



**King County**

**Department of Permitting  
and Environmental Review**

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## **REGULATORY REVIEW COMMITTEE**

- MINUTES -

**MEETING DATE: June 26, 2014**

**TO:** Jim Chan Molly Johnson  
Wally Archuleta Chris Ricketts  
Sheryl Lux  
Ty Peterson  
Steve Roberge

John Starbard, Director  
Lisa Verner, Special Projects Manager and RRC Chair  
Devon Shannon, Prosecuting Attorney's Office

**FM:** Randy Sandin, Product Line Manager, Resource

Present: Lisa Verner, Devon Shannon, Sheryl Lux, Randy Sandin, Ty Peterson, Molly Johnson,

- 1. WAC 197-11-800 lists minor construction projects and activities that are categorically exempt from threshold determination and EIS requirements under the State Environmental Policy Act (SEPA). Many of these categorical exemptions do not apply when a project is undertaken wholly or partly on "lands covered by water." Does "lands covered by water" include the area above or over the ordinary high water mark?**

### Background

Puget Sound Energy is proposing to install a 4 inch gas distribution line on a bridge crossing the the Cedar River. The pipeline will be hung from hangars attached to the bridge and there will be no land disturbance or alteration of any kind below the ordinary high water mark of the river. The department has had similar types of projects associated with development of single family residences where projects propose to bridge small streams (rather than install culverts) to avoid direct disturbance of lands covered by water. However, the projects still result in development of a bridge or similar structure *over* lands covered by water. The department has not been

consistent in its interpretation of “lands covered by water” and this has resulted in confusion as to when SEPA is required.

### Discussion

WaDOE creates the SEPA regulations in Ch 197-11 WAC. During WaDOE’s SEPA WAC update in 2013, the topic of “lands covered by water” was taken up. DOE recognized that the definition was out of date and the application of the “lands covered by water” to land areas adjacent to and above the ordinary high water mark needed to be clarified.

In the draft status report from July 2013, DOE suggested that the exception for lands covered by water was only intended to apply when work was actually occurring within the water body and the exception needed to be clarified that proposals that were over, under or adjacent to the ordinary high water mark were not intended to be covered by the exception. There was also discussion about eliminating the exception altogether. The rationale for that was because of the increased protection brought about by GMA. Critical area and shoreline master program updates have added protections that were not in place in 1984 when the SEPA rules were last updated. Regulatory programs for in-water work have also progressed to provide additional protection that once did not exist. (HPA, 404, 401). DOE elected not to completely eliminate the exception as there were associated sub-issues such as endangered salmon listings and the conclusion was that eliminating the exception completely would take considerable time to discuss and resolve. They did amend the definition to clarify that the exception was not intended to cover the areas above the ordinary high water mark. The current definition which was recently adopted explicitly includes wetlands and explicitly excludes adjacent lands, designated buffers and other areas above the ordinary high water mark. The new definitions in WAC 197-11-756 are as follows:

(1) "Lands covered by water" means lands underlying the water areas of the state below the ordinary high water mark, including salt waters, tidal waters, estuarine waters, natural water courses, lakes, ponds, artificially impounded waters, and wetlands. As specified in Part Nine certain categorical exemptions do not apply when a portion or all of a project or proposal is undertaken on lands covered by water.

(2) Wetlands - Wetlands are defined as areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands include those artificial wetlands intentionally created from nonwetland areas created to mitigate conversion of wetlands. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway.

(3) "Lands covered by water" does not include adjacent lands and designated buffers above the ordinary high water mark.

Conclusion

The “lands covered by water” exception only applies to projects that are actually disturbing the land areas below the ordinary high water mark.