

SEPA AND GREENHOUSE GASES—AN IMPERFECT REGULATORY TOOL

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A. Background—A State Commitment to Regulate Greenhouse Gases

The State of Washington has embarked on a policy to significantly reduce greenhouse gases and has recently issued draft guidance (along with King County and other jurisdictions) that greenhouse gases need to be considered as part of the SEPA review. Since hearing examiners typically get the first cut at appeals claiming “failure to consider,” “failure to act,” or “excessive regulation” by reason of actions taken as a result of environmental analysis, it is important to examine the SEPA tools available to you and how those may become involved in a SEPA appeal.

The state’s policy is stated legislatively as a need to reduce greenhouse gases. The “goal” is as follows:

(1)(a) The state shall limit emissions of greenhouse gases to achieve the following emission reductions for Washington state:

(i) By 2020, reduce overall emissions of greenhouse gases in the state to 1990 levels;

(ii) By 2035, reduce overall emissions of greenhouse gases in the state to twenty-five percent below 1990 levels;

(iii) By 2050, the state will do its part to reach global climate stabilization levels by reducing overall emissions to fifty percent below 1990 levels, or seventy percent below the state’s expected emissions that year.

RCW 70.235.020.

The elements of concern were specifically identified:

(6) “Greenhouse gas” and “greenhouse gases” includes carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, and any other gas or gases designated by the department by rule.

RCW 70.235.010.

In deciding the framework in which such regulation was to occur, the Legislature looked to the University of Washington Climate Impact Group in identifying the potential consequences of greenhouse gases to Washington State over time. The work of the group is based on an average of multiple models and is constantly revamped and updated as new material becomes available.

The result is a set of climate projections from the University of Washington Climate Impact Group that are summarized below.¹

The current draft of the base tables may be found at http://www.ecy.wa.gov/climatechange/2010TAGdocs/20100521_projecteddrrivers.pdf²

Table 1: Precipitation-Related Impacts

Precipitation	Small annual increase projected; potentially large seasonal changes	Projected change in average annual precipitation: +1-2% through midcentury Mean change (with range) in annual precipitation for benchmark periods, relative to 1970-1999: • 2020s: +1% (-9 to 12%)* • 2040s: +2% (-11 to +12%) • 2080s: +4% (-10 to +20%)
Extreme precipitation	Precipitation intensity may increase but the spatial pattern of this change and changes in intensity is highly variable across the state variability.	State-wide (<i>Salathé et al. 2009</i>): More intense precipitation projected by regional climate model but distribution is highly variable; substantial changes only over the North Cascades and northeastern Washington. For sub-regions (<i>Rosenberg et al. 2009</i>): Projected increases in the magnitude of 24-hour storm events in the Seattle-Tacoma area over the next 50 years are 14.1%-28.7%, depending upon the data employed. Increases for Vancouver and Spokane are not statistically significant...

Table 2: Temp and Extreme Heat

Temperature	Increasing temperatures expected through 21st century	Projected change in average annual temp is 0.5°F per decade (range: 0.2- 1.0°F). Mean change (with range) in average annual temperature for specific benchmark periods, relative to 1970- 1999: • 2020s: +2°F (1.1-3.3°F)* • 2040s: +3.2°F (1.5-5.2°F) • 2080s: +5.3°F (2.8-9.7°F)
Extreme Heat	More extreme heat events expected Generally projecting increases in extreme heat events for the 2040s, particularly in south central WA and the western WA lowlands (<i>Salathé et al. 2009</i>).	Western Washington, the frequency of exceeding the 90 th percentile daytime temperature (Tmax) increases from 30 days per year in the current climate (1970-1999) to 50 days per year in the 2040s (2030-2059).

¹ The group goes on to project both a low range scenario and a higher range scenario from the many models it is using to provide a range of what they consider “most probable” consequences—assuming the assumptions in the models are correct.

² Summary of Projected Changes in Major Drivers of PNW Climate Change Impacts Prepared by the UW Climate Impacts Group May 20, 2010 – Draft The information provided below is largely assembled from the 2009 Washington Climate Change Impacts Assessment. Other sources have been used where relevant, but this summary should not be viewed as a comprehensive literature review of PNW climate change impacts. Confidence statements are strictly qualitative with the exception of IPCC text regarding rates of 20th century global sea level rise.

Table 3: Snowpack and Stream Flow

<p>Snowpack (SWE)</p>	<p>Decline in spring (April 1) snowpack expected</p>	<p>Projected decrease in mean April 1 SWE for the B1 and A1B scenarios, respectively (changes relative to 1916-2006):</p> <ul style="list-style-type: none"> • 2020s: -27% (B1), -29% (A1B) • 2040s: -37% (B1), -44% (A1B) • 2080s: -53% (B1), -65% (A1B)
<p>Streamflow Generally expecting little change in annual streamflow totals.</p>	<p>Seasonally, expecting increases in winter streamflow, an earlier shift in the timing of peak streamflow in snow dominant and rain/snow mix (transient) basins, and decreases in summer streamflow. Increasing risk of extreme high and low flows expected. In all cases, results will vary by location and basin type.</p>	<p>Projected changes in mean annual runoff for WA state:</p> <ul style="list-style-type: none"> • 2020s: +2% (B1), 0% (A1B) • 2040s: +2% (B1), +3% (A1B) • 2080s: +4% (B1), +6% (A1B) <p>All changes relative to 1916-2006; numbers rounded to nearest whole value (<i>Elsner et al. 2009</i>)</p> <p>Increasing risk of lower low flows (e.g., 7Q10) most strongly in rain dominant and transient basins. Snow-dominant basins demonstrate relatively small decreases in 7Q10 statistics. (<i>Mantua et al. 2009; Tohver and Hamlet 2010, in draft</i>)</p> <p>Changes in flood risk vary by basin type. Spatial patterns for the 20-year and 100-year flood ratio (future /historical) indicate slight or no increases in flood risk for snowmelt dominant basins due to declining spring snowpack.</p>

Table 4: Sea Level related

<p>Sea surface temperature (SST)</p>	<p>Warmer SST expected</p>	<p>Increase of +2.2°F projected for the 2040s (2030-59) for coastal ocean between 46°N and 49°N. Changes are relative to 1970-99 average.</p>
<p>Coastal upwelling</p>	<p>Little change in coastal upwelling expected</p>	<p>Mean change in winds that drive coastal upwelling is minimal</p>
<p>Ocean acidification</p>	<p>Continuing acidification expected</p>	<p>IPCC projects reductions in average global surface pH of 0.14-0.35 units over the 21st century.</p>
<p>Sea level</p>	<p>Projected global change (2090-2099): 7- 23", relative to 1980-99 average (Solomon et al. 2007)</p> <p>2050: Projected medium change in WA sea level (with range) (Mote et al. 2008):</p> <ul style="list-style-type: none"> • NW Olym Pen: 0" (-5-14") • Cent&So. Coast: 5" (1-18") • Puget Sound: 6" (3-22") <p>2100: Projected medium change in WA sea level (with range) (Mote et al. 2008):</p> <ul style="list-style-type: none"> • NW Olym Pen: 2" (-9-35") • Cent&So. Coast: 11" (2-43") • Puget Sound 13" (6-50") 	<p>High confidence that sea level will rise globally.</p> <p>Confidence in the amount of change at a specific location varies with the amount of uncertainty associated with the factors affecting sea level rise at that location.</p>

As early as 2008 then Director Manning set WDOE on the task to refine guidance for SEPA dealing with climate change.³

The draft guidance was published this year⁴ with the following framework.

The Washington Department of Ecology has prepared this guidance for lead agencies for use when evaluating proposals under the State Environmental Policy Act (SEPA) that:

- Will result in greenhouse gas (GHG) emissions;
- Or may be vulnerable to the effects of climate change

Additional measures and incentives can help meet Washington’s emission limits and contribute to stabilizing our climate. Many of the future reductions will likely result from regional or national greenhouse gas programs, such as those being considered by the Western Climate Initiative, the Environmental Protection Agency and U.S. Congress. *Until these programs are adopted and implemented, SEPA can help fill the gaps* in existing regulations and help the state and its political subdivisions address the threats that greenhouse gas emissions and climate changes pose to our health, our economy, and our environment.

September Guidance, p. 1, emphasis supplied.

WDOE is in the process of developing a task force and has said that new guidance will be forthcoming by October 15, 2010, but this date may change.⁵-

This paper will examine SEPA authority as expressed in the regulations and adopted cases in the context of “filling in the gaps” of State regulations on greenhouse gas emissions.

B. SEPA Appeals—The First Line of Defense

In most jurisdictions hearing examiners hear SEPA appeals and will be the first to be called upon to determine whether SEPA action (or inaction) is consistent with state law and local regulations. This article is designed to review the basic elements of all SEPA appeals and examine those requirements in light of traditional requirements for action.

The State Environmental Policy Act has been in place now for more than 39 years and the basic elements of a SEPA case are well defined.

³ “I am writing to inform you about the upcoming effort by the Department of Ecology to clarify how considerations of climate change should be incorporated into environmental review and decision making under the State Environmental Policy Act (SEPA). It is our intent to revise and clarify the SEPA rules and provide useful guidance on this topic.” April 30, 2008.

⁴ See http://www.ecy.wa.gov/climatechange/sepa_intro.htm

⁵ WDOE has now issued a new “working paper,” but the core issues remain.

1. Standing—Within the zone of interest to be protected

The SEPA standing formulation is a two part test:

- Does the matter under consideration fall within the range of interests covered by the SEPA statute?
- Is the person alleging the interest “directly affected” by the matter at issue?

See: Trepanier v. Everett, 64 Wn. App. 380, 382-83, 824 P.2d 524, review denied, 119 Wn.2d 1012, 833 P.2d 386 (1992).

Where the interests alleged are economic or social, even though affecting a petitioner’s property interests, the courts have been quick to find that the matter rests outside the concerns of SEPA and standing necessarily fails. A typical formulation is found in *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 52 882 P.2d 807 (1994); the Court engaged in a lengthy discussion of standing to challenge certain actions of the Snohomish County Council. In affirming the lower court’s order of dismissal on standing grounds, the Court made three telling points:

- ...The interest that the petitioner seeks to protect must be arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question...
- ...SEPA is concerned with “broad questions of environmental impact, identification of unavoidable adverse environmental effects, choices between long and short term environmental uses, and identification of the commitment of environmental resources.” *DeWeese v. Port Townsend*, 39 Wn. App. 369, 375, 693 P.2d 726 (1984).
- [petitioners advocated] ...The interests of “a resident, property owner and taxpayer of Snohomish County” and an interest in the “protection of individual property rights,” ... concerned with matters such as property values, property taxes, restrictions on the use of property as affecting property value, and the cost of transportation facilities. These economic interests are not within the zone of interests protected by SEPA. *See RCW 43.21C.010, .020; Concerned Olympia Residents for Env’t v. Olympia*, 33 Wn. App. 677, 682, 657 P.2d 790 (1983).

See 76 Wn. App. at 52-53.

At the outset, one may conclude that allegations of the consequences of greenhouse gases (affecting temperature, precipitation, sea level rise, among others) falls within matters pertaining to the environment and hence within the zone of interest to be protected generally. The more difficult question is who is “aggrieved” by climate change to the point that they may have standing to assert the interest?

2. Standing—”Injury in Fact”

The second leg of any standing decision is whether the party raising the SEPA appeal is “aggrieved” by the action taken, which has been interpreted to mean that they have suffered

“injury in fact,” typically characterized as showing that he or she will be “specifically and perceptibly harmed” by the proposed action.” *Trepainier* at 382.

In *Trepainier* an individual who did not reside in Everett, complained that his property interest in the City would be affected by a zone change and the courts held that was insufficient to warrant standing to challenge the City action. The result in *Trepainier* can be contrasted with the result in *Leavitt v. Jefferson County*, 74 Wn. App. 668, 875 P.2d 681 (1994).

Dale Leavitt states in her affidavit that she owns property in Jefferson County adjacent to and downhill from approximately 500 acres of undeveloped land. According to Leavitt, the “Code contemplates a concentration of residences in the 500 acres” adjacent to her property. She contends that the Code would allow residential densities of up to five dwelling units per acre on those 500 acres. Thus, she considers the environmental impact of the Code based on 2,500 residences draining polluted water onto her property. She also considers the traffic impact based on 2,500 potential residences.

Leavitt’s alleged impacts *are speculative and undocumented; they are possible, not necessary, impacts of the Board’s adoption of the Code.* However, the claimed impacts are within the interests protected by SEPA and Leavitt *alleges that they directly impact her property and interests.* We will assume Leavitt has established standing for purposes of review.

Levitt at 679.

Courts seem divided on how much evidence is required to achieve standing, and whether the issue is one of properly pleading specific injury or something more.

Compare *DeAtley v. Yakima County*, 93 Wn. App. 1018, Not Reported in P.2d, 1998 WL 835158 (1998).

Under part two of the test, Mr. DeAtley failed to present any evidentiary facts exhibiting an immediate, concrete or specific injury to himself or to his option to purchase property as a result of the issuance of the MDNS or the special use permit. In his brief Mr. DeAtley complains that noise, traffic and air pollution, loss of property values, and other alleged injuries will be a direct result of these land use decisions. However, he presents no evidentiary facts to back up his allegations. If the injury complained of is merely conjectural or hypothetical, there can be no standing.

DeAtley at p. 1.

With *Anderson v. Pierce County*, 86 Wn. App. 290, 936 P.2d 432 (1997).

The Chairman of the Buckley Plateau Coalition testified before the Hearing Examiner that he owns 60 acres of property immediately adjacent to the RPW Project site which he alleges would be adversely impacted by the RPW Project. He also contended that the mitigation measures

proposed in the MDNS were insufficient to control stormwater runoff which would damage his adjoining property. We agree with the trial court that the Buckley Plateau Coalition adequately alleged a specific “injury in fact” within the “zone of interests” to be protected by SEPA, and that they had standing to challenge the MDNS

Anderson at 300.

The *Anderson* decision would make it seem that pleading specifics rather than proof is the more important. According to the City’s motion to dismiss:

[the complaint consisted of mere allegations of]...community displeasure and hypothetical injury to support its claim, which were insufficient to confer standing. *See CORE v. City of Olympia*, 33 Wash.App. 677, 683-84, 657 P.2d 790 (1983) (a bald assertion of injury without supporting evidentiary facts is insufficient to support standing).

Anderson at 299-300.

Organizations seeking standing are held to the same test and will be granted appellate status if they can show one or more members is directly affected.

“...the courts’ central concern [is]that a specific and perceptible injury to a member of the organization be alleged. An organization whose interest is only speculative or indirect may not maintain an action. (Citation omitted)

SAVE v. Bothel, 89 Wn.2d at 866.

The challenge with climate change, however, is that climate change is not a direct and immediate consequence of any particular action. In examining the consequences of climate change identified through the various scenarios tested by the Climate Impact Group:

- The impacts of climate change are presently based on models showing changes over a long period of time, many measured in generations.
- Climate in the Pacific Northwest is affected by a series of cycles not associated with GHG that create warming and cooling, precipitation and dry cycles, including:
 - Pacific Decadal Oscillation (PDO) (10 -30 years)
 - El Niño/Southern Oscillation (ENSO) (“La Niña [cold ENSO] is expected to last through at least the Northern Hemisphere winter 2010-11”)
 - See <http://cses.washington.edu/cig/fpt/cloutlook>
- The impact of climate change will differ based on location, both east and west of the Cascades, and north to south within individual drainage basins.

- The impacts on the state’s infrastructure (referred to as the built environment) will be a product of both location, and the cumulative effect of the combined changes, which as noted above will differ by region and locality.
- Across the state, the biggest data gap is a localized set of projections, particularly for the combination of change in precipitation, decrease snow pack and sea level rise as it may affect future flood hazard areas.
- Properties in different locations will be affected differently.
 - Inland properties will likely not be affected by sea level rise, or acidity
 - Temperature changes over a period of decades may or may not have a specific impact on the complaining party
 - Precipitation change may have a significant affect in one basin and little in another
- “Scenario planning” can only be meaningful in specific locations if the cumulative consequence of climate change in that location is identified.
- An individual may be affected in their property only if they remain in a given location long enough for the change to occur, and nothing happens to mitigate the impact.
- Without access to the models, scaled to a particular location and tied to a reasonable time frame, third party petitioners will be hard pressed to make allegations of specific and perceptible environmental injury to their property or person in the context of a specific project.

As you hear a SEPA challenge based on climate change, your first responsibility, looking at the pleadings, is to determine and make specific findings on whether the parties to the proceeding allege matters within the zone of interest covered by SEPA and whether they have alleged true “injury in fact” as opposed to hypothetical or conjectural injury. Given the duration over which the projected changes are expected to occur, the differences in the various jurisdictions and the inability to pinpoint where and how a specific individual will be affected will be a significant challenge to individuals and groups seeking to complain about failure to specifically address climate change or greenhouse gases in the SEPA review of a specific action.

C. The Duty to Consider

Assuming you find that the parties before you have standing, the question then is how to assess a SEPA appeal concerning greenhouses gases and possible consequences, conditions or impacts. It is instructive to look at very early SEPA cases where the nature of the enactment and community responsibilities were addressed. In an early case, the Supreme Court noted the wide-ranging interests reflected in the legislative enactment.

... SEPA requires consultation with other agencies, the studied development of appropriate alternatives to proposed projects, and recognition of ‘the world-wide and long-range character of environmental

problems.’ [and] ‘(u)tilize a systematic, interdisciplinary approach . . . in decision making which may have an impact on man’s environment’. RCW 43.21C.030(a).

... SEPA does not demand any particular substantive result ... what SEPA requires, is that the ‘presently unquantified environmental amenities and values will be given *appropriate consideration in decision making along with economic and technical considerations*. ... It is an attempt by the people to shape their future environment by deliberation, not default.

Stempel v. Department of Water Resources, 82 Wn.2d 109, 171-172, 508 P.2d 166 (1973).

But giving appropriate consideration to environmental amenities, putting that requirement into effect at the project level vis a vis climate change, is a daunting task. As noted in the September SEPA guidance, WDOE looks to the US Council on Environmental Quality for guidance and finds:

The Council on Environmental Quality issued general NEPA guidance on considering cumulative impacts that may be useful for SEPA lead agencies when considering these impacts.

The environmental impacts noted in this document are the result of cumulative releases of greenhouse gas emissions. It is difficult, if not impossible, to directly tie greenhouse gas emissions from a single proposal to a specific impact – and we wouldn’t recommend a lead agency attempt to do so. The CEQ draft NEPA guidance on greenhouse gases states “*it is not currently useful for the NEPA analysis to attempt to link specific climatological changes, or the environmental impacts thereof, to the particular project to emissions, as such direct linkage is difficult to isolate and to understand.*”

WDOE September guidance at p. 7.

Jurisdictions throughout the state and country have attempted to address how greenhouse gases are to be considered, but in the main the guidance remains at the policy level, with little guidance as to how specifically a project-level review could be addressed.⁶

As we look at the key questions typically asked in a SEPA appeal, case law provides little guidance on how to proceed.

⁶ King County was one of the first jurisdictions to require inclusion of greenhouse gases in SEPA. <http://your.kingcounty.gov/exec/news/2007/0628climate.aspx> See also the King County webpage concerning “Climate Change and Development Regulations” <http://www.kingcounty.gov/property/permits/info/SiteSpecific/ClimateChange.aspx> (attached). MRSC has a detailed list of GHG resolutions and pronouncements from across the state as well as other useful references. <http://www.mrsc.org/Subjects/Environment/climatechange.aspx>; see generally WDOE 2008 comprehensive plan on climate change <http://www.ecy.wa.gov/climatechange/2008CompPlan.htm>

D. Is an EIS Required?

SEPA guidelines provide that an EIS is required when the project in question has a significant impact on the environment. The guidelines provide:

Significant.

(1) “Significant” as used in SEPA means a **reasonable likelihood of more than a moderate adverse impact** on environmental quality.

(2) Significance involves context and intensity (WAC 197-11-330) and does not lend itself to a formula or quantifiable test. The context may vary with the physical setting. 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.

(3) WAC 197-11-330 specifies a process, including criteria and procedures, for determining whether a proposal is likely to have a significant adverse environmental impact

...

WAC 197-11-794.⁷

Given the abstract nature of a specific project’s potential impact on the environment, and the fact that the consequence at the climate level are dependent upon a host of other factors, natural and human made or caused, section (3)(b) is likely to be the response of many officials.

The decision of the responsible official is to be accorded substantial weight.⁸

⁷ Section 330 outlines the threshold determination process and calls upon the administrator to

1(b) Determine if the proposal is likely to have a probable significant adverse environmental impact, based on the proposed action, the information in the checklist (WAC 197-11-960), and any additional information furnished under WAC 197-11-335 and 197-11-350; and

1(c) Consider mitigation measures which an agency or the applicant will implement as part of the proposal, including any mitigation measures required by development regulations, comprehensive plans, or other existing environmental rules or laws.

(3) In determining an impact’s significance (WAC 197-11-794), the responsible official shall take into account the following, that:

(b) The absolute quantitative effects of a proposal are also important, and may result in a significant adverse impact regardless of the nature of the existing environment;

(c) Several marginal impacts when considered together may result in a significant adverse impact;

(d) For some proposals, it may be impossible to forecast the environmental impacts with precision, often because some variables cannot be predicted or values cannot be quantified.

WAC 197-11-330.

The review of a threshold decision is made under the clearly erroneous test, described by the courts as follows:

threshold determinations and decisions regarding whether a supplemental EIS is required involve the application of law to facts and are reviewed under the “clearly erroneous” standard set forth in RCW 34.05.570(3)(d). A decision is clearly erroneous if the court is “ ‘left with the definite and firm conviction that a mistake has been committed.’ ” FN24

Glasser v. City of Seattle, 139 Wn. App. 728, 739; 162 P.3d 1134 (2007), in Footnote 24 citing *Kettle Range*, 120 Wn. App. at 456, 85 P.3d 894 (quoting *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997)).

The statutory requirement to afford “substantial weight” to the decision of the reviewing officer in the threshold process shifts the burden to someone seeking to overturn the decision of an environmental review officer to require or not require an EIS to show that the agency has made a mistake. Where a hearing examiner concludes that the possible impact of a project, added to existing conditions, creates a potential hazard *not considered* by the reviewing official, such findings support a conclusion that the decision below was clearly erroneous and must be reversed. *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 425, 225 P.3d 448 (2010).

But the agency may not simply assume that impacts will necessarily occur “as a result of the project” and failure to tie the specifics of a project to identifiable consequences would seem to raise the question of a “clearly erroneous” decision. The challenges would be put forth by a project proponent and while historically rare, where a responsible official seeks to tie an EIS requirement to a specific proposal, the question is how the agency finds support for the key nexus and proportionality elements necessary to an EIS condition.

- Reasonable probability
- More than a moderate impact

When both WDOE and the Council on Environmental Quality agree that the connection between a single project and climate is indeterminable, it would seem that absent some specific evidence of a measurable impact and consequence and determination of significance, greenhouse gases may well fall within the clearly erroneous frame of review. Certainly the local jurisdiction must more than simply assume impacts and once they begin down the list of climate impacts listed and the alternate scenarios based on unmeasured and unmeasurable actions through both nature and others—a “reasonable” probability of project-specific impact based on GHG would seem to be out of reach.

⁸ In any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a “detailed statement,” the decision of the governmental agency shall be accorded substantial weight. WAC 197-11-330.

E. Cumulative Impacts

The thrust of the SEPA guidance is that while the specific consequences of individual projects may be unmeasurable, SEPA's cumulative impact analysis is sufficient to rope in climate changes as a consequence of society's collective actions and presumed impact on climate. It is here that the SEPA guidelines and cases pose the greatest challenge to climate impact analysis.

At the outset, it cannot be questioned that cumulative impact is clearly required in any SEPA analysis. But to what extent? The September guidance looks to the Council on Environmental Quality recitation in support of its claim that SEPA's cumulative impact analysis is sufficient to require SEPA review of greenhouse gas impacts, even though the consequences of an individual project may be unmeasurable.

Under NEPA, "cumulative impact" is defined and provides guidance for SEPA-level reviews:

"The impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." (40 CFR 1508.7).

September Guidance at p. 6.

This formulation, however, does not get us to a mandate to consider project-specific GHG impacts. In the first place, under Washington law the cumulative impact analysis required under SEPA looks to cases where the action taken is irrevocably tied to the past, or "reasonably foreseeable" future actions required where projects are directly related. In a recent case, *Gebbers v. Okanogan County Public Utility Dist. No. 1*, 144 Wn. App. 371, 183 P.3d 324 (2008), the Court provided a good summary of the applicable test for cumulative impact.

SEPA does not define "cumulative impacts." Additional projects do not require review in an EIS for cumulative impacts *if they are either substantially independent* from the proposed action or are *not necessary to meet the project's purpose* and need. *Mountlake Terrace*, 87 Wash.2d at 345, 552 P.2d 184 (explaining dependent actions); *SEAPC v. Cammack II Orchards*, 49 Wash.App. 609, 614, 744 P.2d 1101 (1987) (EIS need not cover subsequent phases if initial project is substantially independent of subsequent phase and project would be constructed without regard to future development); see also WAC 197-11-060(3)(b)(ii).

Gebbers at 380-381.

In *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 614, 744 P.2d 1101 (1987) the Court of Appeals held that Douglas County did not have to evaluate the consequence of future subdivisions, including a discussed but not permitted future subdivision related to the project under review in the County in holding an environmental review adequate for a 31-lot subdivision.

Agency decision makers must consider more than the narrow, limited environmental impact of the immediate, pending action and cannot close their eyes to ultimate probable environmental consequences. *Cheney v. Mountlake Terrace*, 87 Wash.2d 338, 344, 552 P.2d 184 (1976). However, SEPA does not require that every remote and speculative consequence of an action be included in the EIS. *Cheney*, at 344, 552 P.2d 184; *Richland v. Franklin Cy. Boundary Review Bd.*, 100 Wash.2d 864, 868, 676 P.2d 425 (1984).

49 Wn. App. at p. 615.

Another formulation is found in *Boehm v. City of Vancouver*, 111 Wn. App. 711, 47 P.3d 137 (2002) in which the Court noted:

An EIS is to analyze “direct, indirect, and cumulative impacts[.]”; (citations omitted) (“Implicit in [SEPA] is the requirement that the decision makers consider more than what might be the narrow, limited environmental impact of the immediate, pending action. The agency cannot close its eyes to the ultimate probable environmental consequences of its current action.”)...*A cumulative impact analysis need only occur when there is some evidence that the project under review will facilitate future action that will result in additional impacts.*

Boehm at 719-720.

In *Organization to Preserve Agr. Lands v. Adams County*, 128 Wn.2d 869, 875, 913 P.2d 793 (1996) the Washington Supreme Court rejected a request that a private project be required to consider a variety of impact flowing from other than the specific project site. As noted by the Court:

Proposals required to be evaluated in one document are those “*that are related to each other closely enough to be, in effect, a single course of action....*” WAC § 197-11-060(3)(b). “*Closely related*” proposals are further defined as ones that are “*interdependent parts of a larger proposal and depend on the larger proposal as their justification....*” WAC § 197-11-060(3)(b)(ii).

OPAL at 880.

In examining greenhouse gas consequences, SEPA consideration is limited to those actions dependent or connected to the project under review, precluding the kind of speculative assessment of the nature and timing of unknown and unknowable future development patterns. Issues of migration, demographic shifts, future regulations and ultimately the climate response by others not only in the U.S. but also worldwide, will determine ultimate consequences. And under SEPA courts and agencies are not to “speculate” on possible future actions and outcomes not dependent on or interrelated with the current project.

But since the consequences of a specific project are difficult if not impossible to quantify, as noted by the Council on Environmental Quality, *supra*; using SEPA to “fill in the gaps” becomes an exercise in abstract discretion typically beyond the reach of police power regulation.

F. Adequacy of Environmental Review

If an EIS has been completed, the first question is the adequacy of environmental review, which is judged under the “rule of reason.”

In a case involving the question of whether an EIS needs to consider alternative locations, the court examined the rule of reason.

EIS adequacy involves the legal sufficiency of the data in the EIS. *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wash.2d 619, 633, 860 P.2d 390, amended, --- Wash.2d ----, 866 P.2d 1256 (1993) (citing Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* § 14(a)(i) (4th ed. 1993)). Sufficiency of the data is assessed under the “rule of reason,” which requires a “ ‘reasonably thorough discussion of the significant aspects of the *probable environmental consequences*’ of the agency’s decision.”

Organization to Preserve Agr. Lands v. Adams County, 128 Wn.2d 869, 875, 913 P.2d 793 (1996).

In examining whether the future use consequences of the third runway at SeaTac airport were “probable” the Court of Appeals used the following analytical approach:

WAC 197-11-060(4) explains that “SEPA’s procedural provisions require the consideration of ‘environmental’ impacts ..., with attention to impacts that are likely, not merely speculative.” This subsection further directs that “[a]gencies 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.” “Probable” is defined in a later section as “likely or reasonably likely to occur, as in ‘a reasonable probability of more than a moderate effect on the quality of the environment’ Probable is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative.” FN30

FN30. WAC 197-11-782.

City of Des Moines v. Puget Sound Regional Council, 98 Wn. App. 23, 988 P.2d 27 (1999) (Upholding an examiner’s decision that requiring data more than 13 years out was too remote and speculative for consideration.)

G. Nexus and Proportionality

While SEPA does have a substantive affect provision that allows mitigation tied to specifically adopted policies, the authority to act is still constrained by traditional notions of nexus and proportionality.

Any governmental action may be conditioned or denied pursuant to this chapter... [but] Such action may be conditioned *only to mitigate specific adverse environmental impacts* which are identified in the environmental documents prepared under this chapter. These conditions shall be stated in writing by the decisionmaker. Mitigation measures shall be reasonable and capable of being accomplished.

RCW 43.21C.060.

Given the acceptance of both WDOE and the Council on Environmental Quality that the project-specific impacts on climate are likely indeterminable and, even at the hypothetical level, subject to a variety of intervening actions by third parties and governments that will exacerbate or alleviate the condition reviewed; the ability for a municipality using SEPA to make the connection between a potential impact and likely mitigation is thin indeed. If the responsible official is unable to articulate with any degree of specificity a “reasonable probability” of impact between the project under review and the impact to be mitigated, and even if such impact is identified, a proper and proportionate response, it is hard to conceive of a condition that will withstand challenge either as clearly erroneous or an error of law.

To borrow a phrase:

If the [applicant] were being singled out to bear the burden of [state’s] attempt to remedy these problems, although they had not contributed to it more than other [similarly situated] landowners, the State’s action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

Nollan v. California Coastal Comm., 483 U.S. 825, p. 836, footnote 4, 107 S. Ct. 3141, 97 L. Ed. 2d. 677(1987).

H. Final Thoughts

Considering the full range of SEPA topics is far beyond the scope of this paper, and Professor Settle has well occupied that field; Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* (rev. ed. 2002). But as you consider the use of SEPA in addressing greenhouse gas cases, it is well to remember:

SEPA’s primary enforcement tool has been the EIS. An EIS must be prepared on proposals that will have a **probable significant adverse environmental impact**. RCW 43.21C.031. “**Significant**” as used in

SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality.” WAC 197-11-794(1).

Cougar Mountain Associates v. King County, 111 Wn.2d 742, 751, 765 P.2d 264 (1988).

Under SEPA, evaluation of a proposal’s environmental impact requires examination of at least two relevant factors:

- (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area, and
- (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.’ Citations omitted.

Chuckanut Conservancy v. Washington State Dept. of Natural Resources, 156 Wn. App. 274, 285, 232 P.3d 1154 (2010).

When impacts are based on scenarios and models attempting to predict something as widely variable as climate, and to ascribe to a specific project a “reasonable likelihood” that the project will contribute to a “significant impact” in a specific area 25, 50 or 100 years from now, notions of nexus, proportionality, and avoidance of speculation as to the remote or hypothetical are severely tested if not totally breached—the decision, of course, will be yours to find.

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Climate change and development regulations

- [Impacts of climate change](#)
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- [State Environmental Policy Act](#)
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Impacts of climate change

Human activities are the most significant factor in the striking increase in atmospheric greenhouse gases (GHGs) over the last century. Increased GHG levels are the primary cause of human-caused climate change.

The impacts of climate change are often associated with problems in far away parts of the world, some time in the future. Sea level rise in low lying countries, damage to coral reefs, melting ice caps, the spread of insect borne disease and increases in drought are just some of these impacts that are linked to climate change.

However, there are significant and critical impacts from climate change that are already occurring in the Pacific Northwest that are very likely to increase in severity; these are often less well known and are briefly highlighted here.

Climate change is likely to have the following impacts in the Pacific Northwest:

Water and snow

- Decreased water for irrigation, fish, and summertime hydropower production and increased urban demand for water, leading to increased conflicts over the resource.
- Warmer winter temperatures and increased winter precipitation are projected to reduce the winter snowpack. This will also delay the opening of the ski season, shorten the length of the season, and increase the likelihood of rain when ski areas are open. The impacts are greater for mid-elevation ski areas (~3,000 to 4,000 feet) than for those at higher elevations.

Salmon

- Increased difficulties for migration and spawning due to increased winter floods, decreased summer streamflow, and increased water temperatures.

Forests

- Potential increases in forest fires.

Related internal links

- [King County Climate Change Conference](#)

Related external links

- [Built Green™](#)
- [U.S. Green Building Council](#)
- [Climate protection](#)

* Note: New hours began Jan. 4 [Read more](#)

- Overall, the Pacific Northwest is likely to see increased forest growth region-wide over the next few decades followed by decreased forest growth as temperature increases overwhelm the ability of trees to make use of higher winter precipitation and higher carbon dioxide.

Wildlife

- Potential for extinction of local populations and loss of biological diversity if environmental shifts outpace species migration rates and interact negatively with population dynamics.

Coastal Flooding and Erosion

- Increased coastal erosion and beach loss due to rising sea levels
- Increased landslides due to increased winter rainfall
- Permanent inundation, especially in south Puget Sound around Olympia
- Increased coastal flooding due to sea level rise and increased winter streamflow from interior and coastal watersheds.

Agriculture

- Many crops will grow better with higher CO₂ and a longer growing season before temperatures substantially increase, provided there is sufficient water. However, some pests and weeds will be similarly advantaged. Low-value irrigated crops may have difficulty competing for less abundant water.

King County's response

King County has taken a number of actions to begin addressing the challenges presented by climate change. These actions include:

- The [King County Global Warming Action Plan](#). The Action Plan includes four Executive Orders directing King County agencies to address climate change in the areas of transportation, land use, renewable energy, and environmental management.
- The [2007 King County Climate Plan](#)** that describes the steps King County is taking to address climate change.
- Development of the [Preparing for Climate Change Guidebook](#) in conjunction with the University of Washington's [Climate Impacts Group](#)* and [ICLEI-Local Governments for Sustainability](#)*.
- [Evaluating greenhouse gas emissions](#) under the State Environmental Policy Act.

State Environmental Policy Act

The Washington [State Environmental Policy Act](#)* (SEPA) requires environmental review of

development proposals that may have a significant adverse impact on the environment.

If a proposed development is subject to SEPA, the project proponent is required to complete the SEPA checklist. The checklist includes questions relating to the development's air emissions. The emissions that have traditionally been considered cover smoke, dust, and industrial and automobile emissions. The SEPA checklist is available in fill-in Word** or PDF** format.

King County is the first local government in the nation to officially add greenhouse gas emissions to the environmental review of construction projects. King County's policy covers projects undergoing environmental review mandated by the SEPA and applies to the County's own developments as well as projects where the County is the lead permitting agency.

GHG emissions associated with development come from multiple sources:

- The extraction, processing, transportation, construction and disposal of building materials
- Landscape disturbance
- Energy demands created by the development after it is completed
- Transportation demands created by the development after it is completed.

King County has developed a GHG emissions worksheet that can assist applicants in answering the SEPA checklist question relating to GHG emissions. The worksheet is available as a fill-in Excel spreadsheet** or in PDF** format.

The SEPA GHG emissions worksheet estimates all GHG emissions that will be created over the life span of a building project. This includes emissions associated with obtaining construction materials, fuel used during construction, energy consumed during the buildings operation, and transportation by building occupants.

Additional information

- DDES SEPA application packet
- DDES Customer Information Bulletin #26, SEPA Process**
- King County Global Warming Web site
- King County Green Tools
- World Meteorological Organization and United Nations Environment Programme Intergovernmental Panel on Climate Change*, Working Group I: The Physical Basis of Climate Change*
- University of Washington Climate Impacts Group: Impacts on Climate Change in the Pacific Northwest*

*external link

*Note: To view PDFs, free software from Adobe is required. Fill-in Word and Excel documents require Microsoft software. For assistance and fill-in instructions, see helpful hints.

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