

October 16, 2009

The Honorable Chris Gregoire
Governor
State of Washington
P.O. Box 40002
Olympia, WA 98504-0002



Re: AWB Comments on Natural Resources Subcabinet's "Ideas to Improve Management of Washington's Natural Resources."

Dear Governor Gregoire:

On behalf of AWB and its 6,800+ members, I would like to take this opportunity to thank you and your staff for the invitation to comment on the above-referenced document prepared by the Natural Resources Subcabinet (Subcabinet).

AWB strongly supports creating greater efficiencies in our state's natural resource management system as well as streamlining and bringing consistency to environmental permitting and quasi-judicial appeals processes. Like you, we believe that while extremely challenging, the historic downturn in our state and national economies, as well as state and local government budget shortages, present unique opportunities to reevaluate how the state does business.

This initial set of comments is intended to provide a relatively cursory, high-level response to the ideas set forth by the Subcabinet. As different proposals move forward, we would appreciate the chance to amend these comments and provide supplemental, more specific comments at that time.

We are encouraged by and appreciate the great deal of time Subcabinet staff put in to the creation of the 166-page report. We view this effort as an opportunity to streamline existing processes which has the potential of saving the state, local governments, and the private, regulated sector precious time and money. That said, we do not view this as an opportunity to weaken existing environmental protection laws or standards. Conversely, we do not see this process as a way to strengthen or enhance existing environmental laws or standards. This process should be used as a way to truly engage the regulated community to offer solid input to this process to identify and contribute meaningful reforms and changes. In addition, this process should be used as a way to increase customer service vis-à-vis the regulated community, increase government efficiencies, and reduce costs. We raise this issue specifically in response to concerns such as those contained on page 1, category three (3) of reform ideas which states "[i]mproving environmental protection, permitting and compliance activities." This theme is continued throughout the appendices under Work Group 3 as well as on page 35 of the report under bullet number two which states: "[t]he natural "resources" structure inherited from the past places emphasis on use . . . Given the press

of development and population growth, a question is *whether reorganization should prioritize conservation objectives over use.*" Again, we believe this line of thinking is contrary to what this process is and should be about, and stresses the need for reorganization for controversial public policy purposes as opposed to the need for government efficiency and customer-service purposes.

Moreover, AWB views the Subcabinet's ideas as ways to create better *regulatory efficiencies* in our state's natural resource management system. We do not, however, believe this effort addresses much of the necessary *regulatory reform* that remains to be done following the passage of 1995's HB 1010, and would draw a distinction between the two topics. This was confirmed in Governor Locke's 2001 Competitiveness Council Report, where regulatory reform was highlighted as an ongoing challenge to Washington's competitiveness with other states.

In addition to AWB's specific responses to the ideas set forth by the Subcabinet, we respectfully request your consideration of other AWB-member ideas relevant to this discussion, which are fully set forth at the end of this document (pages 8-12 below).

With respect to each of the four main components of the report, we respectfully submit the following comments:

1. **NATURAL RESOURCE AGENCY REORGANIZATION/RESTRUCTURING**

1-1/1-4

We believe there is merit in several components of these major agency restructuring ideas. Unfortunately, as a state-wide business association representing a diverse, wide range of business interests, we have not had adequate time to fully digest all parts of these ideas and don't believe three months is sufficient time to fully consider the perspectives of all stakeholders affected by these ideas. We believe this is a discussion that is better suited, from both a policy and a political perspective, during the interim leading to the 2011 legislative session. Accordingly, we have no position on which model (or combination of models) would be the most beneficial from a general business perspective. We do, however, plan to remain engaged in discussions if these ideas are to move forward.

1-5/1-8

We believe the concepts included in ideas 1-5 through 1-8 all have varying degrees of merit and are more appropriate for discussion of short-term solutions for 2010. However, we do not believe that one or even all of these ideas will bring about the true level of reform needed for comprehensive streamlining of our state's existing natural resource management system.

Be it re-aligning natural resource regional boundaries and consolidating regional offices, providing for collaborative ecosystem-based management, or formalizing multi-agency collaboration, we believe the devil for many of these ideas resides in the details and would appreciate the opportunity to participate in any of these ideas or processes that may move forward. Of course, AWB' support for any of the aforementioned ideas would be contingent upon the end result of any such process.

With respect to the Unified State Vision idea, we have some significant concerns. We are unclear about how four or five existing state regulatory agencies with different legislative mandates, different constituencies, different missions and different subject matter jurisdictions would create a unified policy vision for natural resource management. We believe that such an approach is unworkable and would lead to confusion as opposed to clarity. For this reason, we cannot support this idea. Instead, we believe the more appropriate approach would be to have a "Unified Service Delivery System" among the natural resource agencies, with the emphasis placed on reducing costs and increasing customer service, rather than attempting to create a unified policy vision.

2. **NATURAL RESOURCE AGENCY SHARING OF SERVICES AND RESOURCES**

AWB supports GIS data consolidation and governance and combining natural resource agency financial assistance, grant and loan programs. Specifically, AWB encourages the Subcabinet to establish public/private partnerships with existing businesses that provide software and other GIS data and resources, perhaps in two pilot projects: one private development project and one public works project.

AWB also believes there's merit in combining natural resource law enforcement, but, again, the devil is in the details and if done improperly could end with a bad result for the regulated community. AWB would appreciate the opportunity to be involved in any such restructuring effort.

3. **STREAMLINING ENVIRONMENTAL PERMITTING AND COMPLIANCE ACTIVITIES**

- 3-1 AWB strongly supports the idea of a 20-year look back and review of GMA, its existing goals, and how those goals have or have not been met and/or balanced. Over the past two or three legislative sessions, a variety of proposals have been advanced to add new goals or to amend existing goals of the GMA, particularly relating to addressing climate change. AWB opposes adding a new or amended

goal for climate change to GMA due to the amount of new land use appeals that would undoubtedly result from this action.

However, we also strongly suggest that an independent party conduct the review/audit of the GMA, as opposed to a “four-corner”/stakeholder approach. We believe this would be a task more appropriately done by the State Auditor’s office.

- 3-2 In general, AWB supports processes that create pilots or other efforts to consolidate and coordinate land development permits among state and local permitting agencies. In this case either Model #1 (coordinated decision making) or Model #2 (consolidated decision making) would be a good start.

As noted under Model #2, project reviews could include “all local land use requirements including SEPA, shorelines, critical areas, clearing and grading, and related sit plan approvals.”

Consistent with this approach, AWB would ask for consideration of one of its land use priorities for the 2010 legislative session: streamlining of the SEPA process. AWB’s proposal provides the option for cities to create specific subareas for higher densities and/or mixed use development within Urban Growth Areas. Cities would also be allowed to do up-front, programmatic-level Environmental Impact Statements, as opposed to project-level EIS. Landowners, builders or developers that choose to opt-in to one of these subareas would be charged a pro-rata fee for the programmatic EIS and any projects permitted under this approach would be exempt from appeal under SEPA.

- 3-3 AWB supports simplification and consolidation of the Hydraulic Project Approval (HPA) permitting program. Specifically, AWB supports having WDFW prepare “programmatic” HPAs for certain routine practices (e.g. maintenance of small streams) and eliminate the need for individual HPA application and review.

Under the Forest Practices Act, WDFW currently has duplicate authority over certain forest practices through the Hydraulic Code. For forestry applications, this authority should be transferred to DNR with WDFW supporting appropriate forest practices rule changes and training for forest practices foresters. Alternatively, WDFW could issue programmatic Hydraulic Project Approval (HPA) for most or all forest practices in or over fish bearing waters and monitor HPA activity through the forest practices system. Either way, WDFW could continue to monitor implementation and effectiveness of forestry hydraulic rules through the forest practices compliance monitoring and adaptive management

programs. WDFW could also influence forest practices rules through their position on the Forest Practices Board.

Finally, on page 129 under “Authority to Implement Idea” we oppose the idea of granting WDFW civil authority for enforcement for Forest Practices Act purposes.

Another possibility is not to require HPAs if a Shoreline Substantial Development Permit (under the Shoreline Management Act) is required. It is redundant to have the WDFW review projects with SMA issues. Please see the attached Appendix #1 which illustrates the high degree of overlap and redundancy between Shoreline Substantial Development Permits (SSDPs) under the SMA, approved by Ecology (RCW 90.58), and Hydraulic Project Approval, approved by WDFW (RCW 77.55).

In addition, under the SMA, “waters of state” now includes “ditches”, which triggers WDFW HPA review. This is well beyond original intent of the SMA. Therefore, AWB supports removing “ditches” from the definition of “waters of the state.”

- 3-5 Incentive based outcomes can be delivered in a wide manner of delivery systems. The process as contemplated is one such model. AWB would suggest incentive based programs allow regulated entities to be rewarded for their investments and outcomes. In addition, incentives should be used to maintain or increase preferred land uses such as agriculture and forestry practices. This process should not, however, be used to create a higher baseline for regulatory compliance that would serve as basis for increased environmental regulation, as noted on page one of this letter. New, more burdensome regulations only serve to compound a complex regulatory environment when no measurable or net environmental benefit can be determined.

- 3-6 AWB supports the goal of regulation simplification and focusing rules on those necessary to achieve specified results as opposed the multilayered and often confusing and even contradictory regulations in place at the present time. As written, however, the description is too broad based, omits key legal and policy obligations and, as such, could simply result in the addition of another layer of regulation, overregulation, or even more subjective standards rather than real reform.

For outcome based controls to work, we recommend that the language needs to include specific objectives which would be preconditions to implementation of

regulations, and regulations used must be specifically required to meet three objectives which should be built into any legislation on the topic: :

1. Regulations must be both applicable and appropriate. All too often, a regulation such as the use of buffers in natural areas, will be carried over to existing developed area where such rules are ill suited to achieve the intended result and wholly inappropriate in the circumstance presented.

2. Regulations must be reasonably necessary under the circumstances. As possible problem with the guidelines as drafted is that they could lead to situations where "any approach" is justified because the "outcome" is a good result. A clear example of this approach in action was King County's attempt to require all rural lands to set aside a large portion of property to protect the watershed. While the outcome of protecting the watershed was certainly a proper objective of local regulation, the approach used was entirely too broad, inappropriate to the circumstance and ultimately rejected by the Courts.

3. The regulation must promote the Goals of the state's Growth Management Act. The state's Growth management Act specifically spells out a goal to:

" Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries". RCW 36.70A.020 (goal 8)

As the program is a recommendation addressing natural resources in the state, it is imperative that the cited GMA goal be incorporated into the program. State agencies are charged with compliance with GMA based plans to maintain and enhance resource industries and the reform program should specifically address that goal. If not, outcome based regulation can occur at the expense of vital state resource industries which are partners in resource management and stewardship.

4. STREAMLINING QUASI-JUDICIAL BOARDS

4-1/4-6

AWB testified on October 2, 2009 before the Growth Management Hearings Boards (GMHBs) concerning possible restructuring discussions currently underway. The following is derived from that testimony.

Presently there are numerous boards and agencies all charged with administration of different rules and regulations, using different processes and with differing results. While not intentional, the different mandates supporting each of the Board's jurisdictions have been shown to lead to conflicting results (e.g. do we spread out our communities to provide open and green space to absorb storm water runoff and reduce the heating affect of asphalt, or consolidate and infill our cities to increase density and reduce greenhouse gas causing traffic?) While much of the problem rests with conflicting mandates from the Legislature, some stems from a lack of knowledge or sensitivity to the bigger picture before one issue agencies and boards and potential "turf wars" that may be overcome by such a consolidation.

The multitude of boards has also encouraged a multiplicity of appeals, which has the effect of being "sand in the gears" of reasonable economic development, as well as a cost item that the Natural Resources Subcabinet has recognized.

For this purpose, AWB reviewed a variety of regulatory options in light of the draft Triangle Associates survey and report.

From a policy point of view concerning potential GMHB restructuring:

AWB supports timely, cost effective and accurate decision making based on the record and applicable laws, not political push or public sentiment. AWB believes the consolidated boards, including the Growth Boards as the land use component of a consolidated system, can afford the cost savings envisioned and provide the results desired.

AWB supports the idea of regional representation as it is important that the land use board, whatever its numerical composition, be reflective of the regional differences built into the current legislation. Such a program assures the local voice will be heard, but provides the flexibility to respond to shifting case loads as different issues arise and need to be addressed.

AWB believes the political balance or technical expertise (planner or scientist) is not as important as the quality of the decision maker, particularly given the "nonpartisan" nature of many locally elected officials. And the need for an "elected official" is less important than Board members who truly have a well rounded background and understanding of GMA and land use planning issues regionally. AWB believes that a legal background is essential on every panel as many of the issues raised concern technical legal issues as well as the broader process and public interest issues and we believe that legal expertise among a significant number of Board members is necessary.

AWB-member attorneys who frequently practice in land use and environmental cases on behalf of AWB member businesses and landowners, support the notion that Superior

Courts are ill equipped to deal in a timely fashion with the type of legislative, large record cases that arise in the GMA-related cases and would not recommend abandoning the administrative appeals to the land use board in favor of direct appeals to Superior Court. In addition, where appeals occur, they would best be heard by the Courts of Appeals, as litigation which goes to Court often gets to the Courts of Appeals anyway. Skipping the Superior Court step reduces the overall delay in getting final resolution and the Appellate courts are typically better equipped to address the legal issues based on a large record in a timely fashion than Superior Courts, which spend most of their time on initial and not appellate proceedings.

AWB takes no specific position on the specific number of members on the consolidated panel, as that should be a function of the caseload. The Legislature needs to be realistic about how to staff and operate such a consolidated board to operate smoothly and efficiently within the time frames set forth in the legislation. AWB would be happy to work with the Governor and Legislature in addressing such needs as “pro tem” judges (possibly former board members or judges with civil and land use backgrounds) who can provide temporary assistance when case loads spike as a result of a major requirement (shoreline or comprehensive plan updates or periodic updates of population figures) which may result in a potential backlog, but only for a limited period.

OTHER AWB RECOMMENDATIONS RELATED TO STREAMLINING ENVIRONMENTAL PERMITTING AND COMPLIANCE (not in any order of priority).

In addition to AWB’s specific comments above, we respectfully request consideration of the following ideas:

Growth Management Act (GMA)

1. Clarify the Growth Management Hearings Board (GMHB) deference standard to local government. For instance, if a local government has adopted plans or regulations, those decisions should stand unless their adoption was clearly erroneous, etc. This will reduce frivolous appeals to the GMHBs and save valuable staff time and money.
2. Provide for no further appeal from a GMHB compliance determination. Once a GMHB determines a local government to be in compliance with the GMA following an appeal, there should be no further appeals. This will reduce additional appeals and save valuable staff time and money.
3. Limit the right to appeal (standing) to a GMHB to residents of the jurisdiction. This will reduce frivolous appeals and save valuable staff time and money.

4. Eliminate the Dept. of Commerce review of local governments' comprehensive plan and development regulations. This is redundant and a waste of valuable staff time and money.
5. Shorten the appeal period from 60 to 21 days for appeals of comprehensive plan and development regulations appeals. This would be consistent with the Land Use Petition Act (LUPA), would reduce frivolous appeals and save valuable staff time and money.

State Environmental Policy Act (SEPA)

1. Under existing SEPA law, a variety of exemptions exist for small developments (based on project size, etc.) The existing exemption threshold levels could be raised, which means fewer projects would require review by state agency employees, which would reduce paperwork and redundancy and save valuable staff time and money.

Too many environmental checklists, studies and DEIS go to state agencies for review on projects which are consistent with comprehensive plans and environmental regulations adopted by local jurisdictions. By increasing urban, rural and industrial threshold limits, demands on agency time and personnel could be reduced saving both time and money.

For instance, exempting shoreline permits, plats, site plans, and other development permits for projects with a threshold of 40 acres or 100 units, whichever is smaller, from SEPA threshold review requirements would permit most projects to skip the SEPA threshold step and eliminate thousands of pages of paper sent to state agencies every week for processing.

Land use authority and the environment are still protected since local development is still required to deal with traffic, water quality, critical areas, public health and safety issues under regulations already in place. State agencies can still be notified of projects and comment if they believe it necessary, but the necessity of handling 99 checklists to find one worth commenting on would be eliminated.

Hundreds of pages of checklists are sent to government agencies each week for review which are routine, covered by local regulatory controls and yet agencies are required to receive and theoretically review each. Little substantive gain is achieved through the process.

All too often, projects get held up in SEPA determinations which duplicate the underlying regulatory requirements. The need for a checklist suggest the need for further comment and review and delay occurs when local officials want to defer to state agencies "expertise" on certain issues. Delay then occurs while local agencies are waiting on state agency comments on a particular issue but the comments are delayed due to lack of personnel or other priorities causing much duplication of effort and delay.

This is an efficiency in government proposal which would have little if any impact on environmental protections which are already in place and covered under the base permit review

criteria. A move to regulatory efficiency was one of the fundamental premises of GMA--one which has yet to be realized.

2. Expand SEPA planned action provisions. If a development fits within certain defined parameters, SEPA would not be required. Planned action provisions could be expanded to include fewer projects, which translates to less work for state agency employees.
3. Eliminate the SEPA Register maintained by the Department of Ecology. This Register has been in existence since SEPA's inception and is no longer necessary or relevant with existing on-line resources which can now be found on local governments' websites.
4. Eliminate exception for SEPA exemptions when there is critical area.

Habitat Conservation Plans (HCP)

1. The Department of Natural Resources (DNR) is currently spending a lot of money preparing a Habitat Conservation Plan (HCP) on several aquatic lands activities, including shellfish farming. The purpose of the HCP is Endangered Species Act (ESA) compliance. At the same time, the Corps and the shellfish growers are engaged in an ESA consultation on a programmatic permit that would cover all existing farms in Washington, including farms on DNR leases. Any new farms will require Corps permits and, therefore, individual ESA consultations. Therefore, the DNR HCP effort is redundant and not cost-effective.

Shoreline Management Act

1. Revise the SMA to entirely eliminate Ecology substantive review of shoreline conditional use and variance permits for jurisdictions which have adopted Ecology-approved SMPs pursuant to the new 2003 guidelines (WAC 173-26). If a local government reviews and approves a conditional use or variance permit pursuant to an SMP adopted after extensive public process under the most current state-issued regulatory guidelines, that should be sufficient. The landscape has changed. There is no longer a need for Ecology to perform review in order to achieve state-wide consistency, as was the case when the legislature adopted the SMA in 1972.
2. Revise the SMA to eliminate SHB de novo appeal for shoreline permits (SSDP, conditional use, and variance) in jurisdictions which have adopted Ecology-approved SMPs pursuant to the 2003 guidelines as long as the local jurisdiction provides the opportunity for a local open record hearing on the underlying application as a matter of local project review under RCW 36.70B.120. Under this proposal, shoreline permits would be treated as any other land use decision, appealable under LUPA (RCW 36.70C). The SHB could be phased out as jurisdictions come into compliance with the new guidelines, except as to fine appeals, for which responsibility could be re-allocated. This would result in substantial savings to taxpayers and applicants alike, and should result in faster overall review of shoreline appeals.
3. Revise the SMA to expressly provide that project proponents do not need to apply for approval of an activity which is exempt under both SEPA and the SMP, and for which no other permits or approvals are required, unless an Ecology CZM determination is required for an

associated federal permit. If the project is classified as *exempt* from application of the SMA and SEPA, and no state action is otherwise needed on the application, the project should truly be *exempt* from project review. Right now applicants must apply to the local government to have an exempt project deemed exempt.

Water Code/Water Rights

1. Clarify the cost-reimbursement mechanism under RCW 90.03.265. Under current law, an applicant for a water right permit/decision from Ecology may enter a cost-reimbursement agreement for processing (and expediting) the application, but only if the applicant agrees to pay for processing of all prior-filed applications from the same water body. The process is unduly cumbersome and expensive. We often end up in extensive discussions about the extent of the water body (i.e. if the application is in the Teanaway River, do we need to pay for processing of all applications in the Teanaway only, or the upper Yakima River, or the entire Yakima River, or the entire Columbia River)? The results have been inconsistent. Furthermore, there is a question of whether a prior-filed applicant may simply agree not to have the application process. Again, there have been inconsistent answers from Ecology on this issue. Finally, there is the question about consultant selection. Currently, the consultant selection has been on a rotating basis for a pre-selected consultant pool. The consultant is asked to prepare its own scope of work, which is then sole-sourced to the consultant who prepared it.

2. Eliminate the Dept. of Ecology's review of conservancy board decisions in water rights. This is redundant.

In the Conservancy Board review process, Ecology provides technical assistance to Boards and typically posts draft ROEs on Ecology's website. However, Ecology has reversed Conservancy Board decisions even when the Board's decision addresses all of the issues raised by Ecology in the permitting process. Then, when the applicant appeals the decision to the PCHB and Ecology lists its legal issues for the appeal, it then raises additional issues that were never raised during the Conservancy Board process. This result is costly for the Board, applicants, Ecology, and the AG's office. Particular Conservancy Boards would be very supportive of streamlining the system so that Ecology brings forward its comments in a meaningful way. This is especially important to water users given that Ecology's water resource program has been reduced, so the CB's are even more important now.

3. Public Comment on Water Rights.

The current public comment process creates a situation where opponents to permits or projects may be better served by not raising public comments and then appealing the Ecology decision to the PCHB. This is because even if a party does not submit a comment opposing a permit decision, that party can still appeal the decision to the PCHB and before the PCHB, can raise whatever issues it wants to because the PCHB has de novo review. Also, the PCHB is unlike the

Growth Boards which require that a party have submitted comment on a particular issue in order to have standing to appeal that particular issue.

AWB therefore requests that an opponent to a permit or project must provide comments during the public comment period in order to appeal a decision.

4. Remove the Dept. of Ecology from groundwater issues if there is a local government program.

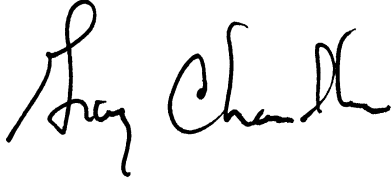
Water Quality / Stormwater Permits

1. The reorganization of state environmental agencies presents new opportunities to better focus current Ecology efforts related to stormwater. AWB member companies are frustrated with how overly and unnecessarily complex and costly the Industrial Stormwater General Permit (ISWGP) has become. Instead of focusing on source control that leads to greater environmental improvement, the Department has instead engaged in a process of ratcheting down on permit requirements that are very costly and sometimes not even technologically achievable and offer little to no environmental gain. Some businesses permitted under the ISWGP believe that the state, as well as the business community, would be better served if the Environmental Protection Agency took over the stormwater program and implemented the Multi-Sector General Permit, as many states have already done. Whatever the final outcome of natural resource agency reorganization, an improved focus on water quality and stormwater efforts given the state's limited resources and abilities needs to occur.

2. The Washington State Department of Agriculture (WSDA) has lead agency authority from the U.S. Environmental Protection Agency (EPA) for pesticide regulation. Ecology has the same authority for Clean Water Act enforcement. Several lawsuits have resulted in the need for NPDES permits for pesticide use in and adjacent to water. As Ecology develops, administers and modifies the permits, they have minimal interaction with WSDA. This often leads to unnecessary complications, duplication of data and best management practices (BMPs) that are difficult to comply with and enforce. A memorandum of understanding (MOU) outlining cooperation between the two agencies could streamline the process, save Ecology time and money, and improve efficiency and customer service. The Ecology Environmental Assessment Division already has an MOU with WSDA for water monitoring relating to pesticides. The Ecology Water Quality Division has had minimal cooperation on NPDES permits. By deferring to WSDA's expertise in specific areas related to pesticide regulation, both agencies and the public would be better served.

AWB applauds the leadership of this effort. We hope we can play a meaningful role in generating substantial change to, as the document suggests, *"the current myriad of laws, created over the course of decades in an ad hoc, some say haphazard manner"*. Thank you again for your time and consideration of our comments and suggestions. Please do not hesitate to contact me with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary Chandler". The signature is fluid and cursive, with the first name "Gary" written in a larger, more prominent script than the last name "Chandler".

Gary Chandler
Vice President of Government Affairs
Association of Washington Business

cc: Rogers Weed, Department of Commerce Director
Marty Brown, Governor's Legislative Director
John Mankowski, Governor's Executive Policy Staff