96. *Id.* at section detailing changes to be codified at Wash. Admin. Code. § 97-11-800.

97. *Id.*

98. *Id.* at section detailing changes to be codified at Wash. Admin. Code § 197-11-315.

99. 13-08 Wash. Reg. 016 (Mar. 25, 2013, effective Apr. 25, 2013).

100. *Id.*

101. *Id.*

102. *Id.* at section detailing changes to be codified at Wash. Admin. Code § 173-350-020.

103. *Id.* at section detailing changes to be codified at Wash. Admin. Code § 173-350-220.

104. *Id.*

conducted on composted material to analyze its physical, chemical, and biological composition.¹⁰⁵ Interestingly, while most of the representative sampling standards were not amended, Ecology did change the requirement that facilities test for both fecal coliform and salmonella.¹⁰⁶ The regulations now only require a test for one of these two contaminants.¹⁰⁷

The sampling regulations became more burdensome in another way, as facilities must now also test for “biological stability.”¹⁰⁸ Biological stability is a scientific term representing the relationship between compost quality and biological activity within the compost.¹⁰⁹ Generally, the highest-quality compost is biologically stable.¹¹⁰ Commercial composters must test for biological stability using the methods developed by the United States Composting Council.¹¹¹

In addition to the amendments, Ecology added two new sections to the solid waste handling standards.¹¹² The first of these, codified at section 173-350-225 of the Washington Administrative Code, details the conditional operating and disclosure requirements for small-scale composters.¹¹³ Generally, small-scale composters who handle between 25 and 1000 cubic yards of solid waste and conform to Ecology’s disclosure requirements are exempt from permitting requirements.¹¹⁴ The second new section, section 173-350-250 of the Washington Administrative Code, similarly sets out operating guidelines for facilities that treat solid waste by

105. *Id.* For elaboration see, US Composting Council, *Sample Collection and Laboratory Preparation*, §2.01, available at <http://compostingcouncil.org/admin/wp-content/plugins/wp-pdfupload/pdf/34/TMECC%20Field%20Sampling%20Protocol.pdf>.

106. 13-08 Wash. Reg. 016, Table 220-B fn. 3 (Mar. 25, 2013, effective Apr. 25, 2013) (changes to be codified at Wash. Admin. Code § 173-350-220).

107. *Id.*, changes to be codified at Wash. Admin. Code § 173-350-220, Table 220-B fn. 3.

108. *Id.*

109. Claudio Mondini et. al., *An Integrated Chemical, Thermal, and Microbiological Approach to Compost Stability Evaluation*, 32 J. ENVTL. QUAL. 2379, (2003), available at <http://www.bvsde.paho.org/bvsacd/cd37/2379.pdf>.

110. *Id.*

111. 13-08 Wash. Reg. 016, Table 220-B fn. 2 (Mar. 25, 2013, effective Apr. 25, 2013) (codified at Wash. Admin. Code § 173-350-220).

112. *Id.* at sections to be codified at Wash. Admin. Code §§ 173-350-225 and 173-350-250.

113. *Id.* at section to be codified at Wash. Admin. Code § 173-350-225.

114. Wash. Admin. Code §173-350-225 Table 225-A.

anaerobic digestion.¹¹⁵ These facilities are exempt from the solid waste permitting requirements as long as they follow the separate rules detailed in this regulation.

HB 2079: Environmental Legacy Stewardship Account

The Legislature passed HB 2079 this year, amending the funding provisions of the Model Toxics Control Act and creating the “Environmental Legacy Stewardship Account.”¹¹⁶ The new account is part of the Washington Model Toxics Control Act (MTCA), chapter 173-340 of the Washington Administrative Code, which is the law governing the cleanup of historical releases or spills of hazardous substances.¹¹⁷ Generally, MTCA’s cleanup programs are administered by Ecology and funded through a tax on the possession of hazardous substances.¹¹⁸ The current hazardous substances tax is .07 percent of the market value of federally-recognized hazardous substances, petroleum products, pesticides, and other substances recognized as harmful by Ecology.¹¹⁹

Previously, the hazardous substances tax was collected and distributed according to the MTCA through State and Local Toxics Control Accounts.¹²⁰ HB 2079 changes this structure by capping funding contributed toward the State and Local Toxics Control Accounts at \$140 million starting July 1, 2013 and diverts any money collected in excess of \$140 million to the Environmental Legacy Stewardship Account.¹²¹ HB 2079’s supporters claim that it will “improve our environment, create jobs and foster long-term economic growth—all without raising taxes” because it uses money already collected by the state in a more efficient way.¹²²

Ultimately, money contributed to the Environmental Legacy

115. Wash. Admin. Code § 173-350-250 Table 250-A.

116. Act of Jul. 3, 2013, Wash. Laws, 2nd Spec. Sess., ch. 28.

117. WASHINGTON REAL PROPERTY DESKBOOK SERIES: VOL. 7 ON ENVIRONMENTAL REGULATION, § 6.1 (Wash. St. Bar Assoc. 4th ed. 2013).

118. Wash. Rev. Code ch. 82.21 (2012).

119. Wash. Rev. Code §§ 82.21.020, .030 (2012).

120. Wash. Rev. Code § 70.105D.070 (2012).

121. Act of Jul. 3, 2013, Wash. Laws, 2d Spec. Sess., ch. 28 §1.

122. Doug Ericksen, *Budget Committee Approves Creation of Environmental Legacy Stewardship Account*, WASHINGTON STATE SENATOR DOUG ERICKSON (Apr. 12, 2013), <http://doug.ericksen.src.wastateleg.org/senate-budget-committee-approves-creation-of-ericksens-environmental-legacy-stewardship-account/>.

Stewardship Account will fund cleanup pilot projects and other remedies aimed at reducing the time spent cleaning up contaminated sites.¹²³ It will also fund projects to deal with abandoned vessels and reduce storm water pollution.¹²⁴ The language of the Bill specifically directs that money in the ELSA may be spent on:

1. Performance and outcome-based projects, model remedies, demonstration projects, procedures, contracts, and project management and oversight that result in significant reductions in the time to complete compared to baseline averages;¹²⁵
2. Design and construction of low-impact development retrofit projects and other high-quality projects that reduce storm water pollution from existing infrastructure;¹²⁶
3. Cleanup and disposal of hazardous substances from abandoned or derelict vessels.¹²⁷

The Bill does not expand the availability of cleanup funding for polluters.¹²⁸

Rulemaking: International Energy Conservation Building Code

The Washington State Building Code Council, the state agency in charge of establishing minimum building code requirements,¹²⁹ adopted the 2012 International Energy Conservation Code (“IECC”).¹³⁰ Starting July 1, 2013, the IECC will dictate the energy standards for residential and commercial structures.¹³¹ The commercial and residential codes are separate and the commercial portion of the code is codified at chapter 51-11C of the Washington Administrative Code, while the residential portion of the code is codified at

123. Act of Jul. 3, 2013, Wash. Laws, 2d Spec. Sess., ch. 28 §1.

124. *Id.*

125. *Id.* at § 1(2)(a).

126. *Id.* at § 1(2)(c).

127. *Id.* at § 1(2)(d).

128. *Id.* at § 1 (3).

129. *See* Wash. Rev. Code § 19.27.074 (2012).

130. 13-04 Wash. Reg. 055 and 056 (Feb. 1, 2013, effective Jul. 1, 2013) (codified at Wash. Admin. Code ch. 51-11C, 51-11R).

131. *Id.*

chapter 51-11R.¹³² The IECC addresses energy efficiency on several fronts, including cost savings, reduced energy usage, conservation of natural resources, and the impact of energy usage on the environment.¹³³

WATER AND OCEAN

Rulemaking: Oil Spill Contingency Planning

In December 2012, the Department of Ecology (Ecology) adopted significant revisions to the oil spill contingency planning regulations of chapter 173-182 of the Washington Administrative Code.¹³⁴ The new regulations implement legislation passed in 2011.¹³⁵ The revisions involve the contingency planning requirements imposed on the operators of certain passenger, cargo, and tank vessels, offshore facilities, and onshore facilities that could reasonably be expected to cause substantial harm to the environment due to discharge of oil into navigable waters.¹³⁶ The rulemaking includes numerous changes to the contingency planning process, many of which are minor, technical, or regional in nature; this section discusses some of the more substantial changes.

Oil spill contingency planning is mandated for operators of certain vessels¹³⁷ and fixed facilities¹³⁸ identified by statute as having the potential to release oil into Washington's waters. The contingency planning requirement forces up-front planning for prompt and effective containment and cleanup to prevent harm to wildlife, natural resources, and property.¹³⁹

Under the new regulation, owners or operators of covered vessels will be required to notify the state's emergency management divisions of a discharge or a substantial threat within one hour of the discharge, or as soon thereafter as

132. *Id.*

133. *Id.*

134. 13-01 Wash. Reg. 054 (Dec. 14, 2012, effective Jan. 14, 2013).

135. Act of Apr. 20, 2011, 2011 Wash. Laws ch. 122. (codified in sections of chapter 88.46 Wash. Rev. Code and at Wash. Rev. Code §§ 90.56.370 and .48.366).

136. Wash. Rev. Code §§ 88.46.010, 88.46.060 (2012).

137. *Id.*

138. *Id.* at §§ 90.56.010, 90.56.210. (2005).

139. *Id.* at §§ 88.46.060, (2011), 90.56.060. (2010).

feasible without further endangerment to the vessel or crew.¹⁴⁰ Scattered sections throughout the chapter are additionally amended to trigger certain existing requirements upon spill notification related to this section.¹⁴¹

The new rules also improve the effectiveness of vessel of opportunity (VOO) response,¹⁴² pursuant to legislative mandate.¹⁴³ The VOO program involves registration of vessels on a voluntary, non-dedicated basis to participate in spill response.¹⁴⁴ Detailed standards are set out in this section both for operators planning for use of VOOs and for vessels registering as part of the VOO program.

Also by legislative mandate,¹⁴⁵ the rule making updates standards for response equipment, specifically considering the requirement of aerial surveillance.¹⁴⁶ Prior to the rule making, aerial surveillance response capability was required only for fixed facilities.¹⁴⁷ The new rule extends this requirement to covered vessels operating in Washington's marine waters, and sets out in considerable detail what the aerial surveillance requirement entails.¹⁴⁸

The final rule was not significantly changed from the proposed rules; most changes were minor clarifications in response to public comments. Substantive changes in response to comments were made to the section regarding aerial surveillance, increasing the time in which aerial assets must arrive on the scene in order to allow operators to contract rather than potentially creating a de-facto requirement to acquire such assets, as well as modifying some technical requirements.¹⁴⁹

140. 13-01 Wash. Reg. 054 (Dec. 14, 2012, effective Jan. 14, 2013) (codified at Wash. Admin. Code § 173-182-262).

141. *Id.*

142. *Id.* at section codified at Wash. Admin. Code § 173-182-317.

143. Wash. Rev. Code § 88.46.190 (2011).

144. *Id.*

145. *Id.* at § 88.46.180 (2011).

146. 13-01 Wash. Reg. 054 (Dec. 14, 2012, effective Jan. 14, 2013) (section codified at Wash. Admin. Code § 173-182-321).

147. Wash. Admin. Code § 173-182-320 (2013).

148. 13-01 Wash. Reg. 054 (Dec. 14, 2012, effective Jan. 14, 2013) (section codified at Wash. Admin. Code § 173-182-321).

149. *Id.*; Wash. Admin. Code § 173-182-321 (2013).

HB1245: Derelict and Abandoned Vessels

With the passage of HB 1245,¹⁵⁰ the Legislature confronted the growing problem of derelict vessels in Washington waters, a problem highlighted by such high-profile incidents as the illegal decommissioning of the barge Davy Crockett, which resulted in a \$22 million cleanup on the Columbia River,¹⁵¹ and the sinking of the Deep Sea in Whidbey Island's Penn Cove, which cost \$5.4 million to clean up and spilled oil perilously close to the cove's famous shellfish beds.¹⁵² The bill includes a wide variety of measures targeted at reducing the likelihood of similar environmental crises.

Prior to passage of HB 1245, measures existed to confront the problem of derelict vessels, primarily through the derelict vessel removal fund.¹⁵³ However, this fund was limited to vessels under seventy-five feet in length, and was scheduled to expire in 2014.¹⁵⁴

The Bill requires vessels longer than sixty-five feet, older than forty years, and subject to registration to be inspected prior to sale or transfer of ownership.¹⁵⁵ The Bill also directs the Department of Natural Resources (Natural Resources) to adopt procedures and standards for these inspections.¹⁵⁶ Additionally, inspection and review procedures are set for transfer of vessels owned by a variety of state and municipal governmental entities.¹⁵⁷

Authorized public entities,¹⁵⁸ and Ecology at their direction,

150. Act effective Jul. 28, 2013, 2013 Wash. Laws ch. 291 (codified in various sections of Wash. Rev. Code).

151. See Wash. Dept. of Ecology, *Barge Davey Crockett Response Incident Timeline* (Jan 10, 2012), available at <http://www.ecy.wa.gov/programs/spills/incidents/DavyCrockett/Davy%20Crockett%20Cleanup%20Poster.pdf>.

152. Maureen O'Hagan, *Derelict Vessels Cause Boatloads of Trouble in State*, THE SEATTLE TIMES (Sept. 8, 2012), available at http://seattletimes.com/html/localnews/2019103617_derelicts09.html.

153. Wash Rev. Code § 88.02.640 (2012).

154. *Id.*

155. Act effective Jul. 28, 2013, 2013 Wash. Laws ch. 291, § 38 (codified in Wash. Rev. Code ch. 79.100).

156. *Id.* § 39.

157. *Id.* §§ 6–26.

158. Including "The department of natural resources; the department of fish and wildlife; the parks and recreation commission; a metropolitan park district; a port district; and any city, town, or county with ownership, management, or jurisdiction over the aquatic lands where an abandoned or derelict vessel is located." Wash. Rev.

are given greater authority to board vessels in order to determine vessel ownership, assess structural integrity, and determine whether the vessel qualifies as an abandoned or derelict vessel.¹⁵⁹ This boarding authority is subject only to the requirement of an administrative search warrant, requiring reasonable cause to believe the search necessary to achieve the purposes of the state's derelict vessel laws, after a reasonable effort to obtain the owner's or a designee's consent to board.¹⁶⁰

Natural Resources is also given the authority to develop a voluntary vessel turn-in program for owners of vessels of minimal or no value with insufficient resources to properly dispose of it.¹⁶¹ This program would be directed towards removing those vessels that do not at this time meet the definition of derelict or abandoned vessels but pose a high risk of becoming such in the future.¹⁶² Such a program would be funded from the derelict vessel removal fund; its funding would be limited to no more than \$200,000 per biennium.¹⁶³

The bill maintains funding of the derelict vessel removal fund through the indefinite extension of a one dollar vessel registration,¹⁶⁴ previously scheduled to expire in 2014,¹⁶⁵ and removes a previously existing provision limiting use of the collected funds to removing vessels less than seventy-five feet in length.¹⁶⁶

Rulemaking: Sediment Management Standards

Ecology adopted changes to the sediment management standards found in chapter 173-204 of the Washington Administrative Code.¹⁶⁷ The changes are mostly bookkeeping in nature, clarifying language and correcting cross-references

Code § 79.100.010(3) (2012).

159. Act effective Jul. 28, 2013, 2013 Wash. Laws ch. 291, § 35 (codified in Wash. Rev. Code ch. 79.100).

160. *Id.*

161. *Id.* § 42.

162. *Id.*

163. *Id.*

164. *Id.* § 1 (codified at Wash. Rev. Code § 88.02.640).

165. Wash. Rev. Code § 88.02.640 (2012).

166. Act effective Jul. 28, 2013, 2013 Wash. Laws ch. 291 § 1 (3) (codified at Wash. Rev. Code § 88.02.640).

167. 13-06 Wash. Reg. 014 (Feb. 25, 2013, effective Sept 1, 2013).

to other regulations and statutes that have been amended since the chapter's last revision. Some changes are made in substance, primarily to harmonize the sediment management standards with the requirements found in the Model Toxics Control Act¹⁶⁸ and the regulations promulgated under its authority,¹⁶⁹ including a complete rewrite on the sediment cleanup decision process and policies found at WAC 173-204-500.¹⁷⁰ The marine and low-salinity sediment cleanup levels in WAC 173-204-520 are also significantly changed. Prior to the rulemaking, detailed standards applied only to Puget Sound waters, with sediment cleanup in marine waters outside the Puget Sound managed on a case-by-case basis; the rulemaking revises these standards and extends them to all marine waters in the state.

168. Wash. Rev. Code ch. 70.105D (2012).

169. Wash. Admin. Code ch. 173-340 (2012).

170. 13-06 Wash. Reg. 014 (Feb. 25, 2013, effective Sept 1, 2013).