

# State Environmental Policy Act cumulative impact review for a large shoreline project

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November 19, 2013

# SEPA review

- SEPA overlays and supplements all other laws
- SEPA is the state's most fundamental expression of environmental policy
- Port districts are “lead agencies” and are responsible for carrying out SEPA's procedural responsibilities. WAC 197-11-758
- When acting as both the project proponent and lead agency, port districts must carry out lead agency responsibilities objectively.

# SEPA review of “actions”

- SEPA review is required for all “actions” unless the action “categorically exempt” WAC 197-11-310(1).
- List of categorical exemptions is found in WAC 197-11-800.
- “Actions” include “non-project” and “project” actions.
  - Non-project actions include plans
  - Project actions include capital projects
- Legislative actions such as the adoption of resolutions does not require SEPA review. WAC 197-11-704.

# Lead Agency Responsibilities under SEPA

- Lead agencies are responsible for determining the scope of the proposal.
- Lead agencies enjoy significant discretion in determining which developments are components of the project.
- Lead agencies enjoy discretion in identifying which environmental impacts will receive the most focus during SEPA review.

# Co-lead agencies

- Agencies can share lead agency responsibilities.
- Disputes about lead agency responsibilities can be decided by Ecology under WAC 197-11-946.
  - Best to avoid such disputes
- Gateway project – Ecology (SEPA), Whatcom County (SEPA), and Corps (NEPA) started out as joint lead agencies.
- Held joint public hearings for scoping process.

# Project level SEPA review

- A proposal exists ...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.
- SEPA review for a large shoreline project would consist of project level SEPA review.
- Lead agency defines the components of the project.

# Defining the Proposal

- Defining the proposal for large projects is challenging.
- Agencies have discretion to determine the scope of the project, but cannot piecemeal consideration of cumulative impacts.
- Agencies are required to review together “closely- related” proposals which cannot proceed independently WAC 197-11-060(b)(I and ii).
  - Road required to reach forest land for clear cutting is an example of “closely-related” proposals

# Threshold Determination

- Threshold determination decides whether the lead agency must prepare an environmental impact statement (EIS).
- Lead agency decides whether the threshold determination should be a determination of non-significance (DNS), mitigated determination of non-significance (MDNS), or a determination of significance (DS).



# Threshold Determination

- An EIS should be prepared “whenever more than a moderate effect on the environment is a reasonable probability”
- MDNS is appropriate when a few significant adverse effects are likely, e.g. traffic impacts, and can be effectively mitigated.
- DNS is appropriate when significant adverse environment impacts are not likely.

# Scoping an EIS

- Scoping process determines which elements of the environment the lead agency will consider and focus upon in the EIS.
- Comment period provide the public and agencies the opportunity to comment on the scoping process
- For Gateway Project, the federal, state, and local agencies entered into a MOU describing their responsibilities and agreed to prepare a joint NEPA/SEPA EIS on 9/21/12.

# GHG impacts under SEPA

- “Climate” is an element of the environment identified in SEPA. WAC 197-11-444(1)(b)(iii).
- Lead agency has discretion to determine if climate change impacts are likely and how they should be addressed.
- Consideration of climate impacts would be part of a cumulative impact analysis in an EIS.

# GHG impacts as part of the consideration of “cumulative impacts”

- “Cumulative impacts” are not defined under SEPA, but are defined under NEPA as the “past, present, and reasonably foreseeable impacts” of a proposal. 40 C.F.R. 1509.7.
- Consideration of cumulative impacts was never intended to include “remote or speculative” impacts.
- Consideration of out of state impacts would likely be remote or speculative, until recently.

# When to address climate change impacts

- Made on a case by case basis by POS
- Rely on GHG emissions quantification methodologies in POS resolution 3650.
- Depends upon the nature of the project and lead agency's decision as to whether consideration of climate change impacts is appropriate.

# Port of Seattle Resolution concerning GHG impacts

- Port of Seattle updated its SEPA resolution in 2011 in Resolution 3650, as amended to include a methodology for climate change impacts.
- Port of Seattle is a member of the Climate Registry.
- Port of Seattle wanted to address GHG impacts in a defensible manner.

# How to evaluate climate change impacts

- POS methodologies include; on-road mobile sources, non-road mobile sources, stationary combustion, industrial processes, fugitive emissions, construction emissions, employee commute, water use and wastewater emissions
- Port of Seattle GHG Emissions Quantification Methodology from Resolution 3650, as amended

# Reasonable Scope of Climate Change Evaluation

- Difficult, if not impossible to evaluate climate change impacts of cargo.
  - Cargo changes, change in cargo is not a new “action” under SEPA.
  - Gateway scoping expands the definition of “action” under SEPA.
- Speculation as to how these impacts might be manifested.



# Scoping Process for Gateway Project

- Scoping occurred in multiple counties.
- Process was coordinated by the lead agencies.
- Scoping was unusually broad
  - Hearings were held in several counties
  - Many agencies, tribes, organizations, and private citizens offered comments
- Many comments focused on the potential GHG impacts from coal exports and adverse impacts from train transport.

# Ecology/Corps scoping

- Held joint scoping meetings.
- Ecology issued statement describing the scope of impacts it would consider in its EIS  
<http://www.ecy.wa.gov/news/2013/197.html>  
including greenhouse gas analysis
  - Would consider cargo ship impacts beyond WA state
  - Would evaluate and disclose GHG emissions of “end-use” of cargo

# Separate EISs

- After Ecology decided to include GHG analysis in its EIS under SEPA, Corps issued a “memorandum for the record” announcing that it would prepare a separate EIS under NEPA.
- Parties adopted an amendment to the MOU describing their separate responsibilities on 9/3/13.
- Highly unusual for co-lead agencies to conduct scoping process together, have a falling out, and announce the preparation of separate EISs.

# Cargo Ship Impacts

- Consideration of cargo ship impacts beyond WA state is a new precedent
  - Individual shipments of cargo are not individual “actions” under SEPA
  - Project level SEPA review does not typically consider impacts of shoreline projects beyond WA state boundaries
  - Ecology intends “a qualitative assessment for impacts beyond WA waters...”

# GHG “end use emissions”

- Direct GHG emissions of project can be analyzed
- Review of “end use emissions” is not typically done
  - Questionable how will this analysis will be done?
    - NEPA – GHG analysis of construction and project site
    - SEPA – GHG from “transportation of commodities and emissions from end-use of coal”
  - What will be the consequences of the GHG end use analysis?

# Effect of Ecology's Decision to Consider GHG Impacts

- Quinault Indian Nation, et. al v. City of Hoquiam, SHB. No. 13-012c
  - SHB granted summary judgment on challenge to adequacy of MDNS for crude-by-rail terminals in Grays Harbor.
  - Board focused on potential cumulative impacts of export cargo.
  - Expanded the definition of cumulative impacts
  - Appeared to rely on the Ecology precedent in Gateway proposal

# Consideration of GHG Impacts for Gateway Project

- Unclear how Ecology intends to consider GHG impacts.
- Creates a difficult precedent that cannot be contained, e.g. Quinault case.
- Evaluating cargo of vessels is not typically required, nor is it easy to accomplish.
- Evaluating end use of cargo in a foreign country is not typically required.

# Mitigation measures under SEPA

- “Mitigation measures shall be reasonable and capable of being accomplished.” WAC 197-11-660(1)(c).
- Lead agency lacks authority to impose mitigation measures on out of state impacts.
- Lead agency could not enforce mitigation measures for out of state impacts.
- Out of state mitigation measure are not “reasonable or capable of being accomplished.”



# Legality of imposing mitigation measures out of state

- Highly unlikely that out of state mitigation measures imposed by a port lead agency would withstand legal challenge.
- Questionable use of agency resources to engage in speculative analysis of out of state impacts.
- Ecology has created an ill-considered legal precedent of requiring Gateway to consider impacts of coal being transported to China.

# Unique difficulties for port lead agencies

- Port tenants do not typically communicate with SEPA lead agencies about the content of their cargo.
- Port lead agencies are likely unable to obtain reliable or meaningful information about the likely greenhouse gas effects of the cargo shipped by Port tenants.

# Conclusion

- Port lead agencies would likely find it impossible to consider the scope of climate change impacts proposed by Ecology for the Gateway project.
- The scope of climate change analysis required by Ecology for the Gateway project is likely exceeds SEPA's requirements.
  - Ecology refers to environmental review to the “fullest extent possible” in SEPA probably wasn't intended to include the entire world.

# Attachments

- Port of Seattle SEPA Resolution 3650, adopted in 2011, methodology for evaluating climate change impacts.
- FAQ on scope of EIS studies for Gateway Pacific Terminal – July 31, 2013
- Letter from Maia Bellon to Senator Doug Ericksen, August 22, 2013
- Order on S/J in SHB 13-012c, November 12, 2013