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Chapter 6. Planning and Environmental Legislation

A. State Environmental Policy Act

1. Background

The State Environmental Policy Act of 1971 (SEPA) is Washington's fundamental environmental law. SEPA mandates environmental analyses of many actions and policies by all agencies of state and local government. SEPA was designed to make environmental consciousness a major component in all government decisions.

The State Environmental Policy Act of 1971 (SEPA) provided Washington state's basic environmental charter. Prior to its adoption, there were concerns that government decisions did not reflect environmental considerations. State and local agencies had responded that there was no authority for them to address environmental issues. SEPA, modeled after the National Environmental Policy Act (1969), was enacted to fill this need. It gives agencies the tools to both consider and mitigate for the environmental impacts of proposals. Provisions were also included to ensure the involvement of the public, tribes, and interested agencies in decisions with environmental impacts.

SEPA applies to all state and local government decisions, unless they are categorically exempt. This includes land use decisions made in the comprehensive plan, development regulations, and during project review.

The Land Use Regulatory Reform Act of 1995 required local governments to better integrate environmental analysis into their land use decision-making process. It recognized that the GMA is a fundamental building block for regulatory reform. By combining good environmental analysis with land use decisions in the comprehensive plan and regulations, projects consistent with those decisions should be more easily processed and approved. (See Chapter 3, Section F, for a discussion of integrated project review.)

Principles Of SEPA/GMA Integration

1. GMA is the building block for regulatory reform.
2. Use the same processes and often the same documents to make land use decisions and analyze the environmental impacts of those decisions.
3. Do not revisit or revise land use decisions made in the comprehensive plan and development regulations at the project level.
4. Determine consistency between a proposed project and applicable regulations or plan through a project review process that integrates land use and environmental impact analysis, so that governmental and public review under development regulations and the environmental process runs concurrently and not separately.
5. Do not duplicate requirements for environmental analysis and studies, and for mitigation of environmental impacts of a proposed project, that exist in different land use and environmental laws. Supplemental authority under SEPA should only be used to the extent existing requirements do not adequately address specific probable adverse environmental impacts.
6. Identify early in the project review process the existing environmental documents that evaluate the impacts of the proposed project. The primary role of project environmental review is to focus on gaps and overlaps that may exist in applicable laws and requirements related to a proposed action.

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While detailing all SEPA rules is beyond the scope of this chapter, the following guidelines should aid in understanding SEPA. (For a more detailed review, see Chapter 43.21C RCW, Chapter 197-11 WAC, and the SEPA Handbook)

2. The Environmental Review Process

The environmental review process involves a number of steps that are briefly described below.

a. Provide a pre-application conference for project proposals (optional)

Although not included in the SEPA rules for project review, the Department of Ecology recommends that agencies offer a process for the applicant to discuss a project proposal with staff prior to submitting a permit application or environmental checklist. The applicant and agency can discuss existing regulations that would affect the proposal, the steps and possible timeline for project review, and other information that may help the applicant submit a complete application.

b. Determine whether SEPA review is required

Once a proposal is made, the agency must determine whether environmental review is required for the proposal by: (1) defining the entire proposal;¹ (2) identifying any agency actions (plans, permits, licenses, etc.);² and (3) deciding if the proposal is categorically exempt. Certain types of proposals have been found to be categorically exempt from environmental review in the statute and SEPA Rules.³ If the proposal does not involve an agency action, or there is an action but the proposal is categorically exempt, environmental review is not required.

c. Determine lead agency

If environmental review is required, the “lead agency” is identified.⁴ This is the agency responsible for the environmental analysis and procedural steps under SEPA. In land use decisions, both at the comprehensive plan and project level, the lead agency is usually the county or city with jurisdiction. However, the county or city will not be the lead agency when a local permit is not required, another agency is the proponent, or another agency is designated under the SEPA rules as lead for a specific type of proposal.⁵

d. Evaluate the proposal

An environmental checklist must be filled out detailing the impacts of the proposal to the various elements of the built and natural environment.⁶ In the case of a permit for a project, the checklist would be submitted with the permit application. The lead agency must review the environmental checklist and other information available on the proposal and evaluate the proposal's likely environmental impacts. The lead agency and applicant may work together to reduce the probable impacts by either revising the proposal or identifying mitigation measures that will be included as conditions.

e. Assess significance and issue a threshold determination

After evaluating the proposal and identifying mitigation measures, the lead agency must determine whether a proposal would still have any likely significant adverse environmental impacts. The lead agency issues a threshold determination.⁷ This is either a determination of nonsignificance (DNS), which may include mitigation conditions, or a determination of significance (DS) and scoping if the proposal is determined to have a likely significant impact.

If the environmental review officer finds more than a moderate risk of significant environmental impact by the proposal, a DS will be issued.⁸ The issuance of a DS requires the preparation of an environmental impact statement (EIS). A scoping document is issued with the DS to determine the scope of the environmental impacts that will be analyzed in the EIS.

Until recently, direct judicial review of an agency's threshold determination was unavailable until final action was taken on the proposal. There is an express legislative prohibition against orphan SEPA appeals that has been upheld by the courts.⁹ In other words, SEPA does not create a cause of action unrelated to a specific governmental action. The intent was to avoid piecemeal adjudication of SEPA compliance.¹⁰ In 1998, the Washington Supreme Court granted a developer's request for a writ of certiorari based on a decision by Snohomish County requiring an EIS for a residential development.¹¹ The court reasoned that application of the SEPA rules,¹² which call for interlocutory review coupled only with review of a final action, might "improperly increase environmental analysis burdens and project delay."¹³

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f. The EIS

The EIS will analyze the probable environmental impacts of the proposal and reasonable alternatives to the proposal, including possible mitigation measures to reduce the environmental impacts of the proposal. A reasonable alternative is a feasible course of action that meets the proposal's objectives but at a lower environmental cost.

An EIS is processed in two phases.¹⁴ First, a draft EIS is prepared by the applicant or the reviewing government, as provided in the ordinance. The EIS describes the project, a no-action alternative, and reasonable alternatives¹⁵ that would permit the applicant to achieve the desired objective in ways that may have different impacts. Once the draft is complete, it is circulated to agencies, tribes, and the community at large for a 30-day comment period. A hearing on the issue may be held, but is not mandatory.

Once comments on the draft EIS are received, corrections made, and questions answered, a “final EIS” is published.¹⁶

The final EIS must be published for seven days before an agency may take final action on a project or proposal.¹⁷

The final EIS may recommend conditions, based on written SEPA policies, which can be used to mitigate environmental impacts.¹⁸ Agencies have the authority under SEPA to condition or deny a land use action based on environmental impacts even where the proposal complies with local zoning and building codes.¹⁹ The courts have recently confirmed the authority of agencies to impose mitigation conditions as part of a mitigated determination of nonsignificance (MDNS) to bring a project below the threshold for preparation of an EIS.²⁰ With an MDNS, promulgation of an EIS and intense public participation are rendered unnecessary because the mitigated project will no longer cause significant environmental impacts.

A supplemental EIS (SEIS) shall be prepared if there are substantial changes to a proposal, or if there is significant new information relating to adverse environmental impacts of the project.²¹

To be adequate, an EIS must present decisionmakers with a “reasonably thorough discussion of the significant aspects of the probable environmental consequences” of the agency’s decision. That is, an EIS must provide sufficient information to allow officials to make a reasoned choice among alternatives.²²

g. Use of SEPA in decision making

The agency decision-maker must consider the environmental information in deciding whether to approve a proposal. Decision-makers may use their authority under SEPA to condition or deny the proposal. However, they must have adopted substantive policies in their SEPA rule or ordinance to provide this authority and the decision must be based upon information in a SEPA document.²³

If a project is to be denied on environmental grounds, the grounds must be identified in environmental documents, and conditions identified in written SEPA policies. A project may be denied if reasonable alternatives do not exist to mitigate a substantial impact.²⁴

All decision-makers making a final recommendation or decision on a project must review the environmental documents for the project.

h. Appeals under SEPA

Appeals under SEPA may be procedural or substantive.²⁵ Procedural appeals include the appeal of a threshold determination or the adequacy of an EIS. A substantive appeal is a challenge to an agency’s use of or failure to use its SEPA substantive authority. A county or city may or may not choose to provide administrative appeals under SEPA. If appeals of project decisions under SEPA are provided, they must be combined with the permit decision appeal in not more than one open record hearing and one closed record appeal. If no administrative appeal is provided for projects, then appeals go directly to superior court. (See project review discussion in Chapter 3.)

The growth management hearings boards have jurisdiction over SEPA appeals of growth management planning decisions such as comprehensive plan or development regulation adoptions and amendments.²⁶

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PRACTICE TIP: It is a good practice to make a specific finding of adequacy. Inherent in this review is the right to send the SEPA documents back to the environmental review officer if an environmental issue is not adequately addressed in the decision-maker’s mind.

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The SEPA appeals process is confusing, even to those who practice daily in the field. SEPA need not be intimidating if the following guidelines are kept in mind:

SEPA GUIDELINES

All land use decisions by the community should be accompanied by SEPA documents (DNS, DS, or EIS), unless a specific exemption is spelled out in writing.

All SEPA-based mitigation must be based on written adopted policies, with written findings as to how the project creates the need for the condition (the nexus); and how the condition properly mitigates the impact (reasonableness).

Environmental policies should be specific and consistent with comprehensive plan policies. (Example: Since one effect of a desired increase in density is increased congestion in urban areas, there should not be a SEPA policy requiring mitigation or denial of a project that creates congestion. Defining acceptable levels of service for all public facilities and services in SEPA policies will do much to achieve this result.)

B. Water Quality Protection

1. Key Issues in Water Quality Protection

We live in an interdependent ecosystem in which water quality plays a vital role. Cutting across political boundaries, long term water quality protection depends on cooperation among local communities and jurisdictions. Effective water quality protection begins with watershed management.²⁷ Reducing the volume of toxic pollutants that enters our watersheds - and responsible land uses - are key to improving water quality throughout our region. Many cities and counties in Washington state are working together to develop cooperative or comprehensive water quality programs. Structuring a successful water quality program at the local level is essential.

a. Water Quality Protection Must Begin at the Local Level

Just as water systems cross and extend beyond political boundaries, successful water quality protection must be cooperative, consistent, and coordinated at all levels. Pollution from one city or county, for example, will degrade water quality in neighboring jurisdictions. The problem is shared by all: “We are all living downstream.”

b. Responsible Water Management, Not “Quick Fix” Solutions

Recognizing the interdependency of our actions and their cumulative effects on groundwater, wildlife habitats, fisheries, and other resources is the first step toward responsible water quality protection. Short term, “quick fix” solutions that merely shunt pollutants from one jurisdiction to another is not the answer. Effective water quality protection depends on comprehensive action plans, in which local jurisdictions work together and pool resources to reduce or eliminate adverse impacts on water quality.

c. Key Concepts in Water Quality Protection

- 1) **Systems Approach:** Considers relationships and dependencies among components, as in food chains and ecosystems.
- 2) **Cumulative Effects:** A single activity may not cause a problem, but adding more activities to an area over time may produce negative effects.
- 3) **Source:** Addressing negative impacts at their source, and preventing them before they occur (i.e., in place and time) is much less expensive than rehabilitation or dealing with effects on water quality “further down the pipe.”
- 4) **Long Term Planning:** Water quality protection requires long term planning to cope with 10, 20, and 50-year impacts. Local governments need to consider the legacy they are leaving for future generations.

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5) Cooperation and Coordination: Local decision-makers, staff of local government departments and citizens need to address water quality issues cooperatively.²⁸ Neighboring cities and counties, local jurisdictions, regional, tribal, state and federal agency staff all have mutually dependent concerns.

2. A Brief Overview of Water Quality Legislation

Key pieces of federal and state legislation related to water quality are listed below. Rules and regulations adopted by state agencies generate advisory standards and minimum guidelines for local jurisdictions. These are incorporated into the Washington Administrative Code.

Water Quality Legislation

General Water Quality

National Environmental Policy Act (NEPA)

State Environmental Policy Act (SEPA)

Federal Clean Water Act (Water Pollution Control Act), 1972

Amended to Water Quality Act of 1987:

Section 208 Plans

Section 301, National Pollution Discharge Elimination System Permits (NPDES)

Section 303, Stream Classification

Section 320, Estuary Management

Section 401 Certification

Section 404 Permits

Section 505, Legal Actions

Federal River and Harbor Act (Section 10 Permit)

Washington Centennial Clean Water Bill

Puget Sound Water Quality Act

Washington Water Pollution Control Act

Washington Water Resources Act

Washington Forest Practices Act

Water Quality Standards - Chapter 173.201 WAC

Revised Standards - Chapter 173.203

Shorelines and Coastal Zones

Federal Coastal Zone Management Act (CZMA) of 1972

Washington Shoreline Management Act (SMA)

Habitat Protection

Federal Endangered Species Act²⁹

Federal Fish and Wildlife Coordination Act

Washington State Hydraulic Code³⁰

Groundwater

Federal Safe Drinking Water Act

Washington Groundwater Protection Act

Groundwater Management Guidelines - Chapter 173-100 WAC

Groundwater Quality Standards - Chapter 173-200 WAC

Nonpoint Pollution

Washington State Nonpoint Rule - Chapter 400.12

WAC Septic Systems - Chapter 248.96 WAC

3. Water Quality Protection Programs

- 1) Puget Sound Action Team (PSAT) programs include Watershed Ranking and Watershed Action Plans.
- 2) Ongoing programs initiated through the federal Clean Water Act, such as Section 208 plans and National Pollution Discharge Elimination System (NPDES) permits, administered by the Washington State Department of Ecology³¹; and Section 404 permits administered by the U.S. Army Corps of Engineers.
- 3) Specific Storm water Management and Wetlands Protection programs, which have evolved from implementing the PSAT Management Plan.
- 4) Programs stemming from specific legislation, such as the Washington Shoreline Management Act, which called for Shoreline Master Plans; the State Hydraulic Code, which requires a Hydraulic Project Approval permit administered by the Washington Department of Wildlife and Department of Fisheries; and

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the Washington Groundwater Protection Acts, which provide guidelines for developing Groundwater Management Areas.

5) Comprehensive plan elements required by the Washington State Growth Management Legislation, specifically, provisions:

- (a) To cleanse water before it enters Puget Sound;
- (b) To protect of critical aquifer recharge areas; and
- (c) To require protection of potable water supplies.

Endnotes For Chapter 6

- 1 WAC 197-11-060(3).
- 2 WAC 197-11-060(3)(b).
- 3 RCW 43.21C.035, 036, 037, 038, 0381, 0382, 039; WAC 197-11-305 and Part Nine.
- 4 WAC 197-11-050.
- 5 WAC 197-11-938.
- 6 WAC 197-11-315.
- 7 WAC 197-11-330.
- 8 WAC 197-11-360.
- 9 RCW 43.21C.075(3)(a); 43.21C.075(6)(c); Saldin Sec., Inc. v. Snohomish County, 80 Wn. App. 522, 910 P.2d 513, review granted, 129 Wn.2d 1022 (1996).
- 10 Foster v. King County, 83 Wn. App. 339, 343-346, 921 P.2d 552 (1996) (statutory writ of review under ch. 7.16 RCW is not available to obtain judicial review of threshold determinations). See also R. Settle, The Washington State Environmental Policy Act: A Legal and Policy Analysis, § 20, at 244 (1995).
- 11 Saldin Securities, Inc., v. Snohomish County, 134 Wn.2d 288, 949 P.2d 370 (1998) (a constitutional writ is available if the project proponent alleges facts that, if verified, indicate the threshold determination was il legal or arbitrary and capricious).
- 12 RCW 43.21C.075(6)(c).
- 13 Saldin, 134 Wn.2d at 292.
- 14 WAC 197-11-405(1)-(3).
- 15 WAC 197-11-440(5).
- 16 WAC 197-11-455.
- 17 WAC 197-11-460.
- 18 WAC 197-11-660(1).
- 19 Donwood, Inc. v. Spokane County 1998 WL 209416 (Wn. App. Div. 3).
- 20 Anderson v. Pierce County, 86 Wn. App. 290, 302-305, 936 P.2d 432 (1997).
- 21 WAC 197-11-405(4).
- 22 The courts have reviewed the adequacy of EISs in three recent decisions, CTO v. Department Of Transp., 90 Wn. App. 225, 951 P.2d 812 (1998); King County v. Friends of the Law, 90 Wn. App. 257, 951 P.2d 1142 (1998); Kiewtt Constr. Group v. Clark County, 83 Wn. App. 133, 920 P.2d 1207 (1996).
- 23 WAC 197-11-660
- 24 WAC 197-11-660.
- 25 RCW 43.21C.075 and WAC 197-11-680
- 26 RCW 36.70A.280
- 27 ESHB 2514, effective June 11, 1998, established a watershed management process to develop in-stream I fow levels, water quality and habitat plans. A primary purpose of watershed planning under this bill is to address the decline of salmon stocks listed under the Federal Endangered Species Act.
- 28 E2SHB 2339, effective, June 11, 1998, establishes a coordinated wetland mitigation bank pro gram at the State level to increase the success of wetland mitigation projects. Local governments and citizen groups are working together to identify wetland mitigation

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- 29 sites that provide a net improvement in wetland functions and values over smaller, site specific mitigation requirements. ESHB 2496, effective June 11, 1998, set out a coordinated framework for responding to the salmon crisis. The legislation includes the creation of a Salmon Recovery Office in the Governor's Office to provide overall coordination of salmon recovery efforts. Prioritized habitat project lists and work schedules will be developed by counties, cities and tribal governments. ESHB 2836 also established a pilot program for the recovery of steelhead in the Lower Columbia River.
- 30 S2HB 2879, effective April 1, 1998, facilitates the review and approval of fish habitat enhancement projects. The bill also addresses fish passage barriers and establishes a system to inventory and prioritize barriers on a state wide basis.
- 31 SSB 6161 recently modified Ecology's dairy waste management program by requiring that every dairy be inspected by Ecology every two years. Ecology may conduct additional inspections as necessary to ensure compliance with state and federal water quality requirements.