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SUPREME COURT
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CLALLAM COUNTY CITIZENS FOR SAFE DRINKING WATER,
PROTECT THE PENINSULA'S FUTURE, and
ELOISE KAILIN,

Appellants,

v.

CITY OF PORT ANGELES, and
WASHINGTON DENTAL SERVICE FOUNDATION, LLC,

Respondents.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

A.	STATEMENT OF THE ISSUES	1
1.	Is the City's decision to fluoridate the Port Angeles water supply categorically exempt from SEPA requirements?	1
2.	Did the City preserve its exemption claim for review?	1
3.	Does a project's exemption from SEPA requirements necessarily preclude issuance of a DNS?	1
4.	Did the superior court correctly dismiss Clallam Citizens' action?	2
B.	STATEMENT OF THE CASE	2
C.	SUMMARY OF ARGUMENT	4
D.	ARGUMENT	4
	Standard of Review	4
1.	The City's decision to fluoridate the Port Angeles water supply is categorically exempt from SEPA requirements.	4
2.	The City preserved for review the claim that its action is categorically exempt.	9
3.	Clallam Citizens cite no authority prohibiting the issuance of a DNS for an action determined to be exempt.	10
4.	The superior court correctly dismissed Clallam Citizens' lawsuit as a matter of law.	12
E.	CONCLUSION	14

F.	APPENDIX	A-1
	Memorandum Opinion and Order on Respondents' Motion to Dismiss (September 2, 2005).....	A-2
	Order on Petitioners' Motion for Reconsideration (October 20, 2005)	A-8
	Notice of Appeal to Supreme Court (November 16, 2005).....	A-11
	Chapter 43.21C RCW (SEPA Statutes)	
	RCW 43.21C.031.....	A-13
	RCW 43.21C.090.....	A-14
	RCW 43.21C.095.....	A-15
	RCW 43.21C.110.....	A-16
	Chapter 197-11 WAC (SEPA Rules)	
	WAC 197-11-050	A-18
	WAC 197-11-305	A-19
	WAC 197-11-704	A-20
	WAC 197-11-714	A-21
	WAC 197-11-720	A-22
	WAC 197-11-734	A-23
	WAC 197-11-762	A-24
	WAC 197-11-784	A-25
	WAC 197-11-796	A-26
	WAC 197-11-800	A-27
	WAC 197-11-810	A-35
	WAC 197-11-845	A-36
	WAC 197-11-926	A-37
	WAC 246-290-460.....	A-38
	Former WAC 248-54-370 (1970).....	A-40

TABLE OF AUTHORITIES

Washington Cases

<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 1258 (1990).....	10
<i>Citizens for Clean Air v. City of Spokane</i> , 114 Wn.2d 20, 785 P.2d 447 (1990).....	12
<i>Cutler v. Phillips Petroleum Co.</i> , 124 Wn.2d 749, 881 P.2d 216 (1994).....	4
<i>Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd.</i> , 131 Wn.2d 345, 932 P.2d 158 (1997).....	8,11
<i>Morris v. McNicol</i> , 83 Wn.2d 491, 519 P.2d 7 (1974).....	13
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982).....	13

Statutes

Chapter 43.21C RCW (SEPA Statutes)	4
RCW 43.21C.031	5
RCW 43.21C.090	12
RCW 43.21C.095	5
RCW 43.21C.110	5
RCW 43.21C.110(1)(a).....	5

Court Rules

CR 12(b)(6)	12
CR 56(c).....	13
RAP 2.5(a)	10

Administrative Rules

Chapter 197-11 WAC (SEPA Rules).....	5
WAC 197-11-050.....	7
WAC 197-11-704.....	6
WAC 197-11-704(1)	5
WAC 197-11-714(1)	5
WAC 197-11-714(4)	6
WAC 197-11-720.....	5,11
WAC 197-11-734.....	11
WAC 197-11-762.....	5
WAC 197-11-784.....	7
WAC 197-11-796.....	5
WAC 197-11-800.....	5
WAC 197-11-800(12)	9
WAC 197-11-800(23)	9
WAC 197-11-810.....	6
WAC 197-11-845.....	6,9,10
WAC 197-11-855.....	8
WAC 197-11-926(1)	8
WAC 246-290-460	6,7
Former WAC 248-54-370 (1970).....	6

This appeal arises from a challenge by Clallam County Citizens for Safe Drinking Water, Protect the Peninsula's Future, and Eloise Kailin (collectively, Clallam Citizens), under the State Environmental Policy Act (SEPA), to the Port Angeles City Council's decision to fluoridate the Port Angeles water supply. The superior court dismissed Clallam Citizens' action and denied their motion for reconsideration.

Respondents City of Port Angeles (City) and Washington Dental Service Foundation (WDSF) answer Clallam Citizens' opening brief in this appeal as follows:

A. STATEMENT OF THE ISSUES

The City and WDSF acknowledge the assignments of error presented by Clallam Citizens. The issues pertaining to those alleged errors are set forth below.

1. Is the City's decision to fluoridate the Port Angeles water supply categorically exempt from SEPA requirements?
(Assignment of Error 1.)
2. Did the City preserve its exemption claim for review?
(Assignment of Error 2.)
3. Does a project's exemption from SEPA requirements necessarily preclude issuance of a DNS? (Assignment of Error 3.)

4. Did the superior court correctly dismiss Clallam Citizens' action? (Assignment of Error 4.)

B. STATEMENT OF THE CASE¹

In February 2003, the Port Angeles City Council accepted WDSF's offer to construct a system that would fluoridate the Port Angeles water supply. AR 12-13. The following year, the City's responsible SEPA official issued a determination of nonsignificance (DNS) for construction of the system. The DNS stated that the proposed fluoridation system "does not have a probable significant adverse impact on the environment." AR 16.

Clallam Citizens were among those who administratively appealed the issuance of the DNS to the City Council. CP 57. They asserted that the City was required to complete an environmental impact statement before the City Council could decide to fluoridate. CP 60-61.

The City Council denied the appeal, determining that the fluoridation proposal is categorically exempt from SEPA and concluding that an environmental impact statement was not required. AR 350. Subsequently, the City and WDSF formalized an agreement whereby WDSF, as part of its charitable mission to

¹ In the Appendix to this brief, Respondents provide copies of cited documents from the Clerk's Papers that they have designated to supplement the record. Statutes and rules cited in this brief are also included in the Appendix.

improve the oral health of Washington's citizens, would provide a fluoridation system. AR 364.

In April 2005, Clallam Citizens filed an appeal in Clallam County Superior Court, challenging the City's actions for noncompliance with SEPA requirements and naming the City and WDSF as respondents. CP 159.

The City argued that the decision to fluoridate the Port Angeles water supply is exempt from the requirements of SEPA and brought a motion to dismiss the matter under CR 12(b)(6). CP 150.

Following a hearing in August 2005, the Honorable Craddock D. Verser presiding, the court held that the decision to fluoridate is categorically exempt and dismissed Clallam Citizens' appeal:

The lawsuit was filed to challenge the DNS pursuant to RCW 43.21C.080. Even if the Court were to conclude that the issuance of the DNS was "clearly erroneous", that determination would not provide the petitioners the relief they request. Because the fluoridation proposal cannot be "conditioned or denied" based on SEPA considerations, RCW 43.21C.110(1)(a), petitioners['] appeal based on alleged failure to comply with SEPA must be DISMISSED as a matter of law.

App. A-7.

Clallam Citizens' motion for reconsideration was denied.

CP 31; App. A-10.

Clallam Citizens now seek direct review by the Supreme Court of the order granting the motion to dismiss and the order denying the motion for reconsideration. App. A-11.

C. SUMMARY OF ARGUMENT

The decision to fluoridate the Port Angeles water supply is categorically exempt from SEPA requirements, and the City properly preserved its exemption claim for review.

Clallam Citizens fail to provide any authority that would prohibit the City's issuance of a DNS for an exempt action.

The superior court correctly dismissed Clallam Citizens' lawsuit as a matter of law.

D. ARGUMENT

Standard of Review

"A trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of law and is reviewed de novo by an appellate court." *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994).

1. The City's decision to fluoridate the Port Angeles water supply is categorically exempt from SEPA requirements.

Under chapter 43.21C RCW (SEPA), an environmental impact statement is to be prepared on proposals for legislation and

other major actions that have “a probable significant, adverse environmental impact.” RCW 43.21C.031.

The Department of Ecology has the authority to adopt and amend rules that interpret and implement SEPA – in order to provide “uniform rules and guidelines to all branches of government.” RCW 43.21C.110. The rules promulgated are set forth in chapter 197-11 WAC. They are to be accorded substantial deference in the interpretation of SEPA. RCW 43.21C.095.

An action² that is categorically exempt “may not be conditioned or denied” under SEPA. RCW 43.21C.110(1)(a). A “categorical exemption” is a type of action, specified in the rules, that does not significantly affect the environment. Neither a threshold determination nor any environmental document, including an environmental impact statement, is required for a categorically exempt action. WAC 197-11-720.

Proposed actions contained in Part Nine of the rules are categorically exempt from SEPA requirements. WAC 197-11-800.

² “Actions” include “new and continuing activities (including projects and programs) entirely or partly financed, assisted, conducted, regulated, licensed, or approved by agencies” and “legislative proposals.” WAC 197-11-704(1).

“Agency’ means any state or local governmental body, board, commission, department, or officer authorized to make law, hear contested cases, or otherwise take the actions in WAC 197-11-704, except the judiciary and state legislature. An agency is any state agency (WAC 197-11-796) or local agency (WAC 197-11-762).” WAC 197-11-714(1).

Among the exempt actions are actions under programs administered by the Department of Social and Health Services (DSHS) as of December 12, 1975. WAC 197-11-845.³

In 1975, DSHS administered programs concerning public water systems, including fluoridation, through its Board and Division of Health. Former WAC 248-54-370 (1970). In January 1991, the Department of Health became responsible for regulating the fluoridation of drinking water.⁴ WAC 246-290-460.

Clallam Citizens argue that the categorical exemption afforded by WAC 197-11-845 applies only to actions by the Department of Health and does not extend to the actions of the City. This argument is not supported by the rule itself, its larger context, or by caselaw.⁵

Actions under programs administered by the Department of Health are categorically exempt. WAC 197-11-845. Fluoridation of

³ The rule's enumerated exceptions are not applicable here.

⁴ If a specific agency has been named in the rules, and that agency's functions have been transferred to another agency, the term means any successor agency. WAC 197-11-714(4). The functions of DSHS, the agency named in the rule, have been transferred to the Department of Health. The Department of Health is the successor agency to DSHS.

⁵ Clallam Citizens argue WAC 197-11-845, 197-11-810, and 197-11-704 are ambiguous. Appellants' Opening Br. at 15. Asserting the Court must look to the legislative history of WAC 197-11-845 to ascertain legislative intent, they present a lengthy narrative and compilation of documents. Appellants' Opening Br. at 16-20; Appendix 1. The rules, however, are straightforward and unambiguous. The legislative history of WAC 197-11-845 is superfluous to this appeal.

a municipal water supply is an action under a program administered by the Department of Health. In all cases, a city must obtain the Department of Health's written approval in order to fluoridate its water supply, and the fluoridation must be done in accordance with regulations set out in the administrative rule. WAC 246-290-460.

Providing approval to fluoridate and regulating purveyors' actions where fluoridation is practiced are specific activities, identified within the Department of Health. WAC 197-11-810. Thus, the City's action is categorically exempt from SEPA requirements under the plain language of the rule.

This interpretation is not altered when the Department of Health's categorical exemption is read in the context of SEPA generally. SEPA does not provide for separate state and local review. If more than one governmental agency must act on a proposal,⁶ then a lead agency is designated. The lead agency is solely responsible for making the threshold determination under SEPA, and if necessary, preparing the environmental impact statement. WAC 197-11-050.

⁶ "Proposal' means a proposed action. A proposal includes both actions and regulatory decisions of agencies as well as any actions proposed by applicants. A proposal exists at the stage in the development of an action when an agency is presented with an application, or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and the environmental effects can be meaningfully evaluated." WAC 197-11-784.

When a local governmental agency itself initiates the proposal, the local government is the lead agency responsible for complying with SEPA. WAC 197-11-926(1). But subjecting that local government's underlying action to SEPA would make the state agency's categorical exemption for the same action meaningless.

Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd., 131 Wn.2d 345, 932 P.2d 158 (1997), also supports this reasoning. In *Dioxin*, the dispute focused on a wastewater discharge permit issued by the Department of Ecology to Boise Cascade Corporation. The issuance of the permit was categorically exempt under WAC 197-11-855, an agency exemption given to the Department of Ecology.

The plaintiffs argued that the Department of Ecology's action was exempt under SEPA, but the actions of Boise Cascade could be reviewed. This argument, precisely parallel to the one made here by Clallam Citizens, was unequivocally rejected:

Any regulatory categorical exemption under the analysis of the concurrence/dissent would always be potentially subject to the claim of any individual who characterized the action as "major," notwithstanding that it clearly fell within a valid categorical exemption. Such would mean that neither the government nor permit applicant could rely on the categorical exemption. Both would always face the risk of litigation over whether or not the particular proposal was indeed a "major action" and thus subject to full SEPA review even though the action was admittedly within an exempt category.

Id. at 364. The *Dioxin* court held that the categorical exemptions are exemptions for the permitted action – not the action of the state agency in signing the permit.

In the present case, the superior court ruled that the City's action was categorically exempt under WAC 197-11-845 (actions under programs administered by the Department of Social and Health Services).⁷ Even if this Court were to conclude that WAC 197-11-845 does not apply, the City's fluoridation decision is also independently exempt from SEPA requirements under WAC 197-11-800(23) (operation of a water utility)⁸ and WAC 197-11-800(12) (agency action undertaken to cure a hazard to public health).⁹

2. The City preserved for review the claim that its action is categorically exempt.

Clallam Citizens would reverse the superior court's ruling that the City's action is categorically exempt from SEPA requirements under WAC 197-11-845 on the basis that this

⁷ Fluoridation was an action subject to permit and regulation by the Department of Social and Health Services as of December 12, 1975. CP 154-56.

⁸ "Fluoridation of the City's public water supply is a 'utility-related action.' The applicant for the DNS is the City of Port Angeles Public Works and Utilities Department. The Public Works and Utilities Department will operate the fluoridation equipment. The activity is fundamentally related to the provision of water to the public, a 'utility-related' activity in every sense." CP 153 (citation omitted).

⁹ Fluoridation of a public water supply is a measure intended to reduce childhood dental caries (tooth decay) – a hazard to public health. CP 156-57.

regulation was not cited to support the City's position during the administrative appeal. Clallam Citizens seem to confuse new *authority* with a new *issue*.

While an appellate court need not consider an *issue* that has been raised for the first time on review (RAP 2.5(a)), appellate courts routinely consider *authority* not argued in the trial court: "[A] statute not addressed below but pertinent to the substantive issues which were raised below may be considered for the first time on appeal." *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990).

The City cited and discussed WAC 197-11-845 in detail in its motion to dismiss. CP 154-56. It was both proper and necessary for the superior court to consider this rule.

3. Clallam Citizens cite no authority prohibiting the issuance of a DNS for an action determined to be exempt.

Clallam Citizens argue that SEPA allows a valid DNS *only if* an action is not categorically exempt from the statute's requirements. But, as the superior court correctly observed, they cite no authority to support the proposition that once a responsible official makes a DNS threshold determination, the project cannot be categorically exempt. A DNS determination and categorical exemption "are not mutually exclusive either by rule or by statute."
App. A-5.

Administrative regulations describe the circumstances in which a threshold determination is required, but they do not bar such a determination for a project that is categorically exempt.

Additionally, it is logically consistent that an action be both categorically exempt *and* eligible for a DNS. A DNS is issued for actions that are found to have no significant impact on the environment. WAC 197-11-734. Categorical exemptions are created by the Department of Ecology for those classes of actions that are found to have no significant impact on the environment. WAC 197-11-720. Thus, it is consistent that one action can both qualify for a DNS and be eligible for a categorical exemption.

The City considered both the DNS and categorical exemption in its analysis of the fluoridation issue. Opponents of fluoridation were afforded the opportunity to present their positions before the City concluded that an environmental impact statement would not be required.¹⁰

There is no express authority in SEPA for the City to issue or uphold a DNS for a proposed action while maintaining the action is

¹⁰ Clallam Citizens assert that the holding of *Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 932 P.2d 158 (1997), supports their position. Appellants' Opening Br. at 26-27. Their reliance, however, is misplaced. Although the *Dioxin* court ruled regarding categorical exemptions, it did not consider the preparation of a DNS for an exempt action.

categorically exempt. But neither SEPA nor other authority has been shown to preclude this conduct.¹¹

4. The superior court correctly dismissed Clallam Citizens' lawsuit as a matter of law.

When a party responds to a CR 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted and presents evidence outside the pleadings, the motion is treated as a motion for summary judgment.¹² But Clallam Citizens apparently misinterpret the language of the order granting the motion to dismiss as the court's failure to treat the City's CR 12(b)(6) motion as a summary judgment motion.

The superior court actually concluded as follows: "This is not a motion for summary judgment where the Court would have to accept *all facts* in a light most favorable to the petitioners." App. A-7 (emphasis added).

¹¹ Clallam Citizens contend the superior court erred by stating it cannot substitute its judgment for the City's. Appellants' Opening Br. at 25-26. This contention is untenable. Questions raised about the adequacy of environmental review are questions of law subject to de novo review, but a reviewing court is to give the agency's decision "substantial weight." *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 34, 785 P.2d 447 (1990) (quoting RCW 43.21C.090). The superior court correctly recognized that the City's decision to fluoridate was to be accorded deference.

¹² If a motion asserts the defense of failure to state a claim upon which relief can be granted and "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56." CR 12(b)(6).

Summary judgment is to be rendered if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). For purposes of summary judgment, a "material fact" is a fact on which the outcome of the litigation depends. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). "The court must consider all facts and reasonable inferences from the facts in the light most favorable to the nonmoving party." *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The sole issue before the superior court in this case was a legal one: "Should Petitioners' appeal under SEPA be dismissed as the proposal to fluoridate the City's water supply is exempt from SEPA requirements?" App. A-3. There is no evidence to suggest the court failed to consider the facts presented by the parties in the light most favorable to Clallam Citizens. But the court ruled on the basis of controlling law.

Facts regarding the benefits or risks of fluoridation were immaterial: "This court cannot determine if fluoridation is an appropriate health measure, nor will this court consider personal views on the subject of fluoridation." App. A-3.

The superior court determined there was no genuine issue as to any *material* fact and correctly dismissed the appeal as a matter of law.

E. CONCLUSION

This Court should affirm the superior court's dismissal of this matter in all respects.

DATED this 20th day of April, 2006.

Respectfully submitted,

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Appendix

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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF JEFFERSON

CLALLAM COUNTY CITIZENS FOR SAFE
DRINKING WATER, PROTECT THE
PENINSULA'S FUTURE, and ELOISE KAILIN,

Petitioners,

vs.

CITY OF PORT ANGELES, and, WASHINGTON
DENTAL SERVICE FOUNDATION, LLC,

Respondents.

Case No.: 05-2-00305-0

MEMORANDUM OPINION AND ORDER ON
RESPONDENTS' MOTION TO DISMISS

This matter came on for argument before the undersigned on August 19, 2005, for the Court to consider respondents' motion to dismiss. Petitioners appeared through their attorney, Gerald Steel, respondent City of Port Angeles appeared through its attorney, William E. Bloor, and respondent Washington Dental Service Foundation, LLC appeared through its attorney, Charles Maduell, of Davis Wright Tremaine, LLP.

The Court considered the documents filed by all parties, including attached exhibits related to this motion, the file herein as it existed on August 19, 2005, those portions of the appeal record cited by the parties and other relevant portions of the record which relate to the issues before the court, the book *The Fluoride Deception*, which was a part of the appeal record, and the arguments of counsel.

CRADDOCK D. VERSER
JUDGE
Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

ORDER - 1

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I. STATUS OF CASE

On March 15, 2004, Brad Collins, the responsible official for the City of Port Angeles issued a Declaration of Non Significance (DNS) with reference to the City's proposal to fluoridate the City's water supply. Mr. Collins also determined that the proposal was categorically exempt from SEPA.

Petitioners appealed that determination to the Port Angeles City Counsel, and a hearing was conducted by that governing body on July 28 and July 29, 2004.

On September 7, 2004, the City Council issued its Findings, Conclusions and Decision.

On March 1, 2005, the City entered into an agreement regarding a gift of a fluoridation system with respondent Washington Dental Service Foundation, LLC.

On April 4, 2005, petitioners filed this action, an Appeal pursuant to RCW 43.21C.080, naming the City and the Washington Dental Service Foundation as respondents.

The respondents, pursuant to CR 12(b)(6) moved to dismiss the appeal arguing that fluoridation is exempt from the requirements of the State Environmental Policy Act (SEPA). Petitioners have responded to that motion and it is this limited legal issue that is before the Court and is addressed in this opinion.

II. ISSUE

Should Petitioners' appeal under SEPA be dismissed as the proposal to fluoridate the City's water supply is exempt from SEPA requirements?

This is the sole legal issue before the court. This court cannot determine if fluoridation is an appropriate health measure, nor will this court consider personal views on the subject of fluoridation. As Justice Weaver quotes the Honorable J. Murray of Lewis County Superior Court in Kaul v. City of Chehalis, 45 Wn. 2d 616, 617-18, 277 P.2d 352 (1954):

The questions to be determined by this court are purely legal and constitutional questions, and will be dealt with only from that standpoint. It is of no consequence or importance whether I personally approve or disapprove of fluoridation.

Further the Court in Health District v. Brockett, 120 Wn. 2d 140, 149, 829 P.2d 324 (1982) speaks of a court's role in addressing the legislative

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1 of 131 Wn. 2d. and concludes that the legislature did not intend to allow
2 "as applied" challenges to categorically exempt activities. 131 Wn.2d 363.

3
4 The Department of Ecology has adopted the rules set forth above which
5 specifies that city water fluoridation is a type of action which does not
6 significantly affect the environment. This Court must give substantial
7 deference to that rule. RCW 43.21C.095.

8
9 (2) As the City designated responsible official used an environmental
10 checklist and made a Determination of Non Significance, the matter is not
11 categorically exempt.

12
13 Petitioners assert that because the responsible official elected to
14 make a threshold determination that the fluoridation proposal did not
15 significantly affect the environment (DNS) that the City is precluded from
16 asserting that the proposal is categorically exempt.

17
18 The City responds that Mr. Collins realized that the proposal would
19 result in public interest and elected to make a threshold determination even
20 though he had determined that the proposal was categorically exempt. He did
21 this to assure the public realized the potential environmental impacts had
22 been considered.

23
24 The record reflects that Mr. Collins, the responsible official, and
25 then the City Council did determine that the proposal was categorically
26 exempt. Assertions by petitioners to the contrary are incorrect. The
27 determination that the project is categorically exempt made by Mr. Collins
28 and the City after two days of hearings, is to be given "substantial weight"
29 by the Court. RCW 43.21C.090. This Court cannot substitute its judgment as
30 to whether the project is categorically exempt for that of Mr. Collins and
31 the City.

32
33 The Petitioners cannot cite authority to support their position that
34 if the responsible official makes a DNS threshold determination the project
35 is not categorically exempt. The two are not mutually exclusive either by
36 rule or by statute.

37
38 (3) The issue of exemption was not preserved for review.

39
40 Petitioners argue that as no one appealed Mr. Collins' determination
41 that the proposal to fluoridate the water system was categorically exempt
42 from SEPA review, that issue is not properly before this Court. They
43 contend that the City Council acted "...beyond its jurisdiction..."
44 [Petitioner's Opposition to City Motion to Dismiss, p7, lines 21-22] in
45 including the finding that the fluoridation proposal was exempt.

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CRADDOCK D. VERSER
JUDGE
Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

1 However, it is clear that if the proposal to fluoridate is
2 categorically exempt there is no basis for the appeal to City Council. The
3 City, rather than deciding the case on that issue and effectively denying
4 citizens any process, decided to hear all testimony regarding the proposal.
5 This does not mean that the City lacked "jurisdiction" or was not
6 "permitted" to consider that issue. The two cases cited by Petitioners,
7 Wells v. Hearings Bd., 100 Wn. App. 657, 997 P.2d 405 (2000) and Cuddy v.
8 Dept., of Public Assistance, 74 Wn. 2d 17, 442 P.2d 617 (1968) do not
9 support Petitioners' position given the facts of this case.

10
11 In Wells, the Court affirmed that issues not raised before the agency
12 cannot be raised for the first time on Appeal. The issue of the exemption
13 of the fluoridation proposal was raised before City Council, and was decided
14 by the responsible official, Brad Collins. Both Mr. Collins and the City
15 made a determination that the proposal was categorically exempt and
16 petitioners certainly had the opportunity to argue that determination before
17 the City Council. There is "more than a hint" of this issue in the record
18 before the City. Cuddy clarifies the requirements for procedural due
19 process as notice and an opportunity to be heard on issues which are known
20 to the parties. The fact that Mr. Collins determined that the proposal was
21 categorically exempt and the fact that the City considered and likewise
22 found that exemption was known to the Petitioners and they had the
23 opportunity to challenge that determination before the City.

24
25 (4) The exemption is unconstitutional.

26
27 Petitioners argue that if the fluoridation proposal is categorically
28 exempt from SEPA review, the rule establishing that exemption is
29 "unconstitutional" as the record shows "...that this type of action has
30 significant adverse environmental impacts..." and thus the rule is in conflict
31 with RCW 43.21C.110(1)(a).

32
33 As cited earlier, RCW 43.31C.110(1)(a) gives the Department of Ecology
34 the authority to determine what action is categorically exempt. The fact
35 that the Department of Ecology has done so with regard to water fluoridation
36 does not make the resulting rule or statute which authorizes the rule
37 "unconstitutional".

38
39 The Court in Kaul v. Chehalis, supra., at 45 Wn. 2d 621, addressed a
40 similar argument made by Mr. Kaul who opposed fluoridation in 1954. "We
41 fail to see, however, where any right of appellant, guaranteed by the
42 constitution, has been invaded." Now 50 years later, no one is forced to
43 drink Port Angeles City water. In 2005, more so than in 1954, alternatives
44 to consuming city drinking water are readily available to every citizen.
45 Petitioners cite no specific right guaranteed by the constitution that is
46 being invaded by the City's determination to proceed with fluoridation of
47 its water.

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CRADDOCK D. VERSER
JUDGE

Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

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V. CONCLUSION

This is not a motion for summary judgment where the Court would have to accept all facts in a light most favorable to the petitioners. Petitioners argue that the Court must accept the position that fluoridation of water is an unhealthy practice which should be eliminated and then proceed to an analysis of the record. This is not the case.

The Court in a CR 12(b)6 motion determines, as a matter of law, if there is a basis for the lawsuit. The lawsuit was filed to challenge the DNS pursuant to RCW 43.21C.080. Even if the Court were to conclude that the issuance of the DNS was "clearly erroneous", that determination would not provide the petitioners the relief they request. Because the fluoridation proposal cannot be "conditioned or denied" based on SEPA considerations, RCW 43.21C.110(1)(a), petitioners appeal based on alleged failure to comply with SEPA must be DISMISSED as a matter of law.

VI. ORDER

Respondents' motion to dismiss is granted. It is hereby ORDERED that this matter is DISMISSED with prejudice and without costs.

Dated this 1st day of Sept, 2005.


CRADDOCK D. VERSER, JUDGE

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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

CLALLAM COUNTY CKITIZENS FOR SAFE
DRINKING WATER, PROTECT THE
PENINSULA'S FUTURE, AND ELOISE KAILIN,

Petitioners,

vs.

CITY OF PORT ANGELES, AND WASHINGTON
DENTAL SERVICE FOUNDATION, LLC,

Respondents.

Case No.: 05-2-00305-0

ORDER ON PETITIONERS' MOTION FOR
RECONSIDERATION

THIS MATTER came before the Court on Petitioners' Motion for Reconsideration. The Court has considered the motion with supporting documents and the declaration of Eloise Kailin together with exhibits annexed thereto and those portions of the record cited therein. The Court has also considered the City's response to the Motion for Reconsideration.

ANALYSIS

The Court will address each of Petitioners' claimed errors in the order that they appear in Petitioners' motion.

1: The Categorical Exemption is Overly broad and Invalid:

Petitioners assert that the Court failed to address their claim that if fluoridation is categorically exempt the exemption is in conflict with the directive of SEPA [RCW 43.21C.110(1)(a)] that requires environmental review of major actions significantly affecting the environment. Thus,

CRADDOCK D. VERSER
JUDGE
Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

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1 Petitioners argue that fluoridation is a major action and therefore if
2 fluoridation is exempt under WAC 197-11-845 that exemption is invalid.
3

4 The Court reread Dioxin/Organochlorine Center v. Pollution Control
5 Hearing Board, 131 Wn. 2d 345, 932 P.2d 158 (1997). The Dioxin majority at
6 131 Wn. 2d 364, specifically rejects Petitioners' position. Proponents of a
7 project which is categorically exempt should not have to face litigation
8 based upon the assertion of the opposition that the project is a "major
9 action" when the Department of Ecology through its regulations has declared
10 that the project is not a major action. The Court accepts the City's
11 argument that if the Petitioners desire to challenge the regulation as
12 invalid and overly broad their avenue for relief is through the
13 Administrative Procedure Act and litigation with the Department of Ecology.
14 It is not for this Court to second guess the Department's regulations when
15 the Department is not available to defend those regulations.
16

17 2. Fluoridation is not exempt under Ecology rules:
18

19 Petitioners state: "The action challenged in the instant case was the
20 Agreement attached as Exhibit 1 to the Appeal Pursuant to RCW 43.21C.080."
21 [see Petitioners' motion page 5, lines 11-12]. Petitioners argue that this
22 is a "major legislative action" by the City which is "...one of a series of
23 actions functionally related..." which is "...not exempt under WAC 197-11-845 or
24 under any other categorical exemption." [Petitioners' motion, page 5 lines
25 14-18]. This seems a bit like arguing that when a property owner signs a
26 construction agreement with a contractor that action is itself subject to
27 SEPA review.
28

29 The Court believes that as fluoridation of a public water supply is an
30 activity regulated by the Department of Social and Health Services as of
31 December 12, 1975, that activity is exempt from SEPA review pursuant to WAC
32 197-11-845. Fluoridation is regulated and permitted by a state agency. The
33 City will have to comply with agency regulations.
34

35 Petitioners also argue because the fluoridation treatment system is to
36 be installed in a new water treatment plant, it is a segment of a "larger
37 proposal". They then argue that the water treatment plant itself is a
38 segment of the National Park Service proposal to remove dams from the Elwha
39 River. Thus Petitioners argue that "...fluoridation is a segment of a larger
40 project to remove the Elwha River Dams, change the diversion point of the
41 City water supply and build a new water treatment plant." [Petitioners'
42 motion, page 8, lines 22-24]. From this supposition the Petitioners argue
43 that Juanita Bay Valley Com. v. Kirkland, 9 Wn. App. 59, 79, 510 P. 2d 1140
44 (1973) and WAC 197-11-305(1) prohibit fluoridation without a full SEPA
45 review.
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1 Petitioners offer no new evidence that the City's proposed
2 fluoridation project would not be implemented if the Elwah River dams are
3 not removed or a new treatment plant is not constructed. Intuitively there
4 is no connection between the three projects other than that they all have a
5 relation to water. The prohibition on "piecemealing" of environmental
6 review as expressed in *Juanita Bay Valley, supra.*, and in WAC 197-11-305(1)
7 "...requires that an Environmental Impact Statement be prepared prior to the
8 first governmental authorization of any part of a project or series of
9 projects which, when considered cumulatively, [emphasis added] constitute a
10 major action.", 9 Wn. App. 72-73. There is no evidence, new or old, that
11 would indicate that fluoridation of the City's water is part of some other
12 project or series of projects. It is an independent action which is not
13 dependent on the other projects. Fluoridation is not a project dependent
14 upon subsequent phases or associated with a series of interrelated steps
15 which constitute an integrated plan. *Murden Cove Preservation Association*
16 *v. Kitsap County*, 41 Wn. App. 515, 704 P.2d 1242 (1985).
17

18 While the court respects the authority and concerns expressed in
19 Dr. Kailin's declaration, the possible use of aluminum sulfate in water
20 treatment is not part of an "integrated plan" for a project which
21 constitutes a major action significantly affecting the environment when
22 considered with fluoridation.
23

24 3. A DNS is inconsistent with a categorical exemption:
25

26 This argument was addressed in the Court's order. Petitioners cite no
27 new authority for their position.
28

29 ORDER
30

31 Petitioners' Motion for Reconsideration is hereby DENIED.
32

33 Dated this 19 day of October, 2005.
34

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37 CRADDOCK D. VERSER, JUDGE
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FILED
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR CLALLAM COUNTY

CLALLAM COUNTY CITIZENS FOR
SAFE DRINKING WATER, PROTECT
THE PENINSULA'S FUTURE, and
ELOISE KAILIN,

Petitioners,

v.

CITY OF PORT ANGELES, and
WASHINGTON DENTAL SERVICE
FOUNDATION, LLC,

Respondents.

NO. 05-2-00305-0

NOTICE OF APPEAL TO SUPREME
COURT

Clallam County Citizens for Safe Drinking Water, Protect the Peninsula's Future, and
Eloise Kailin (collectively "SAFE"), Petitioners/Appellants, seek review by the Washington
State Supreme Court of the September 1, 2005 Memorandum Opinion and Order on
Respondents' Motion to Dismiss and of the October 19, 2005 Order on Petitioners' Motion
for Reconsideration.

Copies of these orders are attached to this notice.

NOTICE OF APPEAL TO SUPREME COURT - 1

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DATED this 18th day of November, 2005.

By C. J. HERRITT
[Signature]

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SAFE11b15.05

NOTICE OF APPEAL TO SUPREME COURT - 2

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RCW 43.21C.031
Significant impacts.

(1) An environmental impact statement (the detailed statement required by RCW 43.21C.030(2)(c)) shall be prepared on proposals for legislation and other major actions having a probable significant, adverse environmental impact. The environmental impact statement may be combined with the recommendation or report on the proposal or issued as a separate document. The substantive decisions or recommendations shall be clearly identifiable in the combined document. Actions categorically exempt under RCW 43.21C.110(1)(a) do not require environmental review or the preparation of an environmental impact statement under this chapter. In a county, city, or town planning under RCW 36.70A.040, a planned action, as provided for in subsection (2) of this section, does not require a threshold determination or the preparation of an environmental impact statement under this chapter, but is subject to environmental review and mitigation as provided in this chapter.

An environmental impact statement is required to analyze only those probable adverse environmental impacts which are significant. Beneficial environmental impacts may be discussed. The responsible official shall consult with agencies and the public to identify such impacts and limit the scope of an environmental impact statement. The subjects listed in RCW 43.21C.030(2)(c) need not be treated as separate sections of an environmental impact statement. Discussions of significant short-term and long-term environmental impacts, significant irrevocable commitments of natural resources, significant alternatives including mitigation measures, and significant environmental impacts which cannot be mitigated should be consolidated or included, as applicable, in those sections of an environmental impact statement where the responsible official decides they logically belong.

(2)(a) For purposes of this section, a planned action means one or more types of project action that:

(i) Are designated planned actions by an ordinance or resolution adopted by a county, city, or town planning under RCW 36.70A.040;

(ii) Have had the significant impacts adequately addressed in an environmental impact statement prepared in conjunction with (A) a comprehensive plan or subarea plan adopted under chapter 36.70A RCW, or (B) a fully contained community, a master planned resort, a master planned development, or a phased project;

(iii) Are subsequent or implementing projects for the proposals listed in (a)(ii) of this subsection;

(iv) Are located within an urban growth area, as defined in RCW 36.70A.030;

(v) Are not essential public facilities, as defined in RCW 36.70A.200; and

(vi) Are consistent with a comprehensive plan adopted under chapter 36.70A RCW.

(b) A county, city, or town shall limit planned actions to certain types of development or to specific geographical areas that are less extensive than the jurisdictional boundaries of the county, city, or town and may limit a planned action to a time period identified in the environmental impact statement or the ordinance or resolution adopted under this subsection.

[1995 c 347 § 203; 1983 c 117 § 1.]

Notes:

Finding -- Severability -- Part headings and table of contents not law -- 1995 c 347: See notes following RCW 36.70A.470.

RCW 43.21C.090

Decision of governmental agency to be accorded substantial weight.

In any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a "detailed statement", the decision of the governmental agency shall be accorded substantial weight.

[1973 1st ex.s. c 179 § 3.]

Notes:

Effective date – 1973 1st ex.s. c 179: See note following RCW 43.21C.080.

RCW 43.21C.095

**State environmental policy act rules to be accorded substantial
deference.**

The rules promulgated under RCW 43.21C.110 shall be accorded substantial deference in the interpretation of this chapter.

[1983 c 117 § 5.]

RCW 43.21C.110

Content of state environmental policy act rules.

It shall be the duty and function of the department of ecology:

(1) To adopt and amend thereafter rules of interpretation and implementation of this chapter, subject to the requirements of chapter 34.05 RCW, for the purpose of providing uniform rules and guidelines to all branches of government including state agencies, political subdivisions, public and municipal corporations, and counties. The proposed rules shall be subject to full public hearings requirements associated with rule promulgation. Suggestions for modifications of the proposed rules shall be considered on their merits, and the department shall have the authority and responsibility for full and appropriate independent promulgation and adoption of rules, assuring consistency with this chapter as amended and with the preservation of protections afforded by this chapter. The rule-making powers authorized in this section shall include, but shall not be limited to, the following phases of interpretation and implementation of this chapter:

(a) Categories of governmental actions which are not to be considered as potential major actions significantly affecting the quality of the environment, including categories pertaining to applications for water right permits pursuant to chapters 90.03 and 90.44 RCW. The types of actions included as categorical exemptions in the rules shall be limited to those types which are not major actions significantly affecting the quality of the environment. The rules shall provide for certain circumstances where actions which potentially are categorically exempt require environmental review. An action that is categorically exempt under the rules adopted by the department may not be conditioned or denied under this chapter.

(b) Rules for criteria and procedures applicable to the determination of when an act of a branch of government is a major action significantly affecting the quality of the environment for which a detailed statement is required to be prepared pursuant to RCW 43.21C.030.

(c) Rules and procedures applicable to the preparation of detailed statements and other environmental documents, including but not limited to rules for timing of environmental review, obtaining comments, data and other information, and providing for and determining areas of public participation which shall include the scope and review of draft environmental impact statements.

(d) Scope of coverage and contents of detailed statements assuring that such statements are simple, uniform, and as short as practicable; statements are required to analyze only reasonable alternatives and probable adverse environmental impacts which are significant, and may analyze beneficial impacts.

(e) Rules and procedures for public notification of actions taken and documents prepared.

(f) Definition of terms relevant to the implementation of this chapter including the establishment of a list of elements of the environment. Analysis of environmental considerations under RCW 43.21C.030(2) may be required only for those subjects listed as elements of the environment (or portions thereof). The list of elements of the environment shall consist of the "natural" and "built" environment. The elements of the built environment shall consist of public services and utilities (such as water, sewer, schools, fire and police protection), transportation, environmental health (such as explosive materials and toxic waste), and land and shoreline use (including housing, and a description of the relationships with land use and shoreline plans and designations, including population).

(g) Rules for determining the obligations and powers under this chapter of two or more branches of government involved in the same project significantly affecting the quality of the environment.

(h) Methods to assure adequate public awareness of the preparation and issuance of detailed statements required by RCW 43.21C.030(2)(c).

(i) To prepare rules for projects setting forth the time limits within which the governmental entity responsible for the action shall comply with the provisions of this chapter.

(j) Rules for utilization of a detailed statement for more than one action and rules improving environmental analysis of nonproject proposals and encouraging better interagency coordination and integration between this chapter and other environmental laws.

(k) Rules relating to actions which shall be exempt from the provisions of this chapter in situations of emergency.

(l) Rules relating to the use of environmental documents in planning and decision making and the implementation of the substantive policies and requirements of this chapter, including procedures for appeals under this chapter.

(m) Rules and procedures that provide for the integration of environmental review with project review as provided in RCW 43.21C.240. The rules and procedures shall be jointly developed with the department of community, trade, and economic development and shall be applicable to the preparation of environmental documents for actions in counties, cities, and towns planning under RCW 36.70A.040. The rules and procedures shall also include procedures and criteria to analyze planned actions under RCW 43.21C.031(2) and revisions to the rules adopted under this section to ensure that they are compatible with the requirements and authorizations of chapter 347, Laws of 1995, as amended by chapter 429, Laws of 1997. Ordinances or procedures adopted by a county, city, or town to implement the provisions of chapter 347, Laws of 1995 prior to the effective date of rules adopted under this subsection (1)(m) shall continue to be effective until the adoption of any new or revised ordinances or procedures that may be required. If any revisions are required as a result of rules adopted under this subsection (1)(m), those revisions shall be made within the time limits specified in RCW 43.21C.120.

(2) In exercising its powers, functions, and duties under this section, the department may:

(a) Consult with the state agencies and with representatives of science, industry, agriculture, labor, conservation organizations, state and local governments, and other groups, as it deems advisable; and

(b) Utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies, organizations, and individuals, in order to avoid duplication of effort and expense, overlap, or conflict with similar activities authorized by law and performed by established agencies.

(3) Rules adopted pursuant to this section shall be subject to the review procedures of chapter 34.05 RCW.

[1997 c 429 § 47; 1995 c 347 § 206; 1983 c 117 § 7; 1974 ex.s. c 179 § 8.]

Notes:

Severability – 1997 c 429: See note following RCW 36.70A.3201.

Finding – Severability – Part headings and table of contents not law – 1995 c 347: See notes following RCW 36.70A.470.

Purpose – 1974 ex.s. c 179: See note following RCW 43.21C.080.

WAC 197-11-050 Lead agency. (1) A lead agency shall be designated when an agency is developing or is presented with a proposal, following the rules beginning at WAC 197-11-922.

(2) The lead agency shall be the agency with main responsibility for complying with SEPA's procedural requirements and shall be the only agency responsible for:

- (a) The threshold determination; and
- (b) Preparation and content of environmental impact statements.

[Statutory Authority: RCW 43.21C.110, 84-05-020 (Order DE 83-39), § 197-11-050, filed 2/10/84, effective 4/4/84.]

WAC 197-11-305 Categorical exemptions. (1) If a proposal fits within any of the provisions in Part Nine of these rules, the proposal shall be categorically exempt from threshold determination requirements (WAC 197-11-720) *except* as follows:

(a) The proposal is not exempt under WAC 197-11-908, critical areas.

(b) The proposal is a segment of a proposal that includes:

(i) A series of actions, physically or functionally related to each other, some of which are categorically exempt and some of which are not; or

(ii) A series of exempt actions that are physically or functionally related to each other, and that together may have a probable significant adverse environmental impact in the judgment of an agency with jurisdiction. If so, that agency shall be the lead agency, unless the agencies with jurisdiction agree that another agency should be the lead agency. Agencies may petition the department of ecology to resolve disputes (WAC 197-11-946).

For such proposals, the agency or applicant may proceed with the exempt aspects of the proposals, prior to conducting environmental review, if the requirements of WAC 197-11-070 are met.

(2) An agency is not required to document that a proposal is categorically exempt. Agencies may note on an application that a proposal is categorically exempt or place such a determination in agency files.

[Statutory Authority: RCW 43.21C.110. 95-07-023 (Order 94-22), § 197-11-305, filed 3/6/95, effective 4/6/95; 84-05-020 (Order DE 83-39), § 197-11-305, filed 2/10/84, effective 4/4/84.]

WAC 197-11-704 Action. (1) "Actions" include, *as further specified below*:

(a) New and continuing activities (including projects and programs) entirely or partly financed, assisted, conducted, regulated, licensed, or approved by agencies;

(b) New or revised agency rules, regulations, plans, policies, or procedures; and

(c) Legislative proposals.

(2) Actions fall within one of two categories:

(a) **Project actions.** A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area. Projects include and are limited to agency decisions to:

(i) License, fund, or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract.

(ii) Purchase, sell, lease, transfer, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified.

(b) **Nonproject actions.** Nonproject actions involve decisions on policies, plans, or programs.

(i) The adoption or amendment of legislation, ordinances, rules, or regulations that contain standards controlling use or modification of the environment;

(ii) The adoption or amendment of comprehensive land use plans or zoning ordinances;

(iii) The adoption of any policy, plan, or program that will govern the development of a series of connected actions (WAC 197-11-060), but not including any policy, plan, or program for which approval must be obtained from any federal agency prior to implementation;

(iv) Creation of a district or annexations to any city, town or district;

(v) Capital budgets; and

(vi) Road, street, and highway plans.

(3) "Actions" do not include the activities listed above when an agency is not involved. Actions do not include bringing judicial or administrative civil or criminal enforcement actions (certain categorical exemptions in Part Nine identify in more detail governmental activities that would not have any environmental impacts and for which SEPA review is not required).

[Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-704, filed 2/10/84, effective 4/4/84.]

WAC 197-11-714 Agency. (1) "Agency" means any state or local governmental body, board, commission, department, or officer authorized to make law, hear contested cases, or otherwise take the actions stated in WAC 197-11-704, except the judiciary and state legislature. An agency is any state agency (WAC 197-11-796) or local agency (WAC 197-11-762).

(2) "Agency with environmental expertise" means an agency with special expertise on the environmental impacts involved in a proposal or alternative significantly affecting the environment. These agencies are listed in WAC 197-11-920; the list may be expanded in agency procedures (WAC 197-11-906). The appropriate agencies must be consulted in the environmental impact statement process, as required by WAC 197-11-502.

(3) "Agency with jurisdiction" means an agency with authority to approve, veto, or finance all or part of a nonexempt proposal (or part of a proposal). The term does not include an agency authorized to adopt rules or standards of general applicability that could apply to a proposal, when no license or approval is required from the agency for the specific proposal. The term also does not include a local, state, or federal agency involved in approving a grant or loan, that serves only as a conduit between the primary administering agency and the recipient of the grant or loan. Federal agencies with jurisdiction are those from which a license or funding is sought or required.

(4) If a specific agency has been named in these rules, and the functions of that agency have changed or been transferred to another agency, the term shall mean any successor agency.

(5) For those proposals requiring a hydraulic project approval under RCW 75.20.100, both the department of game and the department of fisheries shall be considered agencies with jurisdiction.

[Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-714, filed 2/10/84, effective 4/4/84.]

WAC 197-11-720 Categorical exemption. "Categorical exemption" means a type of action, specified in these rules, which does not significantly affect the environment (RCW 43.21C.110 (1)(a)); categorical exemptions are found in Part Nine of these rules. Neither a threshold determination nor any environmental document, including an environmental checklist or environmental impact statement, is required for any categorically exempt action (RCW 43.21C.031). These rules provide for those circumstances in which a specific action that would fit within a categorical exemption shall not be considered categorically exempt (WAC 197-11-305).

[Statutory Authority: RCW 43.21C.110, 84-05-020 (Order DE 83-39), § 197-11-720, filed 2/10/84, effective 4/4/84.]

WAC 197-11-734 Determination of nonsignificance (DNS). "Determination of nonsignificance" (DNS) means the written decision by the responsible official of the lead agency that a proposal is not likely to have a significant adverse environmental impact, and therefore an EIS is not required (WAC 197-11-310 and 197-11-340). The DNS form is in WAC 197-11-970.

[Statutory Authority: RCW 43.21C.110, 84-05-020 (Order DE 83-39), § 197-11-734, filed 2/10/84, effective 4/4/84.]

WAC 197-11-762 Local agency. "Local agency" or "local government" means any political subdivision, regional governmental unit, district, municipal or public corporation, including cities, towns, and counties and their legislative bodies. The term encompasses but does not refer specifically to the departments within a city or county.

[Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-762, filed 2/10/84, effective 4/4/84.]

WAC 197-11-784 Proposal. "Proposal" means a proposed action. A proposal includes both actions and regulatory decisions of agencies as well as any actions proposed by applicants. A proposal exists at that stage in the development of an action when an agency is presented with an application, or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and the environmental effects can be meaningfully evaluated. (See WAC 197-11-055 and 197-11-060(3).) A proposal may therefore be a particular or preferred course of action or several alternatives. For this reason, these rules use the phrase "alternatives including the proposed action." The term "proposal" may therefore include "other reasonable courses of action," if there is no preferred alternative and if it is appropriate to do so in the particular context.

[Statutory Authority: RCW 43.21C.110, 84-05-020 (Order DE 83-39), § 197-11-784, filed 2/10/84, effective 4/4/84.]

WAC 197-11-796 State agency. "State agency" means any state board, commission, department, or officer, including state universities, colleges, and community colleges, that is authorized by law to make rules, hear contested cases, or otherwise take the actions stated in WAC 197-11-704, except the judiciary and state legislature.

[Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-796, filed 2/10/84, effective 4/4/84.]

WAC 197-11-800 Categorical exemptions. The proposed actions contained in Part Nine are categorically exempt from threshold determination and EIS requirements, subject to the rules and limitations on categorical exemptions contained in WAC 197-11-305.

Note: The statutory exemptions contained in chapter 43.21C RCW are not included in Part Nine. Chapter 43.21C RCW should be reviewed in determining whether a proposed action not listed as categorically exempt in Part Nine is exempt by statute from threshold determination and EIS requirements.

(1) Minor new construction -- Flexible thresholds.

(a) The exemptions in this subsection apply to all licenses required to undertake the construction in question, except when a rezone or any license governing emissions to the air or discharges to water is required. To be exempt under this subsection, the project must be equal to or smaller than the exempt level. For a specific proposal, the exempt level in (b) of this subsection shall control, unless the city/county in which the project is located establishes an exempt level under (c) of this subsection. If the proposal is located in more than one city/county, the lower of the agencies' adopted levels shall control, regardless of which agency is the lead agency.

(b) The following types of construction shall be exempt, except when undertaken wholly or partly on lands covered by water:

(i) The construction or location of any residential structures of four dwelling units.

(ii) The construction of a barn, loafing shed, farm equipment storage building, produce storage or packing structure, or similar agricultural structure, covering 10,000 square feet, and to be used only by the property owner or his or her agent in the conduct of farming the property. This exemption shall not apply to feed lots.

(iii) The construction of an office, school, commercial, recreational, service or storage building with 4,000 square feet of gross floor area, and with associated parking facilities designed for twenty automobiles.

(iv) The construction of a parking lot designed for twenty automobiles.

(v) Any landfill or excavation of 100 cubic yards throughout the total lifetime of the fill or excavation; and any fill or excavation classified as a Class I, II, or III forest practice under RCW 76.09.050 or regulations thereunder.

(c) Cities, towns or counties may raise the exempt levels to the maximum specified below by implementing ordinance or resolution. Such levels shall be specified in the agency's SEPA procedures (WAC 197-11-904) and sent to the department of ecology. A newly established exempt level shall be supported by local conditions, including zoning or other land use plans or regulations. An agency may adopt a system of several exempt levels (such as different levels for different geographic areas). The maximum exempt level for the exemptions in (1)(b) of this section shall be, respectively:

(i) 20 dwelling units.

(ii) 30,000 square feet.

(iii) 12,000 square feet; 40 automobiles.

(iv) 40 automobiles.

(v) 500 cubic yards.

(2) Other minor new construction. The following types of construction shall be exempt except where undertaken wholly or in part on lands covered by water (unless specifically exempted in this subsection); the exemptions provided by this section shall apply to all licenses required to undertake the construction in question, except where a rezone or any license governing emissions to the air or discharges to water is required:

(a) The construction or designation of bus stops, loading zones, shelters, access facilities and pull-out lanes for taxicabs, transit and school vehicles.

(b) The construction and/or installation of commercial on-premise signs, and public signs and signals.

(c) The construction or installation of minor road and street improvements such as pavement marking, freeway surveillance and control systems, railroad protective devices (not including grade-separated crossings), grooving, glare screen, safety barriers, energy attenuators, transportation corridor landscaping (including the application of Washington state department of agriculture approved herbicides by licensed personnel for right of way weed control as long as this is not within watersheds controlled for the purpose of drinking water quality in accordance with WAC 248-54-660), temporary traffic controls and detours, correction of substandard curves and intersections within existing rights of way, widening of a highway by less than a single lane width where capacity is not significantly increased and no new right of way is required, adding auxiliary lanes for localized purposes, (weaving, climbing, speed change, etc.), where capacity is not significantly increased and no new right of way is required, channelization and elimination of sight restrictions at intersections, street lighting, guard rails and barricade installation, installation of catch basins and culverts, and reconstruction of existing roadbed (existing curb-to-curb in urban locations), including adding or widening of shoulders, addition of bicycle lanes, paths and facilities, and pedestrian walks and paths, but not including additional automobile lanes.

(d) Grading, excavating, filling, septic tank installations, and landscaping necessary for any building or facility exempted by subsections (1) and (2) of this section, as well as fencing and the construction of small structures and minor facilities accessory thereto.

(e) Additions or modifications to or replacement of any building or facility exempted by subsections (1) and (2) of this section when such addition, modification or replacement will not change the character of the building or facility in a way that would remove it from an exempt class.

(f) The demolition of any structure or facility, the construction of which would be exempted by subsections (1) and (2) of this section, except for structures or facilities with recognized historical significance.

(g) The installation of impervious underground tanks, having a capacity of 10,000 gallons or less.

(h) The vacation of streets or roads.

(i) The installation of hydrological measuring devices, regardless of whether or not on lands covered by water.

(j) The installation of any property, boundary or survey marker, other than fences, regardless of whether or not on lands covered by water.

(3) Repair, remodeling and maintenance activities. The following activities shall be categorically exempt: The repair, remodeling, maintenance, or minor alteration of existing private or public structures, facilities or equipment, including utilities, involving no material expansions or changes in use beyond that previously existing; except that, where undertaken wholly or in part on lands covered by water, only minor repair or replacement of structures may be exempt (examples include repair or replacement of piling, ramps, floats, or mooring buoys, or minor repair, alteration, or maintenance of docks). The following maintenance activities shall not be considered exempt under this subsection:

(a) Dredging;

(b) Reconstruction/maintenance of groins and similar shoreline protection structures; or

(c) Replacement of utility cables that must be buried under the surface of the bedlands. Repair/rebuilding of major dams, dikes, and reservoirs shall also not be considered exempt under this subsection.

(4) Water rights. Appropriations of one cubic foot per second or less of surface water, or of 2,250 gallons per minute or less of ground water, for any purpose. The exemption covering not only the permit to appropriate water, but also any hydraulics permit, shoreline permit or building permit required for a normal diversion or intake structure, well and pumphouse reasonably necessary to accomplish the exempted appropriation, and including any activities relating to construction of a distribution system solely for any exempted appropriation.

(5) Purchase or sale of real property. The following real property transactions by an agency shall be exempt:

(a) The purchase or acquisition of any right to real property.

(b) The sale, transfer or exchange of any publicly owned real property, but only if the property is not subject to an authorized public use.

(c) The lease of real property when the use of the property for the term of the lease will remain essentially the same as the existing use, or when the use under the lease is otherwise exempted by this chapter.

(6) Minor land use decisions. The following land use decisions shall be exempt:

(a) Except upon lands covered by water, the approval of short plats or short subdivisions pursuant to the procedures required by RCW 58.17.060, but not including further short subdivisions or short platting within a plat or subdivision previously exempted under this subsection.

(b) Granting of variances based on special circumstances, not including economic hardship, applicable to the subject property, such as size, shape, topography, location or surroundings and not resulting in any change in land use or density.

(c) Classifications of land for current use taxation under chapter 84.34 RCW, and classification and grading of forest land under chapter 84.33 RCW.

(7) Open burning. Opening burning and the issuance of any license for open burning shall be exempt. The adoption of plans, programs, objectives or regulations by any agency incorporating general

standards respecting open burning shall not be exempt.

(8) **Clean Air Act.** The granting of variances under RCW 70.94.181 extending applicable air pollution control requirements for one year or less shall be exempt.

(9) **Water quality certifications.** The granting or denial of water quality certifications under the Federal Clean Water Act (Federal Water Pollution Control Act amendments of 1972, 33 U.S.C. 1341) shall be exempt.

(10) **Activities of the state legislature.** All actions of the state legislature are exempted. This subsection does not exempt the proposing of legislation by an agency (WAC 197-11-704).

(11) **Judicial activity.** The following shall be exempt:

(a) All adjudicatory actions of the judicial branch.

(b) Any quasi-judicial action of any agency if such action consists of the review of a prior administrative or legislative decision. Decisions resulting from contested cases or other hearing processes conducted prior to the first decision on a proposal or upon any application for a rezone, conditional use permit or other similar permit not otherwise exempted by this chapter, are not exempted by this subsection.

(12) **Enforcement and inspections.** The following enforcement and inspection activities shall be exempt:

(a) All actions, including administrative orders and penalties, undertaken to enforce a statute, regulation, ordinance, resolution or prior decision. No license shall be considered exempt by virtue of this subsection; nor shall the adoption of any ordinance, regulation or resolution be considered exempt by virtue of this subsection.

(b) All inspections conducted by an agency of either private or public property for any purpose.

(c) All activities of fire departments and law enforcement agencies except physical construction activity.

(d) Any action undertaken by an agency to abate a nuisance or to abate, remove or otherwise cure any hazard to public health or safety. The application of pesticides and chemicals is not exempted by this subsection but may be exempted elsewhere in these guidelines. No license or adoption of any ordinance, regulation or resolution shall be considered exempt by virtue of this subsection.

(e) Any suspension or revocation of a license for any purpose.

(13) **Business and other regulatory licenses.** The following business and other regulatory licenses are exempt:

(a) All licenses to undertake an occupation, trade or profession.

(b) All licenses required under electrical, fire, plumbing, heating, mechanical, and safety codes and regulations, but not including building permits.

(c) All licenses to operate or engage in amusement devices and rides and entertainment activities,

including but not limited to cabarets, carnivals, circuses and other traveling shows, dances, music machines, golf courses, and theaters, including approval of the use of public facilities for temporary civic celebrations, but not including licenses or permits required for permanent construction of any of the above.

(d) All licenses to operate or engage in charitable or retail sales and service activities, including but not limited to peddlers, solicitors, second hand shops, pawnbrokers, vehicle and housing rental agencies, tobacco sellers, close out and special sales, fireworks, massage parlors, public garages and parking lots, and used automobile dealers.

(e) All licenses for private security services, including but not limited to detective agencies, merchant and/or residential patrol agencies, burglar and/or fire alarm dealers, guard dogs, locksmiths, and bail bond services.

(f) All licenses for vehicles for-hire and other vehicle related activities, including but not limited to taxicabs, ambulances, and tow trucks: Provided, That regulation of common carriers by the utilities and transportation commission shall not be considered exempt under this subsection.

(g) All licenses for food or drink services, sales, and distribution, including but not limited to restaurants, liquor, and meat.

(h) All animal control licenses, including but not limited to pets, kennels, and pet shops. Establishment or construction of such a facility shall not be considered exempt by this subsection.

(i) The renewal or reissuance of a license regulating any present activity or structure so long as no material changes are involved.

(14) **Activities of agencies.** The following administrative, fiscal and personnel activities of agencies shall be exempt:

(a) The procurement and distribution of general supplies, equipment and services authorized or necessitated by previously approved functions or programs.

(b) The assessment and collection of taxes.

(c) The adoption of all budgets and agency requests for appropriation: Provided, That if such adoption includes a final agency decision to undertake a major action, that portion of the budget is not exempted by this subsection.

(d) The borrowing of funds, issuance of bonds, or applying for a grant and related financing agreements and approvals.

(e) The review and payment of vouchers and claims.

(f) The establishment and collection of liens and service billings.

(g) All personnel actions, including hiring, terminations, appointments, promotions, allocations of positions, and expansions or reductions in force.

(h) All agency organization, reorganization, internal operational planning or coordination of plans or functions.

(i) Adoptions or approvals of utility, transportation and solid waste disposal rates.

(j) The activities of school districts pursuant to desegregation plans or programs; however, construction of real property transactions or the adoption of any policy, plan or program for such construction of real property transaction shall not be considered exempt under this subsection.

(15) **Financial assistance grants.** The approval of grants or loans by one agency to another shall be exempt, although an agency may at its option require compliance with SEPA prior to making a grant or loan for design or construction of a project. This exemption includes agencies taking nonproject actions that are necessary to apply for federal or other financial assistance.

(16) **Local improvement districts.** The formation of local improvement districts, unless such formation constitutes a final agency decision to undertake construction of a structure or facility not exempted under WAC 197-11-800 and 197-11-880.

(17) **Information collection and research.** Basic data collection, research, resource evaluation, requests for proposals (RFPs), and the conceptual planning of proposals shall be exempt. These may be strictly for information-gathering, or as part of a study leading to a proposal that has not yet been approved, adopted or funded; this exemption does not include any agency action that commits the agency to proceed with such a proposal. (Also see WAC 197-11-070.)

(18) **Acceptance of filings.** The acceptance by an agency of any document or thing required or authorized by law to be filed with the agency and for which the agency has no discretionary power to refuse acceptance shall be exempt. No license shall be considered exempt by virtue of this subsection.

(19) **Procedural actions.** The proposal or adoption of legislation, rules, regulations, resolutions or ordinances, or of any plan or program relating solely to governmental procedures, and containing no substantive standards respecting use or modification of the environment shall be exempt. Agency SEPA procedures shall be exempt.

(20) **Building codes.** The adoption by ordinance of all codes as required by the state Building Code Act (chapter 19.27 RCW).

(21) **Adoption of noise ordinances.** The adoption by counties/cities of resolutions, ordinances, rules or regulations concerned with the control of noise which do not differ from regulations adopted by the department of ecology under chapter 70.107 RCW. When a county/city proposes a noise resolution, ordinance, rule or regulation, a portion of which differs from the applicable state regulations (and thus requires approval of the department of ecology under RCW 70.107.060(4)), SEPA compliance may be limited to those items which differ from state regulations.

(22) **Review and comment actions.** Any activity where one agency reviews or comments upon the actions of another agency or another department within an agency shall be exempt.

(23) **Utilities.** The utility-related actions listed below shall be exempt, except for installation, construction, or alteration on lands covered by water. The exemption includes installation and construction, relocation when required by other governmental bodies, repair, replacement, maintenance, operation or alteration that does not change the action from an exempt class.

(a) All communications lines, including cable TV, but not including communication towers or relay stations.

(b) All storm water, water and sewer facilities, lines, equipment, hookups or appurtenances including, utilizing or related to lines eight inches or less in diameter.

(c) All electric facilities, lines, equipment or appurtenances, not including substations, with an associated voltage of 55,000 volts or less; and the overbuilding of existing distribution lines (55,000 volts or less) with transmission lines (more than 55,000 volts); and the undergrounding of all electric facilities, lines, equipment or appurtenances.

(d) All natural gas distribution (as opposed to transmission) lines and necessary appurtenant facilities and hookups.

(e) All developments within the confines of any existing electric substation, reservoir, pump station or well: Provided, That additional appropriations of water are not exempted by this subsection.

(f) Periodic use of chemical or mechanical means to maintain a utility or transportation right of way in its design condition: Provided, That chemicals used are approved by the Washington state department of agriculture and applied by licensed personnel. This exemption shall not apply to the use of chemicals within watersheds that are controlled for the purpose of drinking water quality in accordance with WAC 248-54-660.

(g) All grants of rights of way by agencies to utilities for use for distribution (as opposed to transmission) purposes.

(h) All grants of franchises by agencies to utilities.

(i) All disposals of rights of way by utilities.

(24) Natural resources management. In addition to the other exemptions contained in this section, the following natural resources management activities shall be exempt:

(a) Issuance of new grazing leases covering a section of land or less; and issuance of all grazing leases for land that has been subject to a grazing lease within the previous ten years.

(b) Licenses or approvals to remove firewood.

(c) Issuance of agricultural leases covering one hundred sixty contiguous acres or less.

(d) Issuance of leases for Christmas tree harvesting or brush picking.

(e) Issuance of leases for school sites.

(f) Issuance of leases for, and placement of, mooring buoys designed to serve pleasure craft.

(g) Development of recreational sites not specifically designed for all-terrain vehicles and not including more than twelve campsites.

(h) Periodic use of chemical or mechanical means to maintain public park and recreational land: Provided, That chemicals used are approved by the Washington state department of agriculture and applied by licensed personnel. This exemption shall not apply to the use of chemicals within watersheds that are controlled for the purpose of drinking water quality in accordance with WAC 248-54-660.

(i) Issuance of rights of way, easements and use permits to use existing roads in nonresidential areas.

(j) Establishment of natural area preserves to be used for scientific research and education and for the protection of rare flora and fauna, under the procedures of chapter 79.70 RCW.

(25) Personal wireless service facilities.

(a) The siting of personal wireless service facilities are exempt if the facility:

(i) Is a microcell and is to be attached to an existing structure that is not a residence or school and does not contain a residence or a school;

(ii) Includes personal wireless service antennas, other than a microcell, and is to be attached to an existing structure (that may be an existing tower) that is not a residence or school and does not contain a residence or school, and the existing structure to which it is to be attached is located in a commercial, industrial, manufacturing, forest, or agriculture zone; or

(iii) Involves constructing a personal wireless service tower less than sixty feet in height that is located in a commercial, industrial, manufacturing, forest, or agricultural zone.

(b) For the purposes of this subsection:

(i) "Personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services, as defined by federal laws and regulations.

(ii) "Personal wireless service facilities" means facilities for the provision of personal wireless services.

(iii) "Microcell" means a wireless communication facility consisting of an antenna that is either:

(A) Four feet in height and with an area of not more than five hundred eighty square inches; or

(B) If a tubular antenna, no more than four inches in diameter and no more than six feet in length.

(c) This exemption does not apply to projects within a critical area designated under GMA (RCW 36.70A.060).

[Statutory Authority: RCW 43.21A.090, chapter 43.21C RCW, RCW 43.21C.035, 43.21C.037, 43.21C.038, 43.21C.0381, 43.21C.0382, 43.21C.0383, 43.21C.110, 43.21C.222. 03-16-067 (Order 02-12), § 197-11-800, filed 8/1/03, effective 9/1/03. Statutory Authority: 1995 c 347 (ESHB 1724) and RCW 43.21C.110. 97-21-030 (Order 95-16), § 197-11-800, filed 10/10/97, effective 11/10/97. Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-800, filed 2/10/84, effective 4/4/84.]

WAC 197-11-810 Exemptions and nonexemptions applicable to specific state agencies. The exemptions in WAC 197-11-820 through 197-11-875 relate only to the specific activities identified within the named agencies. These exemptions are in addition to the preceding sections of this part and are subject to the rules and limitations of WAC 197-11-305. The categorical exemptions in WAC 197-11-800 apply to all agencies, including those named in WAC 197-11-820 through 197-11-875 unless the general exemptions are specifically made inapplicable by one of the following exemptions.

[Statutory Authority: RCW 43.21C.110, 84-05-020 (Order DE 83-39), § 197-11-810, filed 2/10/84, effective 4/4/84.]

WAC 197-11-845 Department of social and health services. All actions under programs administered by the department of social and health services as of December 12, 1975, are exempted, except the following:

(1) The adoption or amendment by the department of any regulations incorporating general standards for issuance of licenses authorizing the possession, use and transfer of radioactive source material under RCW 70.98.080, except that the issuance, revocation or suspension of individual licenses thereto shall be exempt. However, licenses to operate low level burial facilities or licenses to operate or expand beyond design capacity, mineral processing facilities or their tailings areas whose products or byproducts have concentrations of naturally occurring radioactive materials in excess of exempt concentrations, as specified in WAC 402-20-250, shall not be exempt.

(2) The approval of a comprehensive plan for public water supply systems servicing one thousand or more units under WAC 248-54-065.

(3) The approval of engineering reports or plans and specifications under WAC 248-54-085 and 248-54-095, for all surface water source development, all water system storage facilities greater than one-half million gallons, new transmission lines longer than one thousand feet located in new rights of way and major extensions to existing water distribution systems.

(4) The approval of an application for a certificate of need under RCW 70.38.120 for construction of a new hospital or medical facility or for major additions to existing service capacity of such institutions.

(5) The approval of an application for any system of sewerage and/or water general plan or amendments under RCW 36.94.100.

(6) The approval of any plans and specifications for new sewage treatment works or major extensions to existing sewer treatment works submitted to the department under WAC 248-92-040.

(7) The construction of any building, facility or other installation not exempt by WAC 197-11-800 for the purpose of housing department personnel, or fulfilling statutorily directed or authorized functions (e.g., prisons).

(8) The approval of any final plans for construction of a nursing home pursuant to WAC 248-14-100, construction of a private psychiatric hospital pursuant to WAC 248-22-005 or construction of an alcoholism treatment center pursuant to WAC 248-22-510.

[Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-845, filed 2/10/84, effective 4/4/84.]

WAC 197-11-926 Lead agency for governmental proposals. (1) When an agency initiates a proposal, it is the lead agency for that proposal. If two or more agencies share in the implementation of a proposal, the agencies shall by agreement determine which agency will be the lead agency. For the purposes of this section, a proposal by an agency does not include proposals to license private activity.

(2) Whenever possible, agency people carrying out SEPA procedures should be different from agency people making the proposal.

[Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-926, filed 2/10/84, effective 4/4/84.]

WAC 246-290-460 Fluoridation of drinking water. (1) Purveyors shall obtain written department approval of fluoridation treatment facilities before placing them in service.

(2) Where fluoridation is practiced, purveyors shall maintain fluoride concentrations in the range 0.8 through 1.3 mg/L throughout the distribution system.

(3) Where fluoridation is practiced, purveyors shall take the following actions to ensure that concentrations remain at optimal levels and that fluoridation facilities and monitoring equipment are operating properly:

(a) Daily monitoring.

(i) Take daily monitoring samples for each point of fluoride addition and analyze the fluoride concentration. Samples must be taken downstream from each fluoride injection point at the first sample tap where adequate mixing has occurred.

(ii) Record the results of daily analyses in a monthly report format acceptable to the department. A report must be made for each point of fluoride addition.

(iii) Submit monthly monitoring reports to the department within the first ten days of the month following the month in which the samples were collected.

(b) Monthly split sampling.

(i) Take a monthly split sample at the same location where routine daily monitoring samples are taken. A monthly split sample must be taken for each point of fluoride addition.

(ii) Analyze a portion of the sample and record the results on the lab sample submittal form and on the monthly report form.

(iii) Forward the remainder of the sample, along with the completed sample form to the state public health laboratory, or other state-certified laboratory, for fluoride analysis.

(iv) If a split sample is found by the certified lab to be:

(A) Not within the range of 0.8 to 1.3 mg/l, the purveyor's fluoridation process shall be considered out of compliance.

(B) Differing by more than 0.30 mg/l from the purveyor's analytical result, the purveyor's fluoride testing shall be considered out of control.

(4) Purveyors shall conduct analyses prescribed in subsection (3) of this section in accordance with procedures listed in the most recent edition of *Standard Methods for the Examination of Water and Wastewater*.

(5) The purveyor may be required by the department to increase the frequency, and/or change the location of sampling prescribed in subsection (3) of this section to ensure the adequacy and consistency of fluoridation.

[Statutory Authority: RCW 43.02.050 [43.20.050]. 99-07-021, § 246-290-460, filed 3/9/99, effective 4/9/99. Statutory Authority: RCW 43.20.050. 91-02-051 (Order 124B), recodified as § 246-290-460, filed 12/27/90, effective 1/31/91. Statutory Authority: RCW 34.04.045. 88-05-057 (Order 307), § 248-54-235, filed 2/17/88. Statutory Authority: RCW 43.20.050. 83-19-002 (Order 266), § 248-54-235, filed 9/8/83.]

the frequency required in WAC 248-54-430. If fecal coliform concentration is measured it shall not exceed 20/100 ml.

(iv) Physical and chemical quality of the source conforms with WAC 248-54-430.

(6) The degree of treatment required may be increased from time to time if raw water quality or sanitary control is deteriorating or has deteriorated; or where such deterioration is reasonably certain and imminent.

(7) As an additional safeguard, and to help prevent water quality deterioration in distribution piping, it is recommended that a chlorine residual be maintained throughout the distribution system of all public water supplies.

(8) Pressure sand filtration or diatomaceous earth filtration may be used for removal of taste, odor, color, or hardness; or for the removal of turbidity from a source not subject to contamination. [Order 49, § 248-54-360, filed 12/17/70.]

WAC 248-54-370 Fluoridation. (1) Where fluoridation is practiced, the concentration of fluoride shall be maintained at 1.0 mg/L insofar as possible, and shall be maintained within the range 0.8 - 1.3 mg/L or as required by the secretary. Analyses for fluoride shall be made daily, or as required by the secretary, and reports of such analyses submitted to the division monthly. Such analyses shall be made in accordance with procedures listed in "Standard Methods". Check samples shall be submitted to the division monthly, or as required by the secretary.

(2) Plans and specifications for any fluoridation installation shall be submitted to the secretary for approval prior to construction, as required in WAC 248-54-300. [Order 49, § 248-54-370, filed 12/17/70.]

WAC 248-54-380 Design of public water supply facilities. Public water supply facilities shall be designed according to good engineering practice, such as the *Recommended Standards for Water Works, A Committee Report of the Great Lakes - Upper Mississippi River Board of State Sanitary Engineers, 1968 Edition** or any superseding edition, or other design criteria and standards acceptable to the secretary.

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[Order 49, § 248-54-380, filed 12/17/70.]

WAC 248-54-385 Distribution reservoirs. (1) All new distribution reservoirs shall have suitable water-tight roofs or covers which exclude birds, animals, insects and dust, and shall include appropriate provisions to safeguard against trespass, vandalism, and sabotage.

(2) All uncovered distribution reservoirs in existence on June 1, 1975, shall be scheduled for covering or replacement unless it is demonstrated to the satisfaction of the secretary that the reservoirs deliver water consistently meeting the quality standards of WAC 248-54-430, and the reservoirs meet the following minimum standards of protection:

[Title 248 WAC—p 164]

(a) All water leaving the reservoir shall be disinfected.

(i) Disinfection equipment shall be proportional feed and shall be otherwise designed in accordance with WAC 248-54-380.

(ii) Disinfection equipment shall be operated in accordance with WAC 248-54-360(1)(b), including a minimum free chlorine residual of 0.2 mg/L after 30 minutes of contact or 0.6 mg/L after 10 minutes of contact. Maintaining a chlorine residual through the reservoir will be considered the equivalent of post chlorination if the water leaving the reservoir contains a minimum of 0.2 mg/L free chlorine residual at all times. Where residuals are carried through the reservoir in lieu of post chlorination, continuous chlorine residual analysis and recording will be required.

(iii) Continuous chlorine residual analyzers shall also be used in cases of variable chlorine demand or where other methods of chlorination control have been found unsatisfactory.

(b) The reservoir shall be protected from unauthorized entry and from vandalism. Use of 24-hour security patrols and/or automatic security devices is recommended and may be required by the secretary if a reservoir has been subjected to frequent security violations. The following security measures are required for all reservoirs:

(i) The reservoir shall be surrounded by a fence, chain link or equivalent. The fence shall be at least 7 feet high; in addition, two strands of barbed wire or the equivalent shall be placed above the fence.

(ii) The fence shall be set back from the parapet a sufficient distance so that debris cannot easily be thrown into the water from outside the fence. A setback of 100 feet is recommended; a setback of 50 feet shall be considered minimum, provided that the multiple of the fence height and the setback, expressed in feet, shall be not less than 600.

(iii) The setback shall be increased if the ground surface beyond the fence has a substantial upward gradient.

(iv) The reservoir and fence shall be inspected at least once daily.

(v) An emergency reaction plan shall be established so that the reservoir can be isolated from the distribution system within one hour after a security violation has been reported.

(c) Undesirable growths of algae or other aquatic organisms shall be controlled. Tastes, odors, color, turbidity, and debris in water within and leaving the reservoir shall be minimized. A control program shall be conducted consisting of at least the following:

(i) Monitoring water in the reservoir for temperature, pH, color, turbidity, and where possible, phytoplankton.

(ii) Application of algicides as necessary to prevent or control algal growths.

(d) The reservoir shall be of suitable construction so as to minimize water quality deterioration.

(i) A parapet wall shall completely encircle the reservoir.

(ii) Surface drainage shall be diverted away from the reservoir.

(iii) The reservoir shall have a smooth impervious lining.