

The Expanded SEPA Has Reduced Regulatory Certainty in Washington

Briefly

- New State Environmental Policy Act (SEPA) reviews look for impacts beyond state borders.
- The Gateway Pacific and Millennium Bulk terminal projects, and the Vancouver Energy facility project are being held to this new standard.
- The target for these reviews have been potential greenhouse gas emissions overseas.
- These projects have experienced long, expensive review periods with no certain end date.
- No set criteria exists for expanded SEPA reviews now undertaken at the regulator's discretion.
- SEPA reviews are often redundant, occurring alongside other mandatory environmental studies.
- Some local governments have sought to stop legal, regulated, international exporting activities.
- Other projects with the potential for high-wage industrial jobs have been abandoned.
- 40 percent of Washington state jobs are tied to international trade.
- Expanded SEPA puts Washington state at a disadvantage with regional and international competitors.

In 2013 and 2014, the state Department of Ecology expanded the scope of review for the purposes of the State Environmental Policy Act (SEPA) beyond state borders, in a seemingly arbitrary manner. Three projects in particular were held to this new standard: Gateway Pacific Terminal at Cherry Point in Whatcom County, Millennium Bulk Terminals near Longview, and the Vancouver Energy (Tesoro Savage) crude oil loading facility at the Port of Vancouver. We wrote about the expanded SEPA in a 2014 report, noting, “the expanded parameters increase uncertainty for business and call into question the competitiveness of Washington for future projects” (WRC 2014).

Since that report, the projects we discussed still have not completed the SEPA process and other projects in the state have been abandoned or may never be proposed—not necessarily because they were or could be held to a higher SEPA standard than is customary, but because the expanded SEPA has contributed to (or was born of) a more restrictive permitting culture in our state.

The SEPA Process

Since 1971, SEPA (RCW 43.21C) has required environmental review “for any state or local agency decision that meets the definition of an ‘action’ and is not categorically exempt” (Ecology 2003). “Actions” are activities that are “financed,

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assisted, conducted, regulated, licensed, or approved by agencies" (WAC 197-11-704). Actions may be related to specific projects or agency decisions on policies, for example (Ecology 2003).

If a SEPA review is required, the lead agency involved considers the potential environmental impacts of the proposal. Then, "the lead agency and applicant may work together to reduce the probable impacts by either revising the proposal or identifying mitigation measures" (Ecology 2003). The lead agency next makes the threshold determination—would there be "likely significant adverse environmental impacts"? (Ecology 2003) If the answer is yes, the environmental impact statement (EIS) process begins.

The scope includes the range of impacts that will be considered in the EIS process. These include direct, indirect, and cumulative impacts (WAC 197-11-792). Scoping initiates the participation by the public in the process (Ecology 2003). Following review of a determination of significance and scoping, a draft EIS is issued, followed by a final EIS and the agency's decision on the action.

Although the time to complete the SEPA process generally varies by project, Ecology has said that review can often be completed in two or three months. But complex projects can take years. (Ecology 2014)

(For more on the SEPA process, see our 2014 report, "A Newly Expanded SEPA Threatens Washington's Competitiveness.")

An Expanded SEPA

Although SEPA is applied on a case-by-case basis, it generally considers the environmental impacts that occur in Washington. More recently, for some projects, SEPA reviews have been expanded to include impacts from lifecycle greenhouse gas (GHG) emissions and transportation that occur outside of the project area and the state. As we wrote in 2014, the Department of Ecology "has

decided to include in its environmental review the GHG emissions associated with the end-use of a product being exported through Washington—not just the emissions associated with the facility's manufacture or operation" (WRC 2014).

The projects that have been subjected to the expanded SEPA thus far would handle either coal or oil. These commodities have been the focus of intense public activism in recent years. As Ecology Director Maia Bellon wrote, the expanded scope of review for the Gateway Pacific Terminal was based in part on "responsiveness to public comment" (Bellon 2013).

The moves to expand SEPA are coming at a time when many believe the act itself may no longer be entirely necessary. As we wrote in a 2011 report, SEPA was enacted

... years prior to the adoption of the Growth Management Act (GMA) and critical area ordinances, the Shoreline Management Act (SMA), stormwater regulations, and a multitude of other regulatory laws to protect the environment. With the adoption of these more recent laws, the EIS and DNS requirements of SEPA are redundant and impose costs without providing any additional environmental protection. (WRT and WRC 2011)

As an example, a 2006 GMA Housing Task Force report recommended that, to increase housing affordability, the state should streamline permitting by creating more categorical exemptions to SEPA or eliminating SEPA review in urban growth areas (AHAB 2006).

Further, in 2016, SB 6527 was introduced in the Legislature (but not voted on). It would have required agencies responsible for environmental reviews under SEPA to "adopt unchanged and implement the scope of analysis contained in the federal environmental analysis."

The bill also would have required SEPA reviews to be complete within 30 days of

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Building & Construction
Trades Council*

a “categorical exclusion determination, a finding of no significant impact, or a final environmental impact statement prepared under the national environmental policy act . . . by a federal agency for the same proposal.” For projects that do not need NEPA review, the SEPA threshold determination would have had to be issued within 60 days and environmental review would have had to be completed within a year.

As SB 6527 noted, “the state environmental policy act should not unreasonably delay or prevent economic growth and development of the state economy, including growth and development of infrastructure.”

The Resulting Regulatory Uncertainty

As Director Bellon has written, “it is not possible to identify a set of ‘industry groups’ or set of specific projects that may trigger a broad or narrow scope of environmental review under SEPA” (Bellon 2013). Thus, “at regulators’ discretion any controversial project may suddenly become subject to global review. In regulatory matters, discretion undercuts certainty” (WRC 2014).

Ecology could apply the expanded review to any future project associated with any commodity. International trade and interstate commerce will be affected. Businesses will face increased uncertainty, and the timeliness of the SEPA process will be reduced. In the end, Washington’s competitiveness will suffer.

The expanded SEPA process can also affect Washington state’s role in the world economy. The Washington Council on International Trade finds that 40 percent of jobs in Washington are tied to trade (WCIT 2012). But, as we noted in our 2014 report, some experts have concluded that the results of the expanded SEPA could constitute export restrictions under World Trade Organization rules (Bacchus and Jeong 2013). Discouraging the development of new export facilities here drives customers to our competitors. As

we wrote in 2013, of goods exported through Washington, the value of goods originating in Washington was lower than that of goods originating elsewhere in the U.S. Thus, “the exporting function is an important line of business for the state” (WRC 2013a). In exporting, Washington’s main competitors are other ports on the west coast, including in Canada (WRC 2013a).

As Lee Newgent of the Washington State Building & Construction Trades Council said, “We have some of the most stringent environmental policies in the world. But our never-ending and arbitrary regulatory processes are limiting manufacturing opportunities in our state—and the good-paying jobs that go with them” (KWC 2016b). Newgent also compared the process in Washington to that of Canada: “If you look at Canada, our competitor, it is an 18-month process to get environmental permits. In Washington, we embrace the fact that you need to have an environmental impact assessment but, you should not be able to stall it out for infinity” (Hammond 2016).

Updates on the Projects Affected by the Expanded SEPA

In our 2014 report we specifically mentioned three projects as coming under the expanded SEPA umbrella. The permitting process is still not complete for any of them.

Gateway Pacific Terminal (GPT). This proposed terminal would be located at Cherry Point in Whatcom County. It would store and handle dry bulk commodities for export, including coal, grain, iron ore, salts, and alumina. When operations are at full capacity, GPT estimates that direct, indirect, and induced jobs would total 1,250. Direct employees at the terminal would earn salaries in the range of \$95,000 to \$100,000. (GPT 2016) The median household income in Whatcom County was \$53,025 in 2014 (Census 2016).

The GPT project was proposed in 2011. The scopes of review for the proposal

To be sure, the three major projects delayed by the expanded SEPA reviews would mean more high wage jobs in parts of the state that are not doing as well as the Seattle metropolitan area.

were issued in July 2013 by Whatcom County, Ecology, and the U.S. Army Corps of Engineers (for review under the National Environmental Policy Act, NEPA). Ecology and Whatcom are co-lead agencies for the SEPA review. Their scope went beyond that of the Corps to include, for example, out-of-state rail impacts, cargo-ship impacts beyond Washington waters, and evaluation of GHG from end-use coal combustion.

In 2014, Ecology and Whatcom “expected to issue draft EISs in late 2016 for public review and comment. They expected to issue final EISs in late 2017” (Ecology 2016). However, in April 2016, Pacific International Holdings (PIH, a joint venture between SSA Marine and Cloud Peak Energy) asked to suspend the EIS process. According to PIH,

There are a number of factors that have gone into this decision, including the extended timing of the US Army Corps of Engineers in their consideration of claims by the Lummi Tribe under the 1855 Treaty of Point Elliott and a desire to ensure all processes in the EIS are in synch, so facts and science generated by the different reviewing agencies continue to follow in line with the EIS process. The uncertainty and related costs are of significant concern.
(Watters 2016)

Just a month after the suspension, the Lummi Tribe’s claims halted the NEPA process. The Lummi Nation had asked

the Corps to deny the GPT permit application in January 2015, on the grounds that it would impact their fishing rights. In May 2016, the Corps agreed: “Because the district has determined the effects to the Lummi’s rights are more than de minimis and because the Lummi maintain their objections to this proposal, the project cannot be permitted by the Corps” (Corps 2016).

Bob Watters of SSA Marine said that they are “considering all action alternatives” (Wilhelm 2016).

In this case, the permitting process has dragged on for years and is now at a standstill—without even getting to the draft EIS stage. Lost time has not been the only cost for the companies involved: According to Crosscut in 2015, SSA Marine had already spent about \$9 million on the EIS, “plus the heavy costs of hiring its own scientists” (McKay 2015).

Millennium Bulk Terminals (MBT). This coal export facility was proposed near Longview in February 2012. It is estimated that ongoing site operations would create 300 direct, indirect, and induced jobs (Berk 2012).

Cowlitz County and Ecology announced the scope of review for the SEPA EIS in February 2014, which included end-use coal combustion. On April 29, 2016, the draft EIS was released. Cowlitz and Ecology “anticipate the Final EIS will be published in 2017” (MBT EIS 2016a).

Links to previous WRC Policy Briefings for more related research :

- **TRADE-DEPENDENT WASHINGTON RELIES ON RAIL** (PB 13-11, August 15, 2013) <https://researchcouncil.org/files/docs/2013/08/railtraffic2013final1.pdf>
- **EXPORT ACTIVITY BOOSTS WASHINGTON'S ECONOMY** (PB 13-12, August 20, 2013) <https://researchcouncil.org/files/docs/2013/08/tradeandtransportationpart4final.pdf>
- **WASHINGTON CARGO RIDES THE RAILS** (PB 13-13, August 29, 2013) <https://researchcouncil.org/files/docs/2013/08/trade-and-transportation-part-3-final.pdf>
- **A NEWLY EXPANDED SEPA THREATENS WASHINGTON'S COMPETITIVENESS** (PB 14-12, June 11, 2014) <https://researchcouncil.org/files/docs/2014/06/sepa.pdf>
- **EXPANDED COMMODITY EXPORTS WILL CREATE JOBS, INCREASE INVESTMENT** (PB 13-14, September 10, 2013) <https://researchcouncil.org/files/docs/2013/08/tradeandtransportationpart4final.pdf>

SEPA “should not unreasonably delay or prevent economic growth and development of the state economy, including growth and development of our infrastructure.”

The draft EIS found no unavoidable and significant adverse impacts to the natural environment from the project. (It did find some potentially significant adverse impacts in other areas, including on rail transportation if infrastructure is not improved.)

But the fact that this project is subject to the expanded SEPA is important. According to the draft EIS, during the scoping period, “The most commonly expressed concerns centered on climate change and potential air quality impacts. Climate change concerns included impacts as a result of combustion of fossil fuels at coal power plants overseas and greenhouse gas emissions from the transportation of coal.” The draft EIS finds that there are significant adverse impacts from GHG emissions. However, these would mostly occur outside of Cowlitz County when the coal is combusted. Over the period from 2021 to 2038, the draft EIS estimates the project would result in 37.6 million metric tons of CO₂—of which only 573,516 metric tons would occur in Cowlitz County. Even so, MBT will have to mitigate 50 percent of the total estimated emissions. (MBT EIS 2016b)

According to the Daily News, the EIS process has cost \$15 million so far. Further, the Daily News editorial board noted, of the draft EIS, “The end-to-end scope, cost and time to produce this report are all unheard of, and one-of-a-kind. No other business we know of has ever been treated this way” (TDN 2016).

There are ramifications. As Larry Brown of the Aerospace Machinists Union District Lodge 751 said of the MBT process, “It is really dampening the willingness of investors to participate or propose large projects which is a basis for living-wage blue collar jobs” (Richards 2016).

Vancouver Energy (Tesoro Savage). This is a proposed crude oil loading facility at the Port of Vancouver that would handle 360,000 barrels per day (EFSEC 2016a). When fully operational, the project would provide 616 direct jobs. (Analysis Group 2015)

Permits were initially applied for in August 2013. The Energy Facility Site Evaluation Council (EFSEC) website notes in the project background that the “facility is expected to be operational in 2014” (EFSEC 2016a). Instead, the permitting process is ongoing. (EFSEC is responsible for permitting large energy projects in Washington.)

The scope of review was announced in April 2014 by EFSEC. It includes impacts of rail and vessel traffic outside of Washington. The draft EIS for the project was released in November 2015 and public comments were closed in January 2016. Hearings before an administrative law judge on the facility took place from June 27 to July 29, 2016. This is a normal part of EFSEC’s process; EFSEC will use the information from the hearings when considering whether to recommend the project to the governor, who makes the final decision (EFSEC 2016b). According to the *Columbian*, “A council recommendation and final word from the governor may not come until early next year” (Johnson 2016). Indeed, the final EIS has not yet been released.

The draft EIS finds some significant unavoidable impacts from increased rail traffic, and discusses the potential impacts from a crude oil spill, fire, or explosion (EFSEC 2016c). Vancouver Energy said,

... we believe the DEIS supports the conclusion that the Vancouver Energy terminal can be constructed and operated in a safe and environmentally responsible manner. It appears that most of the probable impacts identified in the DEIS – especially those associated with the proposed facility itself – are either minor or negligible, or can be mitigated. (Vancouver Energy 2016)

Still, the attorney general’s office opposes the project because its potential benefits “are dramatically outweighed by the potential risks and costs of a spill” (OAG 2016).

When commodities are transported through Washington bound for export facilities, they provide a revenue stream that justifies investment in rail infrastructure, which benefits other users of rail.

Related Cases

Additionally, regulatory uncertainty has contributed to the cancellation of other projects. And, encouraged by political activism, local governments have taken action against coal and oil. These developments will make it more difficult to build in these communities.

Tacoma Methanol Plant. In Tacoma, Northwest Innovation Works had proposed (in 2014) building a methanol plant at the Port of Tacoma. When operating, the facility would have provided 1,007 direct, indirect, and induced jobs. The average job would have paid \$78,131 in wages—compared to the average wage in Pierce County of \$50,627 (in 2018 dollars). (ECONorthwest 2016)

The company cancelled its plans April 19, 2016, reportedly due to “the length of the environmental review process, political uncertainty that included the suggestion of the area being rezoned and the complexity of developing a brownfield” (Martin and Nunnally 2016). Murray “Vee” Godley, president of the company, told the News Tribune that the environmental review process would have taken at least three more years and \$30 million to \$40 million (Martin and Nunnally 2016).

Further,

... the Tacoma project faced vocal opposition from those concerned about environmental and health impacts.

More than 1,000 people attended a hearing in early February. About 1 ½ weeks later, the company put the project on hold, saying it “had been surprised by the tone and substance of the vocal opposition.” (Le 2016)

Matt Driscoll with The News Tribune wrote that “public pressure eroded political will behind the plant and effectively ratcheted up the regulatory hurdles in front of it” (Driscoll 2016).

Port of Tacoma. There is a proposal before the Port of Tacoma commission that would require that new leases for energy

and natural resource tenants be subject to first and second readings before being approved by the commission. (The second reading could not occur until 21 days after the first and a public study session would have to be scheduled between the two readings.) (PoT 2016) Under current rules, leases may be approved after one meeting. Port Commission President Connie Bacon proposed the change because she has heard the public’s demand for more notice of big projects” (Martin 2016).

Whatcom County. In Whatcom County (where GPT is proposed) this summer, the County Council considered proposed changes to the county’s comprehensive plan (which is required under the Growth Management Act). In July, “Whatcom County Council member Carl Weimer proposed changes that would prevent development supporting the export of unrefined fossil fuels, which could include crude oil, coal and natural gas” (Wohlfeil 2016a).

In a letter to the Council, Mark Personius of the county’s Planning and Development Services department wrote that the Weimer proposal changes would

... constitute a significant change in land use/shoreline policy for the County affecting Cherry Point. There are potential legal and regulatory consistency issues raised by these proposals as well as potential economic development and fiscal impacts to be considered. (Personius 2016)

A resolution approved by the Council on July 26 sends these changes to the county Planning Commission for study and requests that the Planning Commission report back by January 15, 2017 (WCC 2016a).

The proposed comprehensive plan changes considered by the Council would favor clean-energy and low-carbon emitting industries in future developments or expansions at Cherry Point. Further, it would require the County to “develop recommendations for le-

gal ways the County can work to limit unrefined fossil fuel exports from the Cherry Point [urban growth area] above levels in existence as of July 5, 2016" (WCC 2016a).

The proposed changes to the comprehensive plan are tied to the Gateway Pacific Terminal experience:

While deep water access made future shipping facilities desirable in the past, recent actions by federal and state regulators denying a proposed fourth pier at Cherry Point have underscored the fact that any future industrial development will undergo scrutiny for compliance with federal and state laws, including treaty rights. (WCC 2016a)

Still, the development itself is not the problem—the commodities involved are: "The large acreage, good rail access and proximity to Washington State and Canadian ports makes the remaining upland area at Cherry Point suitable for major sustainable, clean-energy manufacturing or production of other commercial or industrial products" (WCC 2016a).

On August 9, the Whatcom County Council approved an emergency 60-day moratorium prohibiting new applications "for new or expanded facilities whose purpose is to facilitate the increased shipment of unrefined fossil fuels not to be processed at Cherry Point" (WCC 2016b). As reasons for the moratorium, the ordinance cites recent cases of derailment of trains carrying crude oil and the recent lift of the national crude oil export ban, which is "increasing pressure on deep water ports such as Cherry Point to develop into crude export terminals" (WCC 2016b).

According to the Bellingham Herald,

The council must hold a public hearing on the emergency moratorium within 60 days. After that, an interim emergency moratorium could be put in place for up to six months, which would allow enough time for the Planning Commission to make its recommendation in January, council member

Carl Weimer said. Weimer is the member who first proposed the changes.

"That was key," Weimer said. "I was scratching my head about whether I was going to support the whole comp plan because I felt we should support the Cherry Point amendments, but I am fine with passing it while we have this protection in place." (Wohlfeil 2016b)

Vancouver. The Vancouver City Council voted on July 18, 2016 to ban new (and expansion of existing) oil refineries and storage facilities that average less than 50,000 barrels a day. Although the ban will not affect Vancouver Energy, the *Columbian* reports that Vancouver's mayor said the council meant "to send a message" (Dake 2016). The *Columbian* also quotes a community organizer as saying, "This will send the governor the message that we don't want Tesoro-Savage, either" (Dake 2016).

Spokane. The Spokane City Council voted July 25, 2016 to put an initiative on the November ballot that would fine each rail car carrying crude oil or uncovered coal through downtown Spokane. City Councilman Breean Beggs said, "Spokane might be built on 100 years of railroads, but it's not built on oil and coal trains" (Hill 2016a).

City Council policy advisor Brian McClatchey told the Council on July 21 (before the vote) that federal law would likely preempt the initiative (Walters 2016). On August 15, the City Council voted to withdraw the ordinance from the ballot. City Council President Ben Stuckart said, "I do not believe that it is legally defensible, or defensible for us to bring forward" (Hill 2016b).

Comment

The expanded SEPA and associated political activism have resulted in permitting delays, project cancellations, and even outright bans of projects involving certain commodities. This negatively impacts the communities involved that would have benefited from increased

jobs and tax revenues.

As Willy Myers of the Columbia Pacific Building and Construction Trades Council and Joe Wilson of Pederson Brothers wrote in the Everett Herald,

Projects like Vancouver Energy also help diversify our employment base. Washington is fortunate to have thriving technology, global health and international trade sectors. But a strong economy still must provide family-wage job opportunities for skilled tradespeople and other blue-collar workers. (Myers and Wilson 2016)

To be sure, these projects would mean more high wage jobs in parts of the state that are not doing as well as the Seattle metropolitan area. For example, in July 2016, the unemployment rate in King County was 4.4 percent. Meanwhile, it was 6.4 percent in Whatcom, 7.7 percent in Cowlitz, 6.8 percent in Clark, 6.7 percent in Pierce, and 6.6 percent in Spokane (ESD 2016).

Further, some of the projects subjected to the expanded SEPA are export facilities. Not only is trade very important for Washington's economy, but so is the exporting function itself. Additionally, when commodities are transported through Washington bound for export facilities, they provide a revenue stream that justifies investment in rail infrastructure, which benefits other users of rail (WRC 2013b).

Another result is that future growth is endangered. As Kris Johnson of the Association of Washington Business has said, "Washington's regulatory process has become longer and more uncertain, which sends the wrong message to employers" (KWC 2016a). Indeed, he noted, some companies "will not be willing to tolerate the delays of Washington's permitting system and will not bring the needed investment to our state" (KWC 2016a).

These efforts to prevent legal, environmentally regulated exporting activities from taking place in this state will fre-

quently cause them to be moved to other countries with far less environmental restrictions. The final outcome is worse for the planet and foolishly penalizes working families and the whole economy of Washington state.

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