



# **SEPA Substantive Authority: Summary and Analysis of Recent Interpretations**



**Tadas Kisielius**

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# Introduction

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1. Overview of relevant SEPA principles
2. History of SEPA Substantive Authority
3. Current Trends in Scope of SEPA Review and Exercise of Substantive Authority

# SEPA Overview

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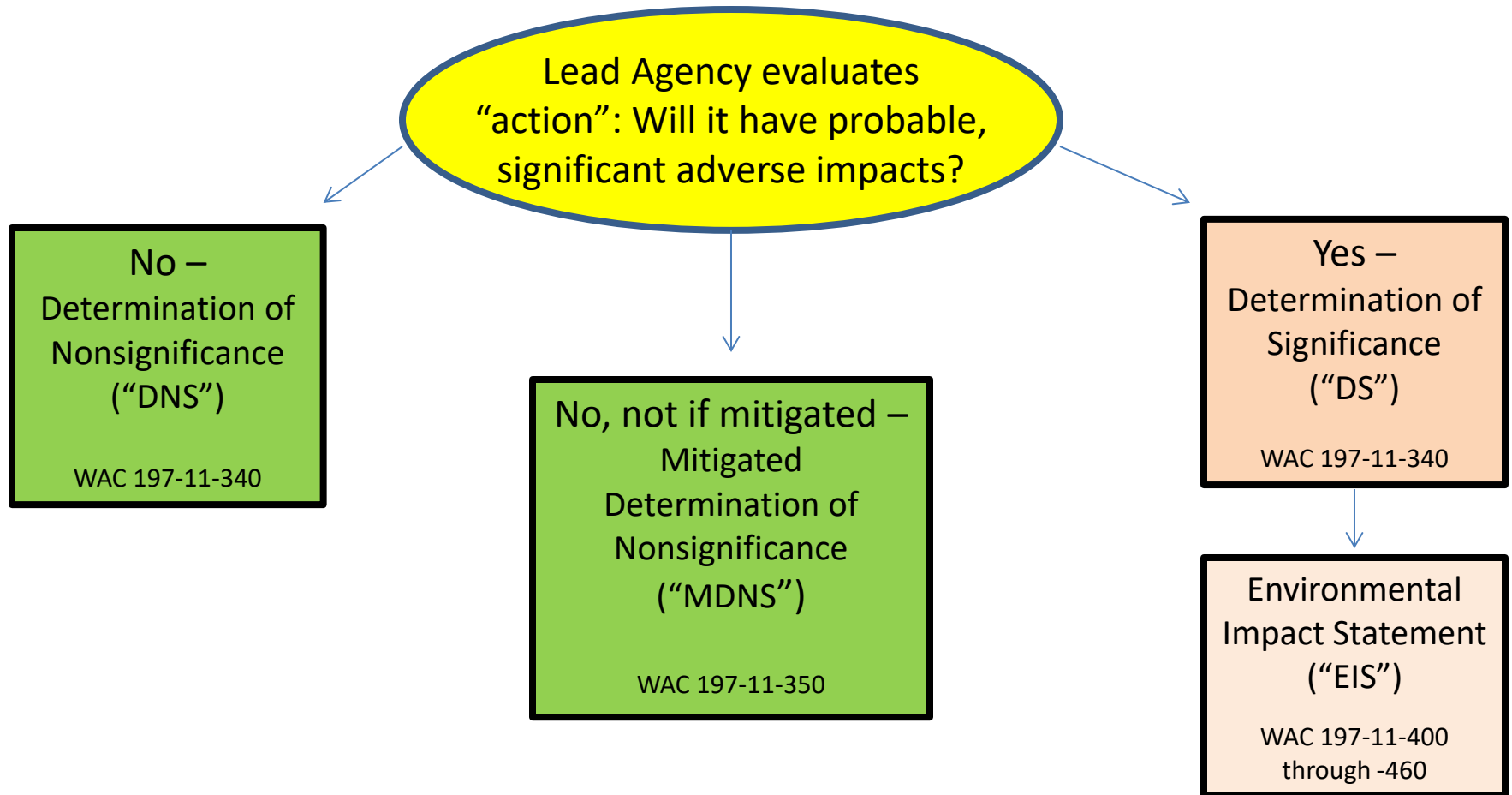
## **RCW 43.21C.030 Guidelines for State Agencies and Local Government Decision-making:**

“The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall: . . .

(b) Identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.”

# SEPA Overview

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# SEPA Overview

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## **RCW 43.21C.031: Significant impacts.**

“(1) An environmental impact statement . . . shall be prepared on proposals for legislation and other major actions having a probable significant, adverse environmental impact. . . . (2) An environmental impact statement is required to analyze only those probable adverse environmental impacts which are significant.”  
*(emphasis added)*

# SEPA Overview

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## What is “probable”?

- **Regulatory definition WAC 197-11-782:** *(emphasis added)* “Probable means likely or reasonably likely to occur . . . Probable is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative. This is not meant as a strict statistical probability test.”
- **See also: WAC 197-11-060 Content of Environmental Review:**  
“(4) **Impacts.** (a) SEPA's procedural provisions require the consideration of ‘environmental’ impacts . . . , with attention to impacts that are likely, not merely speculative.”
- **Other Guidance (*SEPA Commission Section-by-Section Summary of 1983 Amendments*):**  
“Probable is not meant as a strict probability test and would be satisfied where an impact’s likelihood of harm is slight, but the extent of the environmental harm is immense.”

# SEPA Overview

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## What is “significant”?

### Regulatory definition (WAC 197-11-794) *(emphasis added)*

- “[A] reasonable likelihood of more than a moderate adverse impact on environmental quality.”
- “Significance involves both context and intensity . . . Intensity depends on the magnitude and duration of an impact.”
- “The severity of an impact should be weighed along with the likelihood of its occurrence. An impact may be significant if its chance of occurrence is not great but the resulting environmental impact would be severe if it occurred.”

# SEPA Overview

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## Scope of impact review

### WAC 197-11-060 (4) Impacts:

- Geographic scope not limited to jurisdiction of SEPA lead agency:

“(b) In assessing the significance of an impact, a lead agency shall not limit its consideration of a proposal's impacts only to those aspects within its jurisdiction, including local or state boundaries (see WAC 197-11-330(3) also).”
- Duration of impacts may be life of project or longer:

“(c) Agencies shall carefully consider the range of probable impacts, including short-term and long-term effects. Impacts shall include those that are likely to arise or exist over the lifetime of a proposal or, depending on the particular proposal, longer.”



# SEPA Overview

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## Indirect and cumulative impacts:

### WAC 197-11-060(4)(d-e) Content of Environmental Review

- (d) A proposal's effects include direct and indirect impacts caused by a proposal. Impacts include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions.
- (e) “The range of impacts to be analyzed in an EIS (direct, indirect, and cumulative impacts, WAC 197-11-792), may be wider than the impacts for which mitigation measures are required of applicants (WAC 197-11-660). This will depend upon the specific impacts, the extent to which the adverse impacts are attributable to the applicant’s proposal, and the capability of applicants or agencies to control the impacts in each situation.” (*emphasis added*)

# A Brief History of Substantive Authority:

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- 1971, SEPA adopted. Laws of 1971, 1<sup>st</sup> Ex. Sess., Ch. 109.
- 1977 Substantive SEPA provision amended to impose some limitations on breadth of substantive authority; Laws of 1977, 1st Ex. Sess., Ch. 278.
- 1983 Substantive SEPA provisions amended again, adding some additional parameters around substantive authority; Laws of 1983, Ch. 117, Sec. 3.

# A Brief History of Substantive Authority:

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## RCW 43.21C.060

“The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of all branches of government of this state, including state agencies, municipal and public corporations, and counties. Any governmental action may be conditioned or denied pursuant to this chapter.”

Laws of 1971, 1<sup>st</sup> Ex. Sess., Ch.109

# A Brief History of Substantive Authority:

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1977 Amendments: Laws of 1977, 1<sup>st</sup> Ex. Sess., Ch. 278

Amended RCW 43.21C.060 to read as follows:

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of all branches of government of this state, including state agencies, municipal and public corporation, and counties: PROVIDED, HOWEVER, That any governmental action, not requiring a legislative decision, may be conditioned or denied pursuant to this chapter only on the basis of specific adverse environmental impacts which are both identified in the environmental documents prepared pursuant to the chapter and stated in writing by the responsible official of the acting governmental agency. . . . such conditions or denials made more than one year from the effective date of this 1977 amendatory act shall also be based upon policies developed by the appropriate local governmental authority and incorporated into resolutions, regulations, ordinances, plans, or codes. .

”  
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# A Brief History of Substantive Authority:

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1983 Amendments: Laws of 1983, Ch. 117, Sec 3

Amends RCW 43.21C.060 to read as follows:

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorization of all branches of government of this state, including state agencies, municipal and public corporations, and counties ~~(; PROVIDED, HOWEVER, that))~~. Any governmental action ~~((; not requiring a legislative decision,))~~ may be conditioned or denied pursuant to this chapter ~~((only on the basis of))~~: PROVIDED, That such conditions or denials shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency (or appropriate legislative body, in the case of local government) as possible bases for the exercise of authority pursuant to this chapter. Such designation shall occur at the time specified by RCW 43.21C.120. Such action may be conditioned only to mitigate specific adverse environmental impacts which are ~~((both))~~ identified in the environmental documents prepared ~~((pursuant to the))~~ under this chapter ~~((and))~~. These conditions shall be stated in writing by the . . . decisionmaker. Mitigation measures shall be reasonable and capable of being accomplished. In order to deny a proposal under this chapter, an agency must find that : (1) The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact. . . .

# Substantive SEPA Authority Today:

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## RCW 43.21C.060 Chapter supplementary – Conditioning or denial of governmental action. *(emphasis added)*

- Any governmental action may be conditioned or denied pursuant to this chapter: PROVIDED, That such conditions or denials shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency . . . as possible bases for the exercise of authority pursuant to this chapter.”
- Such action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter.”
- “Mitigation measures shall be reasonable and capable of being accomplished.”
- “In order to deny a proposal under this chapter, an agency must find that: (1) The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter.” *(emphasis added)*

# SEPA Overview

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## Exercise of substantive SEPA authority (RCW 43.21C.060 & WAC 197-11-660)

- **Impacts** must be identified in environmental documents.
- **Substantive Authority** must be based on policies adopted in agency plans, regulations, codes.
- **Existing Regulations** must be inadequate to mitigate impacts.
- **Basis of Authority** must be articulated with some specificity.
- **Authority to Condition or Deny** is discretionary (“may” not “must”).
- **Nexus to project** required.
- **Mitigation** must be reasonable and capable of being accomplished.

# Recent Fossil Fuel Projects Driving Change in Scope of Review and Exercise of Substantive SEPA Authority:

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- **Vancouver Energy Terminal**, (*Tesoro Savage LLC, EFSEC No. 15-001*) *Adjudication Findings of Fact, Conclusions of Law, and Order* dated December 19, 2017.
- **Millennium Bulk Terminal**, (*Millennium Bulk Terminals-Longview LLC v. Ecology, PCHB No. 17-090*) *Order on Summary Judgment* dated August 15, 2018; (*In Re Millennium Bulk Terminals, Cowlitz County Hearings Examiner File No. 12-04-0375*), *Findings of Fact, Conclusions of Law and Decision Denying Permits* dated November 14, 2017.
- **Kalama Methanol Manufacturing and Export Facility**, *Columbia Riverkeeper et al v. Cowlitz County et al, SHB No. 17-010c* *Order on Motions for Partial Summary Judgment*. Sept. 15, 2017; (*Port of Kalama v. Shoreline Hearings Board, Cowlitz County Superior Court Case No. 17-2-01269-08*), *Order Affirming in Part and Reversing in Part*, dated July 12, 2018.



# Project Case Studies: Vancouver Energy

## Status:

- EFSEC recommended denial
- Governor accepted recommendation
- No appeals

## Grounds for denial:

- Seismic Impacts
- Spill Risk/Consequence
- Rail Transport Impacts
- Environmental Justice Impacts
- GHG Emissions



# Project Case Studies: Millennium Bulk Terminals

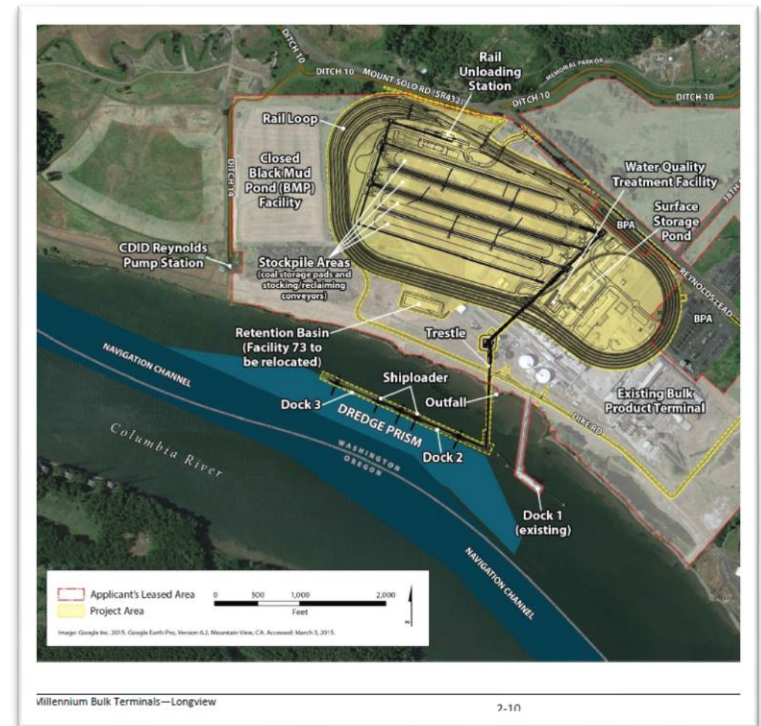
Ecology denies Clean Water Act 401 water quality certification, relying on substantive SEPA authority based on significant impacts to:

- Cancer risk from rail locomotive emissions
- Vehicle delays at rail crossings
- Locomotive horn noise
- At-grade rail crossing safety risks
- Admittedly “low” chance of vessel incidents and spill risk
- Demolition of historic metals reduction plant

PCHB Case No. 17-090

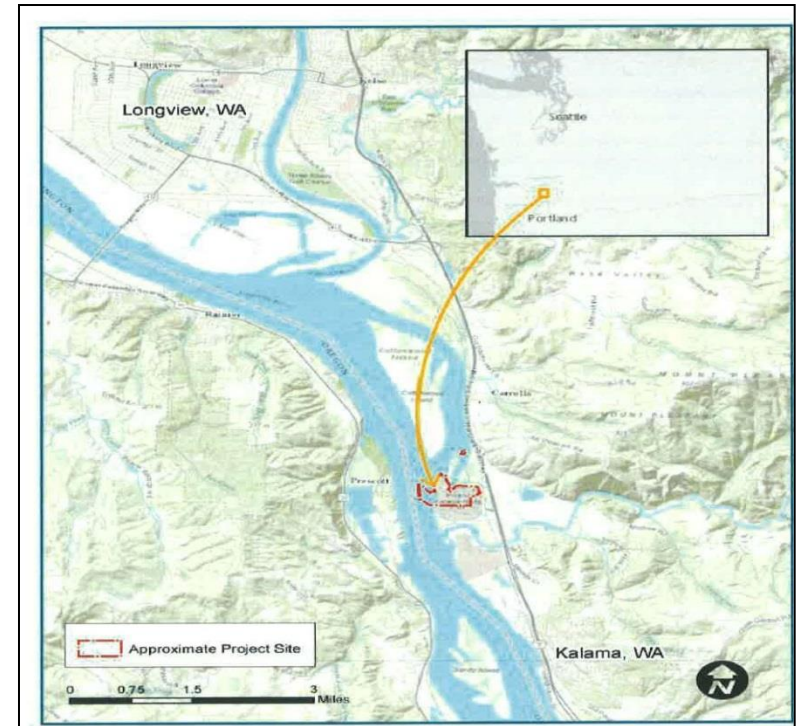
(Order of Summary Judgment, Aug 15, 2018):

- Ecology’s reliance on substantive SEPA authority, rather than CWA standards to deny 401 certification was not clearly erroneous.
- Use of Substantive SEPA authority not preempted by federal law that governed 401 certifications.



# Project Case Studies: Kalama Manufacturing & Marine Export Facility

- SHB – deemed FEIS evaluation of GHG impacts inadequate because of its reliance on Ecology GHG SEPA Guidance document that “prematurely stopped its analysis of potential mitigation.”
- Cowlitz County Superior Court –
  - FEIS inadequacy affirmed
  - The court did not reach the issue of what the new SEIS analysis should look like.



# ...and one to watch: Tesoro Clean Products Upgrade Project

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*Stand.Earth, et al., v. Shorelines Hearings Board, et al.,*  
Thurston County Superior Court No. 18-2-05991-34

- SHB determined that appeal of EIS was time-barred because Appellants failed to appeal the first permits that relied on the EIS.
- Appeal pending in Thurston County Superior Court – argument scheduled for October 11, 2019.

# Are fossil fuel projects making new SEPA scope and substantive authority law?

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- Impacts must be probable and significant to trigger EIS.
- Substantive authority shall be based on formally designated policies, plans, rules or regulations.
- First consider whether existing requirements would mitigate impacts.
- Mitigation must be reasonable and capable of being accomplished.
- Responsibility for implementing mitigation measures may be imposed upon an applicant only to the extent attributable to the identified impact of its proposal.

# Additional Questions for discussion:

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- Is the use of substantive SEPA authority in these examples in keeping with legislature's attempts to narrow the focus of substantive SEPA authority in the 1977 and 1983 amendments?
- How might these GHG and climate change principles evolving from recent fossil fuels projects apply to other actions?
- Under what circumstances are upstream and downstream impacts appropriate for SEPA review? GHGs only, or other impacts?
- If upstream and downstream impacts are reviewed, when should those be attributed to the midstream project?
- If upstream and downstream GHG emissions are reviewed, what is the proper "context" for determining significance? If global impacts are quantified, must significance be judged at global levels? And if so, can impacts from a single project ever be considered significant in the global context?

# Additional Questions:

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- How do the reporting thresholds and emission reduction standards of Ch. 70.235 RCW provide a framework for evaluation of significance of impacts? Do all new sources of GHG emissions conflict with statewide reduction goals?
- If tribunals are willing to accept GHG emissions as a proxy for climate change impacts and not find significant impact judgments to be speculative, to what other resource areas might a similar conclusion apply?
- How to address the problem of the perspective that everything contributes, but nothing, alone, causes climate change, especially if mitigation and substantive SEPA authority is limited to only those impacts directly related to the proposed action?
- What degree of specificity in substantive SEPA policies is or should be required for exercise of substantive SEPA authority, particularly where there is a specific statute or regulation that addresses the impact?

## Additional Questions:

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- For GHG's in particular, if we agree that the risk of climate change impacts is probable, significant, and adverse, if a complete life cycle analysis is required for GHG emissions, and if an emission threshold of 10,000 tons or 25,000 tons per year (current reporting thresholds) is not appropriate as a floor for judging significance after the *Kalama* SHB decision, might we expect to see more EIS's on GHG issues?



For more information:

**Tadas Kisielius**

206-623-9372

[tak@vnf.com](mailto:tak@vnf.com)