

ENVIRONS

**Washington Department of Ecology Updates
Rulemaking Suspensions**

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Breaking Developments In Environmental Law

The Washington Department of Ecology ("Ecology") has released its latest list of rulemaking proceedings that will be suspended in compliance with Gov. Christine Gregoire's November 17, 2010, executive order directing state agencies to suspend non-critical rulemaking. The list is relatively short, and it appears that many of Ecology's proposed regulations, particularly those dealing with greenhouse gas emissions, will continue through the rulemaking process notwithstanding the Governor's suspension order.

The Governor said in her executive order last month that the rulemaking suspension is necessary because "severe budget constraints [make] it difficult for small businesses and governments to monitor and respond to proposed changes in rules and policies." She directed state agencies to suspend immediately all "non-critical" rulemaking through December 31, 2011, because of the need to provide a "stable and predictable regulatory and policy environment," to "conserve resources for small businesses and local governments, and to promote economic recovery." The Governor's order came with a set of guidelines, including a number of exemptions, for determining what constitutes non-critical rulemaking subject to the suspension. Ecology issued an initial list of determinations and then solicited input from citizens, stakeholders, and local and tribal governments.

Ecology issued an update on December 8, 2010, which largely affirms the initial suspensions, but also makes some important changes. Under Ecology's latest determinations, only seven rulemaking proceedings are being suspended, while 18 other proposed rules will continue through the process, and eight proceedings are in the "to-be-determined" category.

Delayed Rulemaking

The most visible of the suspended rulemakings are Ecology's proposals to revise and update the regulations implementing the state Model Toxics Control Act ("MTCA"). That statute is our state's equivalent to the federal Superfund law, also known as CERCLA, and the regulations provide the framework for cleanup decisions under MTCA. Ecology's stated rationale for suspending the MTCA revisions is that the existing rules already incorporate sufficient flexibility to make case-by-case decisions, and that the agency expects greater demand for technical support with more site-specific decisions.

Also suspended are the following proposed rulemaking:

- Setting fees for manufacturers of mercury-containing light bulbs to fund collection, transport and recycling programs. Ecology did not anticipate starting the rulemaking process on this issue until late 2011.
- Revisions to dangerous waste regulations to comply with federal changes. The affected stakeholders were not asking Ecology to continue pursuing the updates.
- Comprehensive reclaimed water rulemaking to address commercial and industrial uses, land applications, direct recharge, wetland discharges and stream flow augmentation, among others. The agency will develop a guidance for reclaimed water to address some concerns by stakeholders and existing permitting will continue.
- Wood-burning stove rule updates to reduce emissions, align the rule with proposed 2011 legislation and incorporate the federal Environmental Protection Agency ("EPA") revisions planned next year. Ecology determined that the process can wait until 2012 after the legislature has adjourned and the EPA has adopted its final revisions.

Rulemaking to Continue

Many more Ecology rulemaking proceedings will continue under one or more exemptions provided for in the Governor's guidelines, including the following:

- Sediment Management Standards – The rules currently are not clear on what sediment cleanup levels will protect human health, fish and wildlife, and particularly the impact of bioaccumulative chemicals. Local governments, tribes and environmental groups have pressed for this rulemaking to continue, although part of the confusion was due to conflicts between the sediment standards and MTCA regulations. The revisions of the latter having been suspended for a year.
- Children's Safe Products Act – The rules under this statute would establish a reporting schedule for chemicals of high concern in children's products. The agency considers this exempt as "pilot" rulemaking that involves substantial participation by interested parties.
- Underground Storage Tanks ("UST") – The proposed rules would bring the state into compliance with new federal standards. Without the revisions, the state would lose \$1.8 million in federal grants that cover the UST program's federal compliance costs.
- Water Quality Standards – This rule would correct or clarify portions of the surface water quality standards. Errors in at least one permit and two processes currently are affected by incorrect information. Ecology says that stakeholders have asked for the revisions, and to date one permittee has appealed its permit based on the existing errors.
- Brake Pads – New legislation requires brake pad manufacturers to phase out certain toxic metals, such as copper, from brake pads. Ecology's rules would set a proof of certification mark for packaging and set up data collection concerning the toxic metal content of brake pads sold in the state and create exemptions. The agency says that brake pad manufacturers are urging adoption of rules so that criteria are clear when the law takes effect in 2013.
- Municipal Solid Waste Landfill Criteria – New federal regulations need to be adopted into existing state rules to make sure Ecology has full federal approval. Regulated landfill

owners also requested continuation of the rulemaking to adopt the required federal changes.

Greenhouse Gas Regulations Continue

Ecology also will not be suspending the rulemaking process for several of its climate change-related regulations, including the greenhouse gas reporting rule, as well as the state's air pollution sources and operating permit regulations. The reporting rule is required by state law and is needed to harmonize the state reporting with requirements adopted by the federal EPA. The air pollution sources and operating permit regulation revisions also are prompted by EPA requirements to add greenhouse gas thresholds to state permitting by January 1, 2011.

Ecology moved from "to be determined" to "continue" a proposed rule on lower emission vehicles. The updates to its existing rule are to comply with California's vehicle manufacturer reporting requirements. Washington opted to follow California's vehicle emission standards; consequently, it must periodically update our rules to align with changes in California's regulations.

Ecology moved from "delayed" to "to be determined" a proposed rule that would have imposed new restrictions on diesel engine idling for public fleets. Whether the agency moves forward on this rule will depend on how much local governments are concerned about non-compliance with more stringent federal air quality standards that may be adopted next year.

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