Richard (Nick) Nikkila

These comments are being submitted by the Wahkiakum County Real Property Rights Advisory Board, which is a volunteer board appointed by the county commissioners to advise the commissioners regarding property rights issues. For more than 5 years, the board has been Ecology's primary point on contact regarding updating the County SMP.

Comment 1

ISSUE:

Other commenters, as well as DOE itself, recognize the proposed amendments to the SMA related WACs, if adopted, would generate substantial additional long-term workloads on local governments in both the short and long term. This is especially burdensome for the smaller counties such as Wahkiakum, for which adequate funding is perennially problematic causing County Commissioners to struggle with budgets insufficient to address even the basic issues of safety, education and roadways needed by its citizens.

DISCUSSION:

An excerpt from DOE's discussion of its economic analysis states:

"The proposed rule would change the requirements for local governments during the periodic review process. ***We expect that these additional requirements will create costs for local governments, as the increased level of planning is significan****t, especially for jurisdictions subject to sea level rise.*

However, ***those costs are assumed to be covered by the state funding grants provided pursuant to RCW 90.58.080(6)*** *and 90.58.250. As stated in 90.58.250(1), "The legislature… intends that the state will provide funding to local governments that is reasonable and adequate to accomplish the costs of developing and amending shoreline master programs consistent with the schedule established by RCW 90.58.080.*

Therefore*, as cited throughout this PRA,* ***costs associated with proposed rule amendments*** *that affect periodic review requirements are considered covered by the grants and* ***are not factored into the cost-benefit analysis****."* [(1)]

[(1)] Highlighted for emphasis

The highlighted assumption fails to recognize the caveat included in RCW 90.58.080 which specifies such funding is "subject to availability." Even if available, the RCW limits the funding to support only the development of the required periodic review and SMP update. No mention is made in the analysis of the increased ongoing workload placed upon stressed local governments or funding to support that workload.

RECOMMENDATION:

That DOE develop a program that will provide the funding necessary for the smaller local governments such as Wahkiakum County to address the additional ongoing workload and prioritize the availability of funding for periodic review requirements for such local governments.

Comment 2

ISSUE: The proposed changes to WAC 173-26 can result in significant negative impacts unless the required reviews, decisions, technical advice and assistance by the Department of Ecology are provided in the timely manner needed by local governments.

DISCUSSION: On the subject of timeliness, the department has a less than stellar track record. In apparent recognition of that record, the department seeks, within the proposed amendments, to extend its required response times and, in some cases, to eliminate specified timeframes for responding. With Department response times already measuring into years, this places an unwarranted and unworkable burden on local governments. In this regard, the proposed language is clearly not in compliance with the cooperative approach envisioned in the Act nor with the intent of the Act. One county continues to experience an ongoing response period currently totaling in excess of **1,070** days. In this case, the Department of Ecology offers justification for the ongoing delay due to the overburdening of tasks and an accompanying lack of personnel.

The Department's response heightens the concern noted in Comment 1 regarding the availability of funding for smaller financially stressed local governments to address the additional workload the proposed amendments create. If the Department of Ecology can't achieve the funding level necessary to support its own workload, what chance do these local governments have in receiving the funding necessary to support the additional workload the proposed amendments impose on them?

An inability of the Department to conduct the reviews, decisions, and technical assistance required by its proposed amendments and provide responses to local governments in a timely manner creates a barrier to economic growth, places an undue hardship on already stressed smaller local governments and frustrates the implementation of the environmental progress mandated by the Act.

RECOMMENDATION: Department staffing needs to match the workload created by its SMA-related WACs and their proposed amendments. In lieu of matching staffing to workload, the proposed WAC amendments need to be changed to align workload to staffing by mitigating the extent of review and oversight it places on the Department and, in turn, reduce the extent of reporting and recording requirements placed on local governments. To avoid the barriers discussed above, the proposed WAC language needs further amendment to establish enforceable deadlines on the Department that meet the needs of its local government partners.

Comment 3

ISSUE: The proposed amendments to the Department's SMA related WACs address the effects of global warming; sea level rise and increased storm severity yet fail to address emissions of greenhouse gases known to be causative factors of global warming. Wetlands sequester large amounts of carbon dioxide, methane and other known greenhouse gases. Projects within a wetland can result in the release of some or all of the global warming precursors stored within its vegetation and soils.

DISCUSSION: The introduction of greenhouse gases into the troposphere is known to be a major contributor to global warming.

Global warming is known to be a cause of sea level rise due to the melting of polar ice and the expansion of water as its temperature rises.

Concern exists among the community of global warming scientists that there is a temperature in the range of 1.5 degrees Celsius which, once reached, can create a cascade of ever increasing negative environmental effects referred to as tipping points. For that reason, great importance is placed on the reduction of emissions in the near-term in an effort to avoid global warming from reaching that critical temperature.

While the proposed amendments establish significant planning and regulation in preparation for sea level rise and increased storm severity, they fall short of any planning or regulation that, within the purview of the SMA, could avoid or mitigate the emissions of greenhouse gases that ultimately are responsible for sea level rise and increased storm severity.

The reduction of greenhouse gases is a priority of the state with its citizens incurring tremendous expenses as the state attempts to achieve that goal. Failure to prevent the emission of greenhouse gases that would otherwise remain sequestered within wetlands would thwart the expenditure of Washingtonians and reduce the effect of state led reduction programs.

RECOMMENDATION: Emissions of greenhouse gases result in a loss to the environment. The meaning of No Net Loss contained within the proposed amendments should be expanded to include avoidance of near-term emissions of greenhouse gases sequestered within wetlands. Projects within wetlands should be prohibited if they can reasonably be determined to cause the release of sequestered greenhouse gases. The proposed amendments such as those found in WAC 173-26-221 should be amended to ensure against the avoidable release of sequestered greenhouse gases and their precursors.

Comment 4

While the definition of "Should" does not appear to be one of the amendments in DOE's proposal, the fact that by itself, Chapter 173-26 WAC as proposed employs "should" 273 times warrants consideration of its meaning.

According to the above referenced WAC, "*Should" means that a particular action is required unless there is a demonstrated, compelling reason, based on policy of the SMA and this chapter against the action*.

Notwithstanding the argument that should is universally referred to as an advisory term by a myriad of policies and definitions from such organizations as the United States Federal Register, the State of Washington Bill Drafting Guide, the United States Department of Justice, the International Standards Organization, et al, the DOE definition is problematic on its face.

The DOE definition of "should," universally considered to be an advisory term, means an act or action is mandatory unless DOE specifically says it is not. If this were applied within the arena of law, it would equate to a person being required to be treated as guilty unless and until law enforcement officials declare them to be innocent.

It delays progress towards meeting the goals of the SMA by generating differences of interpretation of language in the SMA related WACs, including "demonstrated" and "compelling" found within the WAC definition of "should". (The number of concerns expressed in public comments regarding the lack of specificity in the proposed WAC language highlights this point.)

It does not consider real world experiences or conditions at the local level.

It is noteworthy the SMA avoids any use of the word "should." Likewise, it does not mandate the use of the word "should" in the implementing WACs. The closest it comes to that is found in RCW 90.58.340 which states "Local governments shall, in developing use regulations for such areas, take into consideration any recommendations developed by the department as well as any other state agencies or units of local government."

Recommendation: Redefine "should" as "strongly recommended." If DOE feels the SMA requires an action, use the term "shall" or "must" in its implementing guidance. For strong recommendations use "should" and for other recommendations use "may."