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CULTURAL RESOURCES WORKGROUP - November 2013 REPORT
WASHINGTON DEPARTMENT OF ECOLOGY

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Sythesis of Consideration of Potential Impact to Cultural Resources prepared by Mary Rossi

Executive Summary

This report summarizes the work of the 2013 Cultural Resources Workgroup. The group was formed by the Department of Ecology and met from April to August 2013. The workgroup met five times to examine opportunities to improve notice to tribes and other parties during development project review; and ensure that cultural resource protection measures are incorporated into development permitting.

Three key outcomes of Workgroup dialogue:

- **We have opportunities to improve the effectiveness of efforts to protect cultural resources.** At this time, procedures and outcomes on cultural resource protection are inconsistent. We have uneven performance in providing notice: Some local governments communicate well with affected tribes, others do not. The best information available is not being consistently deployed in protecting these resources: Data and tools developed by the Department of Archeology and Historic Preservation (DAHP) are utilized by some but not all local and state agencies. In workgroup discussions, there was a sense that we may be at a point where cultural resources protection could move to the new level of consistency and effectiveness – if we can define a workable path forward.
- **SEPA has long been relied upon, but is not an optimal framework for achieving cultural resources protection.** Many times, SEPA checklists are filled out without rigorous analysis. "Not applicable" or "not known" is too often the answer to checklist questions. Detailed information on the proposed project and relevant technical information is often not provided in SEPA documents. And projects that could affect cultural resources may be exempt from SEPA.
- **To move cultural resource protection to the next level of sophistication and effectiveness, we may need statutory amendments.** Our State's laws require an *outcome of* cultural resources protection, but generally do not define a clear path to achieve this objective. Our statutory frameworks for planning and development project review may need revision to improve our protection of cultural and historic resources.

  Two different proposals were discussed that would amend the process for *development proposal* review through the Local Project Review Act RCW 36.70B.

  - City representatives proposed amendment to RCW 36.70B to ensure early notice to tribes and others (at "determination of completeness" stage.)
  - Tribal representatives proposed additional RCW 36.70B details on timeframes for tribal comment; and stipulating that tribal comments must be considered in permit conditions.

  A broader and more challenging issue discussed by the group: Elevating cultural resource protection as a specific planning requirement under the Growth Management Act. The Shoreline Management Act already requires protection of "historic, archaeological and cultural features" within shoreline areas. One option could be expansion of this requirement to the broader landscape.

Background

2012 Senate Bill 6406

In 2012, the Washington State Legislature adopted Senate Bill 6406 directing the Department of Ecology to update the rules guiding local and state agencies in implementing the State Environmental Policy Act (SEPA). SEPA provides a process for local and state governments to consider the impacts of proposed actions on the natural and built environment.

SB 6406 directed Ecology to form an advisory committee to assist with the SEPA rule update. Tribal and historic/cultural resource interests were included in the required membership of the committee.

The importance of SEPA in providing notice to tribes and other parties was reflected in the requirements of SB 6406. The bill directed that Ecology and the advisory committee:

- "…(ii) Ensure that state agencies and other interested parties can receive notice about projects of interest through notice under chapter 43.21C RCW and means other than chapter 43.21C RCW; and
- (iii) Ensure that federally recognized tribes receive notice about projects that impact tribal interests through notice under chapter 43.21C RCW and means other than chapter 43.21C RCW…"

Ecology formed the Advisory Committee and initiated work to implement SB 6406 in August 2012. An initial round of SEPA rule amendments were adopted by Ecology in December 2012. These amendments increased the level of development that local governments may choose to exempt from SEPA review through a local ordinance. These exempted projects are no longer subject to SEPA notification and review procedures.

Tribal concerns and 2013 HB 1809

In early 2013, tribes and cultural resources interests were expressing concern at the loss of SEPA notice for the newly-exempt development projects. These concerns led Rep. John McCoy to sponsor House Bill 1809 in the 2013 legislature. The bill requires notice for all projects subject to SEPA in 2012 (even those now exempt from SEPA by the 2012 rule update), unless specified protections for cultural resources are provided.

The 2013 legislation proposed by Rep. McCoy led to dialogue with stakeholders, Governor's office and Ecology. This dialogue resulted in an agreement that Ecology would convene a Cultural Resources Workgroup. This group was distinct but related to the SEPA Rule Update Advisory Committee; the workgroup was intended to complement the efforts of the Rule Update Advisory Committee in achieving the cultural resource projection objectives that were included in 2012 SB 6406.

The following framework for the workgroup was identified:

- Objective is to accomplish protection of cultural/historic resources. This protection is required by state and federal statutes, and is the right thing to do.
- We need to understand how cultural resources are currently protected, so the effectiveness of the current process can be assessed in formulating ideas for improvement.
- All options for improvement are on the table, but none are presumed (ex. the workgroup may go beyond SEPA and identify the potential for new cultural resources legislation.)

Key strengths and challenges identified in workgroup discussions

Key issues gleaned from workgroup discussions regarding current procedures and statutes, and potential revisions to improve cultural resource protection:

1. **State cultural resource laws**
    a. Strength:
        - WA statutes clearly require *protection* of cultural resources on public and private land.
        - Inadvertent discovery provisions are being included in some permits; local governments seem open to including these more consistently for development projects.

    b. Challenge:
        - The State cultural resource protection statutes do not include a complete project review *process* to accomplish protection.
        - Statutes do not provide explicit authority and responsibility for local governments to protect cultural resources during permit review. This has led to reliance on the general substantive authority provided in SEPA.

2. **Cultural resource protection information and tools**

a. Strength:

- DAHP has developed data and a predictive model that can assist in identifying areas with likely cultural resources.
- 37 cities, counties and PUDs have Data Sharing Agreements with DAHP (i.e. are using the available information in decision making.)
- A few jurisdictions (ex. Clark County) have adopted local procedures that ensure cultural resource review is a routine part of development project reviews.

b. Challenges:

- This best available information is not being consistently used during long-range planning and development project review. This fails to meet the spirit of state planning statutes.
- There is concern regarding extra time and cost for cultural resource technical reviews; particularly, concern whether the added time and expense will result in significant improvements to protecting these resources.
- Many cities and counties are avoiding DAHP Data Sharing Agreements due to legal liability concerns related to public records requests. The Archaeological sites exemption in RCW 42.56.300 provides an exemption for the "location" of archaeological sites, and some cities interpret that to be narrower than the output of the DAHP predictive model. The Public Records Act has stiff daily penalties for failure to disclose records that were not covered by an exemption, and cities are very sensitive to not running afoul of the act. Some cities may not prefer to test whether DAHPs interpretation of the exemption will stand up in court.
- The confidentiality agreement requires the naming of a specific staff person who is authorized to access and use the predictive model. There are concerns about ability to process permits in a timely manner if that staff person leaves and there is a delay in getting new people authorized to use the system.
- There are also generalized liability concerns about whether a city is opening themselves up to potential liability if permits are issued based upon the predicted level of archaeological sensitivity, and then the developer does disturb an archaeological site. Will a developer then turn to the city to share in the cost of any fines or penalties because we provided them "bad information."

3. SEPA procedures

a. Strengths:

- SEPA provides the "backstop" process for notice to tribes and others.
- SEPA includes "substantive authority" to address identified impacts – thus providing authority to address cultural resource issues, even when State and local regulations may lack specific authority.

b. Challenges:

- SEPA notice often lacks details on proposals that are vital to effective review and comment.
- There is no notice of projects exempt from SEPA review.
- It is not always clear what happens to comments that are provided.

4. Local Project Review Act, RCW 36.70B

a. Strengths:

- The Legislature intended that 36.70B would provide an integrated process for project review, including review under SEPA (from Findings from 1995 legislation in Notes for 36.70B.030):

  > "(4) When an applicant applies for a project permit, consistency between the proposed project and applicable regulations or plan should be determined through a project review process that integrates land use and environmental impact analysis, so that governmental and public review of the proposed project as required by this chapter, by development regulations under chapter 36.70A RCW, and by the environmental process under chapter 43.21C RCW run concurrently and not separately."

- Some local governments have adopted integrated procedures.
- The "determination of completeness" could be used to trigger notice to Tribes and others; this would result in earlier notice and more complete information, encompassing a broader set of development applications, than SEPA notice.

b. Challenges:

- Statutes may not provide clear authority for local governments to require action from project applicants to protect cultural resources.
- Local government performance in notifying tribes is very uneven; some do a good job, others do a poor job.
- RCW 36.70B applies only to "fully planning" counties and cities

5. Shoreline Management Act

a. Strengths:

- The SMA and Shoreline rules (WAC 173-26-221) require all Shoreline Master Programs to incorporate provisions to "…protect historic, archaeological, and cultural features and qualities of shorelines..." including specific standards for review and protection.
- Many important cultural sites are located along shorelines.

b. Challenges:

- Extending this SMA provision to all areas, through amendment to the GMA or other statutes, could be viewed by local governments and legislators as an "unfunded" expansion of planning obligations.

Statutory Amendment Concepts

Two specific proposals emerged from Work Group dialogue. Cities propose a simple but significant amendment, requiring notice to tribes and others at a very early stage in development review – the "determination of completeness." Tribal interests propose amending the same section, providing more detail on the procedures of tribal engagement in development review.

1. City proposal – Amendments to RCW 36.70B

RCW 36.70B.070

Project permit applications — Determination of completeness — Notice to applicant.

(1) Within twenty-eight days after receiving a project permit application, a local government planning pursuant to RCW 36.70A.040 shall mail or email ~~or provide in person~~ a written determination to the applicant, any persons requesting such notification, the Department of Archaeology and Historic Preservation, and any affected tribes that request ongoing notice, stating either:

(a) That the application is complete; or

(b) That the application is incomplete and what is necessary to make the application complete.

(2) To the extent known by the local government, the local government shall identify other agencies of local, state, or federal governments that may have jurisdiction over some aspect of the application.

(3) A project permit application is complete for purposes of this section when it meets the procedural submission requirements of the local government and is sufficient for continued processing even though additional information may be required or project modifications may be undertaken subsequently. The determination of completeness shall not preclude the local government from requesting additional information or studies either at the time of the notice of completeness or subsequently if new information is required or substantial changes in the proposed action occur.

(4) The determination of completeness may include the following as optional information:

(a) A preliminary determination of those development regulations that will be used for project mitigation;

(b) A preliminary determination of consistency, as provided under RCW 36.70B.040; or

(c) Other information the local government chooses to include.

(4) (a) An application shall be deemed complete under this section if the local government does not provide a written determination to the applicant that the application is incomplete as provided in subsection (1)(b) of this section.

(b) Within fourteen days after an applicant has submitted to a local government additional information identified by the local government as being necessary for a complete application, the local government shall notify the applicant whether the application is complete or what additional information is necessary.

RCW 36.70B.140

Project permits that may be excluded from review.

(1) A local government by ordinance or resolution may exclude the following project permits from the provisions of RCW 36.70B.060, RCW 36.70B.080, ~~through *36.70B.090~~ and 36.70B.110 through 36.70B.130: Landmark designations, street vacations, or other approvals relating to the use of public areas or facilities, or other project permits, whether administrative or quasi-judicial, that the local government by ordinance or resolution has determined present special circumstances that warrant a review process different from that provided in RCW 36.70B.060, RCW 36.70.B.080, ~~through *36.70B.090~~ and 36.70B.110 through 36.70B.130.

(2) A local government by ordinance or resolution also may exclude the following project permits from the provisions of RCW 36.70B.060 and 36.70B.110 through 36.70B.130: Lot line or boundary adjustments and building and other construction permits, or similar administrative approvals, categorically exempt from environmental review under chapter 43.21C RCW, or for which environmental review has been completed in connection with other project permits.

RCW 36.70B.150

Local governments not planning under the growth management act ~~may use provisions~~.

(1) A local government not planning under RCW 36.70A.040 may incorporate some or all of the provisions of RCW 36.70B.060, 36.70B.080, ~~through *36.70B.090 and~~ 36.70B.110, and RCW 36.70B.120 ~~through 36.70B.130~~ into its procedures for review of project permits or other project actions.

(2) A local government not planning under RCW 36.70A.040 shall incorporate of the provisions of RCW 36.70B.070 and 36.70B.130 into its procedures for review of project permits or other project actions.

2. **Proposal prepared by Dawn Vyvyan on behalf of the Yakama Nation and Puyallup Tribe. This proposal is also supported by the Snoqualmie Tribe and Stillaguamish Tribe – Alternative amendments to RCW 36.70B**

RCW 36.70B.070

Project permit applications — Determination of completeness — Notice to applicant.

(1) Within twenty-eight days after receiving a project permit application, a local government planning pursuant to RCW 36.70A.040 shall mail ~~or provide in person~~ a written determination to the applicant, stating either:

(a) That the application is complete; or

(b) That the application is incomplete and what is necessary to make the application complete.

(2) Prior to making a determination of completion and within twenty-eight days after receiving a project permit application,, a local government planning pursuant to RCW 36.70A.040 or not planning under the growth management act shall mail or e-mail the Department of Archeology and Historic Preservation, ("Department") and any Federally Recognized Tribe that requests ongoing notice, that a project permit application has been received by the local government. Such notice shall include an identification of the project permit application and a website on which project application documents can be viewed. If the local government does not maintain such records, the local government shall provide such records with its notice or provide a contact by which such records can be obtained via e-mail. The Department and Tribe may comment on the application as to the proposed project's impact on historic, archeological and cultural resources.

(a) When a local government receives comment from the Department or a Federally Recognized Tribe, such comments shall be considered by the local government and a determination made as to the proposed project's impact to historic, archeological and cultural resources. The Department and the Federally recognized Tribe shall receive the local government's determination within twenty days of the local government's receipt of comment.

(b) If there is a determination of significant impact, and the project is exempt from the State Environmental Protection Act, the site for the proposed development shall be surveyed by a professional archeologist and monitored during site disturbance for potential impacts to the historic, archeological and cultural resource. Mitigation of the impacts to historic, archaeological, and cultural resources shall be agreed upon by the local government, Department and affected Federally Recognized Tribe.

(3) To the extent known by the local government, the local government shall identify other agencies of local, state, or federal governments that may have jurisdiction over some aspect of the application.

(4) A project permit application is complete for purposes of this section when it meets the procedural submission requirements of the local government and is sufficient for continued processing even though additional information may be required or project modifications may be undertaken subsequently. The determination of completeness shall not preclude the local government from requesting additional information or studies either at the time of the notice of completeness or subsequently if new information is required or substantial changes in the proposed action occur.

(5) The determination of completeness may include the following as optional information:

(a) A preliminary determination of those development regulations that will be used for project mitigation;

(b) A preliminary determination of consistency, as provided under RCW 36.70B.040; or

(c) Other information the local government chooses to include.

(6) (a) An application shall be deemed complete under this section if the local government does not provide a written determination to the applicant that the application is incomplete as provided in subsection (1)(b) of this section.

(b) Within fourteen days after an applicant has submitted to a local government additional information identified by the local government as being necessary for a complete application, the local government shall notify the applicant whether the application is complete or what additional information is necessary.

RCW 36.70B.140

Project permits that may be excluded from review.

(1) A local government by ordinance or resolution may exclude the following project permits from the provisions of RCW 36.70B.060, RCW 36.70B.080, ~~through *36.70B.090~~ and 36.70B.110 through 36.70B.130: Landmark designations, street vacations, or other approvals relating to the use of public areas or facilities, or other project permits, whether administrative or quasi-judicial, that the local government by ordinance or resolution has determined present special circumstances that warrant a review process different from that provided in RCW 36.70B.060, RCW 36.70.B.080, ~~through *36.70B.090~~ and 36.70B.110 through 36.70B.130.

(2) A local government by ordinance or resolution also may exclude the following project permits from the provisions of RCW 36.70B.060 and 36.70B.110 through 36.70B.130: Lot line or boundary adjustments and building and other construction permits, or similar administrative approvals, categorically exempt from environmental review under chapter

43.21C RCW, or for which environmental review has been completed in connection with other project permits.

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Local governments not planning under the growth management act ~~may use provisions~~.

(1) A local government not planning under RCW 36.70A.040 may incorporate some or all of the provisions of RCW 36.70B.060, 36.70B.080, ~~through *36.70B.090 and~~ 36.70B.110, and RCW 36.70B.120 ~~through 36.70B.130~~ into its procedures for review of project permits or other project actions.

(2) A local government not planning under RCW 36.70A.040 shall incorporate of the provisions of RCW 36.70B.070 and 36.70B.130 into its procedures for review of project permits or other project actions.

Attachments:

Cultural Resources Workgroup Members

Leonard Bauer

Brandon Housekeeper

Carl Schrader

Dawn Vyvyan

Allyson Brooks, DAHP

Mary Rossi

Laura Merrill

Neil Aaland

Michael Groesch

Carey List

Jason Sullivan

Consideration of potential impacts to cultural resources is not dependent on the size of a proposed project but on the *location* of a project.

PROJECT-LEVEL APPROACH

Project Exempt from Consideration of Impacts

A project should only be exempt from consideration of impacts if the following criteria are met; these criteria are applicable in all regulatory contexts, not just SEPA.

Exempt for archaeology if *any:*
1) Prior negative survey on file.
2) No ground disturbance proposed.
3) Project in 100% culturally-sterile fill.

Exempt for built environment if *both:*
1) Less than 45 years old; *and*
2) Not eligible for or listed in any historic register or historic survey.

For *all* projects, exempt or not:
Include SIDL on all related permits (compliance with RCW 27.53, 27.44)

Project Not Exempt from Consideration

If a project is *not* exempt according to the criteria above, then a cultural resource review is necessary. The following represents a decision tree for a cultural resource review.

DECISION TREE

***For Above-Ground Cultural Resources (e.g. historic buildings):**

1) Consult public version of **WISAARD**[1] (DAHP's online searchable database for cultural resources; an award-winning online GIS map tool)
2) Determine appropriate action as follows
    a. Project **exempt** if *both* are met:
        1. Resource is less than 45 years old *and*
        2. Resource ineligible for/not listed in any historic register or database
        Note: if property information on WISAARD does not indicate eligibility, contact DAHP for confirmation.
    b. If project is **not exempt** (i.e. does not meet the two criteria in "a") and resource is identified in database
        1. DAHP determines significance
        2. If **significant**, Avoid resource or determine Mitigation strategy
        3. Condition permit with decision

***For Below-Ground Cultural Resources (e.g. archaeological sites):**

1) Consult secure version of **WISAARD** including the **Statewide Predictive Model** (obtained via data-sharing agreement with DAHP)
2) Determine appropriate action as follows
   a. Project **exempt** if *any* are met:
      1. Prior negative archaeological survey on file
      2. No ground disturbance will occur
      3. Project in 100% culturally-sterile fill
   b. If **no known** cultural resources are present, apply the DAHP Predictive Model and follow the survey recommendations according to the associated risk identified.
   Note: In *all* cases, *regardless* of risk, condition permit with standard inadvertent discovery language (SIDL)
   c. If cultural resources **are** present and ground-disturbance is proposed
      1. Notify and consult with DAHP and tribes
      2. Avoid resource or determine Mitigation strategy
      3. Condition permit with decision
3) For **all** ground-disturbing projects
   a. Include SIDL language consistent with RCW 27.53 and 27.44 protecting sites, graves, and Indian burials on public and private lands
   b. Provide tribal notification (adjust per tribe's instruction)

[1]**WISAARD –** Washington Information System for Architectural and Archaeological Records Data (https://fortress.wa.gov/dahp/wisaard/)

PLANNING-LEVEL APPROACH (note: both options would include a project-level approach as above)

Consideration of potential impacts to cultural resources can be facilitated through the planning efforts outlined below; such efforts will provide efficiencies over an exclusively project-level approach.

Exempt for archaeology *and* built environment if:
   1) Cultural resource management plan (**CRMP**[1,2]) is incorporated into Comp Plan, *or*
   1) **Local ordinance** or **development regulations**[3] address pre-project review and standard inadvertent discovery language (SIDL), *and*
   2) **Data-sharing agreement**[4] is in place.

For *all* projects:
Include SIDL on all related permits (compliance with RCW 27.53, 27.44)

[1]**CRMP defined** – A plan integrating cultural resource identification and management into land use planning and permitting processes. Included in the plan is a "pre-project cultural resource review process" which must be conducted by professionally qualified staff with the required knowledge and expertise; examples of qualified staff include DAHP, affected federally-recognized Tribes, and professional archaeologists as defined at RCW 27.53.030.

[2]**CRMP examples** – The Washington State Historic Preservation Plan 2009-2013 can

be accessed at http://www.dahp.wa.gov/sites/default/files/PreservationPlan09.pdf
The City of Tacoma Historic Preservation Plan (a Comprehensive Plan element) can be accessed at http://cms.cityoftacoma.org/Planning/Comprehensive%20Plan/11%20-%20Historic%20Preservation%206-14-11.pdf
The Whatcom County Shoreline Management Program-Archaeological, Historic and Cultural Resources section (Whatcom County Code 23.90.070) can be accessed at http://www.codepublishing.com/wa/whatcomcounty/

[3]**Local ordinance/development regulations examples** – Whatcom County Code 20.72.652 (zoning) addressing pre-project review and SIDL for archaeological resources can be accessed at http://www.codepublishing.com/wa/whatcomcounty/
As of February 2013, seventy-one local jurisdictions were participating in the Certified Local Government (CLG) program administered by DAHP. CLGs must have a historic preservation ordinance.

[4]**Data-sharing agreement** – As of February 2013, thirty-seven local jurisdictions held a data-sharing agreement with DAHP.

ALL APPLICANTS SHOULD BE INFORMED OF THE FOLLOWING:

- Washington State law (RCW 27.53 and 27.44) protects archaeological resources (RCW 27.53) and Indian burial grounds and historic graves (RCW 27.44) located on both the public and private lands of the State.
- An archaeological excavation permit issued by DAHP is required in order to disturb an archaeological site.
- Knowing disturbance of burials/graves and failure to report the location of human remains are prohibited at all times (RCW 27.44 and 68.60).