Environmental and Land Use Law Section

Rethinking Washington's State Environmental Policy Act

by Jay Derr and Tadas Kisielius

Requiring SEPA review of project impacts that are now addressed by new and evolved federal, state, and local regulatory schemes creates a potentially duplicative regulatory framework that has prompted many to rethink SEPA and its role.

Since its adoption over 40 years ago, the State Environmental Policy Act (SEPA), chapter 43.21C RCW, has been a cornerstone in the practice of land use and environmental law. SEPA's reach extends beyond those specific practice areas, however, and applies to most actions of any state or local government agency. It ensures that agencies identify and consider the potential environmental consequences or "impacts" of any proposed action. It also provides agencies the authority to mitigate identified impacts or even deny proposed actions on the basis of any identified significant adverse impacts. SEPA has been prominent in the land use and environmental arena for much of its history, but it now stands at a crossroads. A dense and complex environmental regulatory framework has evolved over SEPA's history, causing many practitioners and stakeholders to complain that the SEPA process is unnecessarily duplicative such that it should be streamlined and scaled back. Simultaneously, others continue to use SEPA review as a gap-filling mechanism to advance policy objectives and pursue more rigorous environmental protections where, they argue, existing regulations are insufficient to provide necessary protection. Any lawyer advising a client with a proposed action subject to environmental review under SEPA needs to be aware of the ever-evolving role of the statute and its application to their client's proposal.

SEPA requires state and local governmental agencies to review "actions" which broadly include "activities . . . entirely or partly financed, assisted, conducted, regulated, licensed, or approved by agencies." WAC 197-11-704. In the land use and environmental context, this includes almost every permit issued for a project, as well as land use planning documents and adoption of regulations. The agency issues a threshold determination for each action. A "determination of non-significance" or "DNS" means that the action is not likely to have probable, significant adverse environmental impacts and may proceed without further SEPA analysis. Alternatively, an agency can issue a "Determination of Significance" or "DS," which indicates that an action is likely to result in probable, significant adverse environmental impacts. An impact is "significant" when it is more than likely that the proposed project will have a "reasonable likelihood of more than a moderate adverse impact" on the environment. WAC 197-11-794. A DS prompts a more thorough review of a proposed action through a lengthy (and often expensive) environmental impact statement (EIS) that investigates those identified impacts and considers alternatives to the proposal and mitigation measures. A hybrid of the DNS and DS is known as a "mitigated DNS," which allows an agency to impose conditions on a project that are adequate to mitigate the action's impacts to a less than significant level such that the agency may proceed to reach a decision on the proposed action without requiring an EIS.

SEPA was patterned after the National Environmental Policy Act (NEPA), a federal statute that requires federal agencies substantive authority in contrast to that of NEPA. NEPA imposes a process for agency consideration of impacts before taking a federal action, but does not require any particular substantive outcome, nor does it authorize decisions or denials not otherwise authorized by federal statute or regulation. By contrast, SEPA obligates agencies to use their substantive authority to condition or even deny an action if they identify significant adverse environmental impacts. This requirement provides interested parties the ability to challenge an agency's action based on the potential environmental impacts of a proposed action.

While SEPA was one of the primary tools for environmental protection when it was adopted, over the past 40 years, other local, state, and federal environmental laws and regulations have become more complex and stringent, commensurate with a better scientific understanding of what is required to protect the environment. For example, storm water regulations and associated best management practices have changed dramatically and impose significant requirements for storm water quantity and quality management as a condition of development approval. Additionally, the Washington State Legislature has adopted new laws that

require local governments and state agencies to directly address many of the environmental issues that they had previously relied on SEPA to resolve. In the land use arena, one of the biggest changes was the adoption in 1990 of the Growth Management Act (GMA), chapter 36.70A RCW, which requires local governments to adopt deregulations that designate and protect "critical areas." The resulting GMA regulations are, in essence, localized environmental laws that protect sensitive areas such as streams, rivers, wetlands, fish and wildlife conservation areas, aquifer recharge areas, geologic hazard areas, and more.

Requiring SEPA review of project impacts that are now addressed by new and evolved federal, state, and local regulatory schemes creates a potentially duplicative regulatory framework that has prompted many to rethink SEPA and its role. Even though SEPA's implementing regulations expressly allow agencies to rely on existing environmental regulations to discharge their obligations under SEPA, some advocates nonetheless rely on SEPA to push for mitigation or even denial of proposed actions beyond what those existing environmental regulations require. In response, other practitioners and stakeholders have been pushing to eliminate or streamline SEPA and reduce duplication more explicitly. For example, the Legislature in 2012 adopted Chapter 1, Laws of 2012 (2ESSB 6406), directing the State Department of Ecology to consider changes to SEPA's implementing regulations in chapter 197-11 WAC. Ecology addressed these changes in two rounds. The first was completed in 2012 and was narrowly focused on increasing the range of projects that local governments may exempt from SEPA review as "minor new construction" and revising the process by which local governments set flexible thresholds for exemptions. The second round has extended into 2014. The proposal includes updating exemption thresholds for other actions as well as mechanisms to better integrate SEPA review with the GMA, to reduce duplication. Ecology expects to adopt the second round of rule changes by the end of the first quarter of 2014. While these are an important step, some practitioners and stakeholders were pushing for a broader reform in the interest of streamlining and modernizing environmental review.

Even as Ecology considers changes to SEPA's implementing regulations (primarily to exemption levels), many agencies and advocates still use SEPA as a powerful "gap-filling" mechanism to

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advance environmental review of issues where they claim existing laws are insufficient to address potential impacts. This is especially true in areas of law where policy choices regarding the need for protections against environmental concerns of the day are heavily debated, but not yet established. Examples are wide-ranging, but typically involve emerging environmental issues where there is either no federal or state statute addressing the issue of concern, or where advocates argue existing statutes are insufficient to protect the environment.

A recent high-profile example of SEPA's reach into issues not fully addressed by other environmental regulations involves agency review of greenhouse gas emissions. Because greenhouse gas emissions are not addressed in any other regulatory scheme, Ecology has adopted guidance on using SEPA to evaluate greenhouse gas emissions impacts. In the case of coal exports, the scope of SEPA review for greenhouse gas emissions has been expanded to include "cradle to grave" evaluation of impacts from extraction, transportation, and combustion of coal for energy generation in Asia. This expanded review requires the SEPA lead agencies on proposed marine export terminals to evaluate and consider mitigation not only for the potential environmental impacts of constructing and operating the marine terminals in Washington, but also for coal mining in Wyoming, rail transportation of coal from mines to the terminals, and coal combustion in Asia. This particular expansion and application of SEPA's "gap-filling" substantive authority raises especially difficult challenges regarding implementation, jurisdiction, and authority for the state and local agencies involved.

Another example where SEPA continues to play an important, but often loosely-defined, gap-filling role involves review of development projects for potential impacts on cultural resources. While laws exist to protect cultural resources that are discovered during construction of a project, such as chapter 27.53 RCW, many argue that the law is too reactive because it only addresses protection of resources once they are disturbed. Accordingly, advocates and agencies have increasingly relied on SEPA review to require pre-project analysis and site study prior to project construction, an approach that Ecology has considered in its SEPA rulemaking.

The challenge for SEPA today lies is finding the appropriate balance between two goals. On the one hand, SEPA must continue to recognize that the state's natural environment is one of its most valuable resources that needs careful consideration and protection to achieve sustainable prosperity. On the other hand, there is benefit to reducing regulatory red tape, duplication, and uncertainty when trying to implement important economic development objectives for the state. SEPA once was the only tool for this consideration. Today, SEPA continues to serve as an appropriate supplement to other laws and regulations that have been adopted to make specific policy choices and address specific impact issues. Where one draws those lines between what is adequately addressed by existing regulations and what has not will be the subject of ongoing debate regarding SEPA reform, not just in 2014, but likely for years to come. **NWL**

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