

HOUSE BILL REPORT

HB 2070

As Reported by House Committee On:
Transportation

Title: An act relating to Washington state department of transportation projects.

Brief Description: Concerning Washington state department of transportation projects.

Sponsors: Representatives O'Ban, Clibborn and Zeiger.

Brief History:

Committee Activity:

Transportation: 2/4/14, 2/10/14 [DPS].

Brief Summary of Substitute Bill

- Creates a seven-step required permitting process for all transportation projects undertaken by the Washington State Department of Transportation (WSDOT) that require the preparation of an environmental impact statement (EIS) under the National Environmental Policy Act.
- Directs the WSDOT to continue using the multiagency permit program and places various requirements upon the staff and the program.
- Requires the WSDOT environmental staff to develop all environmental documentation and oversee project work in order to insure environmental compliance.
- Creates various training, design, and funding requirements related to environmental permitting.
- Updates the Shoreline Management Act (SMA) to exempt maintenance, repair, replacement of structures, minor safety updates, and signage installation from permits and reviews under the SMA, so long as these activities are within the right-of-way of state highway facilities.
- Updates the State Environmental Policy Act to exempt repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, ferry dock, or transit facility as long as certain conditions are met.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- Requires the WSDOT to use available technologies to minimize permit delays for, inform and interact with interested parties regarding, and optimize effectiveness of compensatory mitigation projects.
- Requires the WSDOT to consider the correction of fish-passage barriers on city streets and county roads within the same watershed as a proposed project for compensatory mitigation and requires that the WSDOT submit a report to the Legislature regarding the use, effectiveness, and suggested improvements to the mitigation option by December 1, 2015.
- Requires the WSDOT to submit a report to the Legislature on engineering errors in excess of \$500,000.
- Defines the concept of right-sizing and recognizes that the WSDOT is utilizing this concept in their Safety Analyst Program.
- Requires the WSDOT to submit a report to the Legislature on right-sizing by January 1, 2015.

HOUSE COMMITTEE ON TRANSPORTATION

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 26 members: Representatives Clibborn, Chair; Farrell, Vice Chair; Fey, Vice Chair; Moscoso, Vice Chair; Orcutt, Ranking Minority Member; Hargrove, Assistant Ranking Minority Member; Bergquist, Freeman, Habib, Hawkins, Hayes, Klippert, Kochmar, Moeller, Morris, Muri, Ortiz-Self, Pike, Riccelli, Rodne, Ryu, Sells, Takko, Tarleton, Walkinshaw and Zeiger.

Minority Report: Do not pass. Signed by 4 members: Representatives Overstreet, Assistant Ranking Minority Member; Fitzgibbon, Shea and Young.

Staff: Alyssa Ball (786-7140).

Background:

Transportation Permitting.

The Legislature and the Governor formed the Blue Ribbon Commission on Transportation (Commission) in 1998 to: assess the local, regional, and state transportation system; ensure that current and future money was spent wisely; make the system more accountable and predictable; and prepare a 20-year plan for funding and investing in the transportation system. The Commission consisted of 46 members representing business, labor, agriculture, tribes, government, ports, shipping, trucking, transit, rail, environmental interests, and the general public. The Commission made 18 recommendations to the Governor and the Legislature.

Transportation Permit Efficiency and Accountability Committee.

Recommendation 11 directed the Washington State Department of Transportation (WSDOT) to work toward a goal of one-stop environmental permitting for transportation projects. Pursuant to this recommendation, in 2001 the following projects were made eligible for a

streamlined environmental permitting process: designated pilot projects, transportation projects of statewide significance, and projects selected for a programmatic approach by the Transportation Permit Efficiency and Accountability Committee (TPEAC) created in that same act.

The TPEAC was required to assess the application of then current environmental standards and integrate those standards where appropriate. The TPEAC was also required to designate three pilot projects and use a streamlined process for permitting those projects. An interim process for permitting transportation projects of statewide significance applied until the TPEAC adopted integrated standards and best management practices. This process was optional for the WSDOT and specified a multi-step process including: early involvement of affected agencies, identification of permit requirements, selection of preferred alternatives, coordinated reviews and hearings, and timelines for completing reviews and decisions. The legislation establishing the TPEAC and the various environmental permitting processes described above expired in 2006.

The Shoreline Management Act.

The Shoreline Management Act of 1971 (SMA) governs uses of state shorelines. The SMA enunciates state policy to provide for shoreline management by planning for and fostering "all reasonable and appropriate uses." The SMA prioritizes public shoreline access and enjoyment and creates preference criteria listed in prioritized order that must be used by state and local governments in regulating shoreline uses. The SMA involves a cooperative regulatory approach between local governments and the state. At the local level, the SMA regulations are developed in city and county shoreline master programs that regulate land use activities in shoreline areas of the state. Each local government is charged with establishing a program for the administration and enforcement of a shoreline permit system. While the SMA specifies standards for local governments to review and approve permit applications, the administration of the permit system is performed exclusively by the local government. Local governments, however, must notify the Department of Ecology (DOE) of all the SMA permit decisions.

The SMA requires a property owner or developer to obtain a substantial development permit for substantial developments within shoreline areas. "Substantial developments" are defined to include both developments with a total cost or fair market value exceeding \$5,718 and developments materially interfering with normal public shoreline or water use. Certain exemptions to the substantial development permit requirement are specified in statute.

The permit review and approval standards generally specify that a local permit system must include provisions to assure that construction on a project may not begin or be authorized until 21 days from the date of filing, which is defined as the date of receipt by the DOE of the local government's decision, or until all review proceedings are terminated.

Wetland Mitigation.

Both the state and federal governments require a proponent of a project that will diminish the function of an existing wetland to mitigate that loss of function. This duty is called "compensatory wetland mitigation." The project proponent has a number of options available to him or her for mitigating wetland loss; however, any mitigation plan must be

approved by the state (primarily through the DOE) and the United States Army Corps of Engineers.

Projects that disturb wetlands are expected to undergo a sequencing review. Actual compensation for wetland loss does not occur unless the loss cannot be avoided or minimized through project planning. Once mitigation requirements are triggered, a project proponent must develop a mitigation plan that either restores the damaged wetland, creates new wetland functions at a new site, enhances an existing wetland, or preserves an at-risk wetland.

The WSDOT is required to develop a uniform method, in consultation with relevant environmental regulatory authorities, for submitting proposed mitigation measures to the relevant environmental regulatory authorities. The WSDOT is allowed to coordinate with the DOE or the Department of Fish and Wildlife and pair the mitigation investment made by the project proponent with the funding needs of one of three existing state programs: the Forestry Riparian Easement Program, the Riparian Open Space Program, and the Family Forest Fish Passage Program.

Change Orders.

A change order happens when the WSDOT determines it is necessary to make a change to a contract during the performance of the contract. Typically, change orders are initiated in the following circumstances: (1) as a response to unexpected conditions; (2) if there are plan deficiencies, such as errors or omissions; (3) extra or unanticipated necessary work is required; or (4) there are design criteria changes. There is a detailed change order process that the WSDOT must follow outlined in the WSDOT Construction Change Order Process Guide manual. This manual includes provisions on contracting implications, negotiating agreed prices and timing, required documentation, and so forth.

The WSDOT differentiates between minor and major change orders. A minor change is defined as a change value of \$15,000 or less, or any change in working days of 10 days or less, whereas a major change is defined as variations in quantity up to 25 percent above or below proposal quantities. Minor changes follow the regular change order process outlined in the manual. In the case of major overruns, renegotiation of price is available to either party and only units measured in excess of 125 percent of the proposal quantity are eligible for renegotiation.

There is currently no statutory requirement that the WSDOT report errors.

Right-Sizing.

"Right-sizing" is a term the Washington State Transportation Commission (WSTC) has used to describe a lean, metric-based approach to determining project investments. The goal is to find a "best fit" transportation solution for the context that meets the expectations of decision makers, the state, stakeholders, and the community. It entails compromise between project cost and design, incorporating community needs, desired outcomes, and available funding. The WSTC indicates that right-sizing would include a peer review to assess scope and scale against objectives and cost.

The WSDOT's safety program has recently begun to apply the concept of right-sizing, utilizing software called "SafetyAnalyst," which automates statistical approaches to improve

the identification and programming of site-specific highway safety improvements. A complete root causes analysis and evaluation is conducted, options and countermeasures are assessed, and solution options are identified according to cost and benefit.

Summary of Substitute Bill:

Transportation Permitting.

An environmental review and approval process for the WSDOT is created for any transportation project that requires the preparation of an environmental impact statement (EIS) under the National Environmental Policy Act, which consists of the following seven steps:

1. *Public and Agency Involvement in Defining the Purpose and Scope of Environmental Review.* The first step in the process requires notice to the public, an invitation to provide input to various parties, and a 30-day comment period. Input from the parties must be considered in finalizing the purpose and scope of environmental review.
2. *Identify Participating Agencies and Convene Meeting with an Interdisciplinary Team.* This step requires the identification of any governmental agencies with an interest in the project and an invitation to these agencies to serve as participating agencies, in order to provide input on various aspects of the review. This step also requires the formation of interdisciplinary teams consisting of participating agency staff and the WSDOT technical specialists which must convene during each subsequent step.
3. *Participating Agency Involvement During the Screening of Alternatives.* This step is initiated by providing notice to participating agencies that the screening of project alternatives has begun. Within 30 days of receiving notification, participating agencies must identify: the specific features that the agency considers significant with respect to the agency's role in environmental reviews, permits, or other approvals for the project; the reasons these features are significant; and any concerns the agency may have about the alternative because of potential significant adverse impacts of these features on resources or social policies within the agency's jurisdiction. For each feature for which an agency raises concerns, they must identify: recommendations on how the potential adverse impacts could be avoided, minimized, and mitigated; and an assessment of the relative ranking of each alternative with respect to whether and to what extent these concerns apply; and other information the participating agency requests the WSDOT to consider in deciding whether, when, where, or how to proceed with the project.
4. *Participating Agency Involvement During the Identification of Environmental Permits and Approvals, Application Procedures, and Decision Standards.* For this step, the WSDOT, in consultation with the participating agencies, must identify all permits and other approvals the agencies might require for each project alternative. Also, after consulting with all participating agencies, the WSDOT completes this step by compiling a list of all environmental permits and approvals it believes are needed for the project under each alternative being considered.
5. *Complete an Environmental Analysis and Issue a Draft Environmental Impact Statement.* The WSDOT initiates this step by providing notice of the availability of the draft EIS to participating agencies, tribal governments, and the public. Notification must include posting on the State Environmental Policy Act (SEPA)

- register. State, county, and city agencies must, and federal agencies are encouraged to, provide written comments on the draft EIS no later than 45 days after the WSDOT posts notice in the SEPA register.
6. *Develop a Final Environmental Impact Statement.* The WSDOT must work with the federal lead agency to consider and respond to all substantive comments received during the comment period. The WSDOT must also evaluate public and agency comments on the draft EIS to determine if the statement sufficiently identifies and analyzes the impacts and mitigation of the proposed action. The WSDOT must engage participating agencies in refining alternatives and completing the environmental review.
 7. *Issue a Final Environmental Impact Statement.* The final EIS must contain: the WSDOT's final recommendation and preferred alternative, a summary of the comments received on the draft EIS and the response, and a description of the procedures required to ensure that mitigation measures are implemented. The WSDOT must provide notice of the final EIS and the federal lead agency's record of decision in the SEPA register.

Washington State Department of Transportation Requirements.

The WSDOT:

- is required to invite affected tribes to participate in the review process and make reasonable efforts to engage with tribes that choose not to participate;
- is directed to continue using the multiagency permit program, which must provide early project coordination, expedited project review, project status updates, technical and regulatory guidance, and construction support. The multiagency permit program staff is required to assist with project mitigation and assessments, establish programmatic agreements, develop permit application guidance, and perform quality assurance regarding these functions. The multiagency permit program staff is also required to collaborate with federal staff from various agencies to develop, implement, and maintain complete permit application guidance;
- environmental staff, or consultants hired by the WSDOT, are required to develop all environmental documentation, conduct prebid meetings for environmentally complex projects, review environmental considerations with the selected contractor, and oversee project work in order to insure environmental compliance. These staff must notify the WSDOT project engineer of noncompliance with permit conditions or environmental regulations and notify regulatory agencies of noncompliance. Upon notification, the WSDOT project engineer must order the contractor to halt nonconforming work and bring the project into compliance; and
- is also required to provide training in environmental procedures and permit requirements, require wetland mitigation sites to be designed by a qualified interdisciplinary team, develop an environmental compliance data system, continue to implement the environmental compliance assurance procedure, and report noncompliance.

The bill creates a new chapter in Title 47. Nothing in the chapter created by the act creates a private right of action or review.

Shoreline Management Act.

The maintenance, repair, replacement of structures, minor safety upgrades, and signage installation within the right-of-way of state highway facilities are not subject to review or approval by a local government under this act. Minor safety upgrades and replacement of structures do not include new travel lanes or the expansion of transportation facilities and the replacement of structures must be comparable to the original structure.

State Environmental Policy Act.

The repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, ferry dock, or transit facility are exempt from the SEPA as long as they occur within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location and do not result in the addition of automobile lanes, a change in capacity, or a change in the functional use of the facility.

Wetland Mitigation.

The WSDOT is required to use available technologies to minimize permit delays for, inform, and interact with interested parties regarding, and optimize the effectiveness of proposed compensatory mitigation projects. The WSDOT is also required to consider the correction of fish-passage barriers on city streets and county roads within the same watershed as a proposed project for compensatory mitigation. The WSDOT must consult with the Department of Fish and Wildlife, local governments, and interested tribes to prioritize fish passage barrier projects in a manner that maximizes the value of investment, corrects multiple fish passage barriers in whole streams, and maximizes habitat recovery through coordination between agencies. The WSDOT must report to the Legislature on the use, effectiveness, and suggested improvements to the new mitigation option by December 1, 2015.

Change Orders.

The WSDOT is required to submit a report to the Legislature detailing engineering errors on highway construction projects resulting in errors in excess of \$500,000. An initial report must be submitted within 30 days upon recognition of an error occurring and a full report must be submitted within 90 days. The full report must include how the error happened, the department of the responsible employee or employees, what corrective action was taken, and what action the Secretary of the WSDOT recommends to avoid similar errors.

Right-Sizing.

The WSDOT is required to submit a report to the transportation committees of the Legislature on right-sizing by January 1, 2015. The report must include when and where the concept has been applied within the WSDOT and must also include an assessment of the feasibility of extending the concept to all capital programs.

Substitute Bill Compared to Original Bill:

The substitute bill removes several requirements from the original bill: that the WSDOT seek approval for specific project changes and the specification of the process for approving project changes, removes the baselines set for staffing levels in the highway construction program and ferry vessel terminal construction program, removes the project delivery reporting requirement, eliminates the creation of Expert Review panels for various megaprojects, removes requirements for the DOE to convene a work group and to update

their rules, and removes the requirement that the WSDOT submit a report on engineering errors that have occurred on projects that are currently under construction, but not yet operationally complete.

The substitute bill updates the SMA to exempt maintenance, repair, replacement of structures, minor safety updates, and signage installation from permits and reviews under the SMA, so long as these activities are within the right-of-way of state highway facilities. Additionally, it updates the SEPA to exempt repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, ferry dock, or transit facility as long as certain conditions are met. Lastly, the substitute bill specifies that WSDOT consult with the Department of Fish and Wildlife, local governments, and interested tribes to prioritize fish passage barrier projects in a manner that maximizes the value of investment, corrects multiple fish passage barriers in whole streams, and maximizes habitat recovery through coordination between agencies.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This is an omnibus bill that compiles four good reforms that were passed out of the Transportation Committee and the House of Representatives by large majorities and died in the Senate last year. This bill is trying to provide more accountability and transparency for the WSDOT, especially when there are design errors and problems. The Legislature should pose an affirmative obligation to report on the errors and how they will be corrected.

The WSDOT is very supportive of the sponsor's interest in regulatory and business practice reforms. The WSDOT has been very involved in permit streamlining over the last 15 years and this bill takes some good next steps. The WSDOT is supportive of reforms and transparency and will continue to take further steps to ensure projects are right-sized for better community fit.

This bill is a meaningful reform that protects the environment and working families, and reduces red tape while promoting reform and transparency. Common sense reforms like this are important, but won't solve the transportation funding gap on their own.

(Opposed) None.

Persons Testifying: Senator O'Ban, prime sponsor; Allison Camden, Washington State Department of Transportation; and Kelsey Beck, Futurewise.

Persons Signed In To Testify But Not Testifying: None.