

A NEWLY EXPANDED SEPA THREATENS WASHINGTON'S COMPETITIVENESS

BRIEFLY

The Department of Ecology and others have recently undertaken SEPA reviews that expand the scope of review beyond state borders to an unprecedented extent. By expanding SEPA in these cases, Washington risks its competitiveness by making the process more uncertain for future projects.

Environmental groups and agencies like the U.S. Environmental Protection Agency (EPA) have proposed expanding National Environmental Policy Act (NEPA) and State Environmental Policy Act (SEPA) reviews to consider global, lifecycle, and cumulative impacts of projects they deem controversial. At the national level, the Keystone XL pipeline project review process demonstrates how such expanded scope is creating a climate of delay for these projects.

Three recently proposed developments in Washington have prompted the Department of Ecology and others to undertake SEPA reviews that expand the scope of review beyond state boundaries to an unprecedented extent.

Under SEPA, "Any governmental action may be conditioned or denied" (RCW 43.21C.060). Consequently, the expanded parameters increase uncertainty for business and call into question the competitiveness of Washington for future projects.

How SEPA Works

SEPA was enacted by the Washington Legislature in 1971 (RCW 43.21C). The act requires 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 those activities "entirely or partly financed, assisted, conducted, regulated, licensed, or approved by agencies" (WAC 197-11-704). They may be either project actions, which are "agency

decisions to license, fund, or undertake a specific project," or nonproject actions, which are "agency decisions on policies, plans, and programs" (Ecology 2003). Categorical exemptions "are types of projects or agency actions that are not subject to SEPA review because the size or type of the activity is unlikely to cause a significant adverse environmental impact" (Ecology 2003).

Once it is determined that SEPA review is required, the lead agency evaluates "the proposal's likely environmental impacts" (Ecology 2003). To do so, it uses an environmental checklist—

a standard form used by all agencies to obtain information about a proposal. It includes questions about the proposal, its location, possible future activities, and questions about potential impacts of the proposal on each element of the environment (such as earth, water, land use, etc.). (Ecology 2003)

At this point, "the lead agency and applicant may work together to reduce the probable impacts by either revising the proposal or identifying mitigation measures that will be included as permit conditions" (Ecology 2003).

The next step is for the lead agency to "determine whether a proposal would still have any likely significant adverse environmental impacts" (Ecology 2003) after mitigation. (This is the threshold determination.)

If a proposal is determined to have significant adverse impacts, the environ-

mental impact statement (EIS) process begins:

Scoping is the first step in the EIS process. The purpose of scoping is to narrow the focus of the EIS to significant environmental issues Scoping also provides notice to the public and other agencies that an EIS is being prepared, and initiates their involvement in the process. (Ecology 2003)

The scope looks at the range of impacts to be analyzed, including the direct, indirect or cumulative impacts of a proposal (WAC 197-11-792). An example from the SEPA Handbook:

- A new residential development may propose to place fill in a wetland in order to construct a road (a direct impact).
- The new road will encourage increased development in the area be-

cause of the improved access (an indirect impact).

- Increased runoff and contaminants from the development would be added to the volumes and levels of contamination from similar developments surrounding the wetland (cumulative impacts). (Ecology 2013)

Under SEPA, there is a defined path for proposal review. Agencies, however, apply SEPA on a case-by-case basis. Note that the scope of the EIS is not necessarily indicative of whether a permit will be approved or not:

The agency decision-maker must consider the environmental information, along with technical and economic information, when deciding whether to approve a proposal. (Ecology 2003)

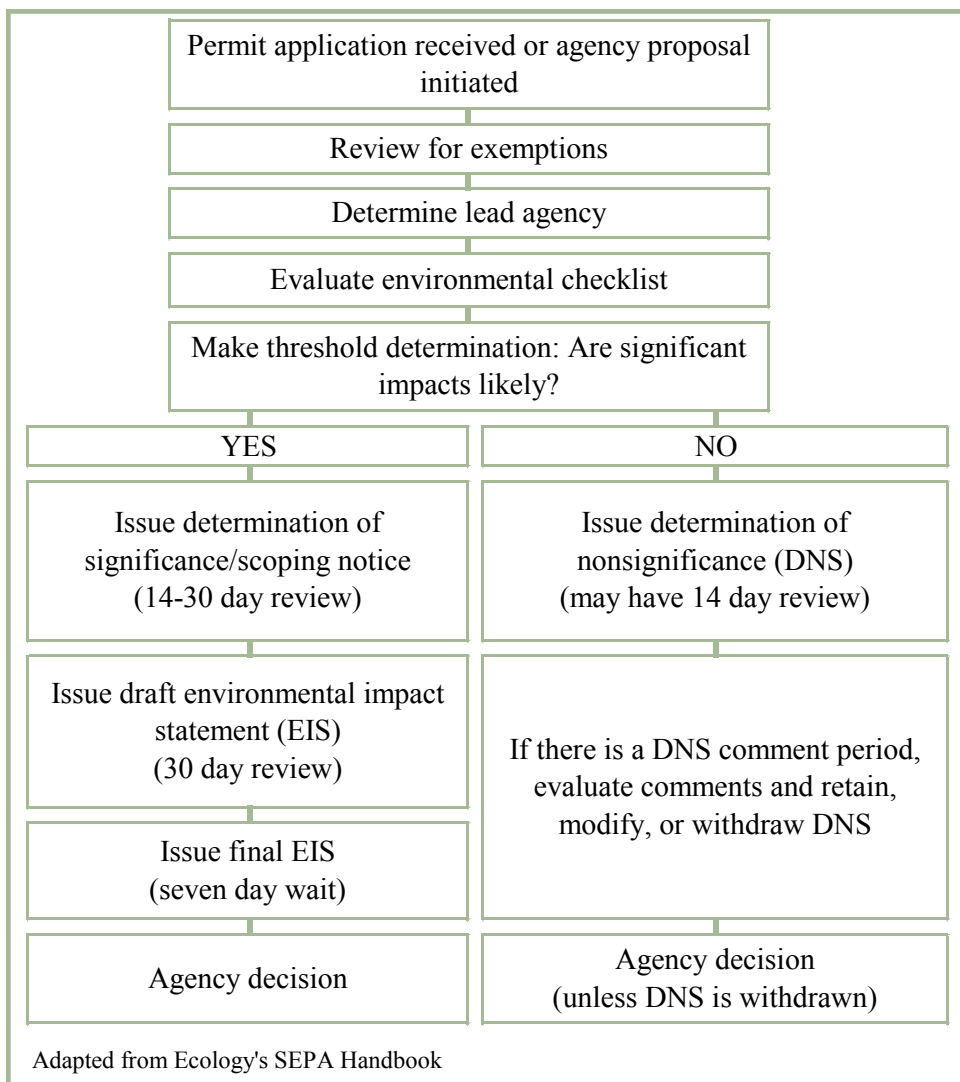
That said, by using a broad scope and considering more far-reaching impacts, the approval process is prolonged, more obstacles introduced and more reasons for denial identified.

Newly Expanded Review

This longstanding review process has typically considered in-state environmental impacts, particularly those at the project site. Recently, agencies in Washington have broadened that review for three projects to include lifecycle greenhouse gas (GHG) emissions and transportation impacts—even those occurring outside Washington. The state’s action contrasts with the decision of the U.S. Army Corps of Engineers to decline requests for a cumulative review of these projects, along with similar ones in Oregon (like Ambre Energy’s Morrow Pacific project).

1. In July 2013, Whatcom County, Ecology, and the U.S. Army Corps of Engineers announced the scopes of review for the proposed Gateway Pacific Terminal (GPT) at Cherry Point. The terminal “would provide storage and handling of exported dry bulk commodities, including coal, grain, iron ore, salts and alumina” (Whatcom 2013). The Corps’ NEPA EIS will include

Chart: SEPA Review Process



an extensive analysis of the projects' on-site and nearby impacts, including environmental effects on wetland, shoreline and inter-tidal areas, water and air quality, cultural and archeological resources, fish and wildlife, noise and vibration, among other possible effects. (Whatcom 2013)

(This is consistent with typical SEPA reviews.)

Ecology will additionally include broader impacts, including

a detailed assessment of rail transportation on other representative communities in Washington and a general analysis of out-of-state rail impacts; an assessment of how the project would affect human health in Washington; a general assessment of cargo-ship impacts beyond Washington waters; [and] an evaluation and disclosure of greenhouse gas emissions of end-use coal combustion. (Whatcom 2013)

2. In February 2014, Cowlitz County and Ecology announced the scope for the proposed Millennium Bulk Terminals coal export facility near Longview. The EIS

will contain an evaluation of impacts associated with the project from greenhouse gas emissions including those from terminal construction and operations, rail and vessel traffic, and end-use coal combustion. (Millennium 2014)

3. On April 2, 2014, the Energy Facility Site Evaluation Council (EFSEC) announced the scope of the EIS for Tesoro Savage Petroleum's proposed crude oil loading facility at the Port of Vancouver:

The environmental review of the proposed facility will closely study the direct impacts at the site. Analysis will also include review and evaluation of a broad range of indirect and cumulative impacts likely to occur within the state of Washington. Outside the state, analysis

will include less detailed discussion on probable impacts, including those related to rail and vessel traffic. (EFSEC 2014)

In short, the Department of Ecology, along with its co-lead agencies, 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. The agencies are also considering transportation impacts beyond Washington. This is speculative, broad, and could have far-reaching impacts.

Though the breadth of the review is unprecedented, Ecology Director Maia Bellon contends that the scoping decision does not alter SEPA standards: "The SEPA scoping announcement does not change any underlying permit requirements or standards, nor does it make any permitting decisions" (Bellon 2013).

In a letter to state Senator Doug Ericksen regarding the preliminary scope of environmental review for the Gateway Pacific Terminal, Director Bellon notes that the scope was based on factors including:

- "Responsiveness to public comment" (including from the EPA).
- The fact that Washington has adopted laws and an executive order on limiting GHG emissions (RCW 70.235) and a law discouraging coal power.
- Specific details about the GPT proposal. For example, "GPT would be the nation's largest coal export facility, increasing America's total export of coal by some 40 percent" and "there is no speculation as to the end use of the exported coal" (Bellon 2013).

Indeed, the EPA had commented on GPT to the Army Corps of Engineers, asking them to

... evaluate the potential impacts along the full route associated with transportation of dry bulk goods, in-

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cluding coal, to the new terminal. That evaluation would appropriately include the potential increases in fugitive coal dust and diesel emissions that would accompany the additional rail traffic to the proposed new terminal . . . EPA also recommends that environmental impacts from increases in regional rail traffic and combustion of coal in receiving markets be examined in the context of other proposed export facilities in the Pacific Northwest region, so that reasonably foreseeable cumulative environmental impacts from additional facilities can be understood. (McLerran 2013)

Environmental groups also asked the Corps “to evaluate the cumulative and related impacts of all proposed coal export terminals in Oregon and Washington in a single, comprehensive, area-wide environmental impact statement” (Boyles 2013a).

As noted above, the Corps declined the invitations.

Washington and Oregon have become ground zero for expanded review at the state level, but the actions here are part of a concerted national campaign, as the National Association of Manufacturers points out:

This petition by the environmental groups is an attempt to slow down the permitting process and to kill these export expansion efforts by delaying permits for years and by requiring huge expenditures by the private and public sectors. Expanding environmental review to include all of the Washington and Oregon proposals and their potential cumulative economic and environmental impacts across the region, the United States and the world, would be a drastic policy shift from current practices that would undermine national goals to boost exports. (Yost 2013)

Statutory authority. How can Ecology suddenly include end-use and transportation impacts that occur out of state in environmental review? Under SEPA, all branches of government must

Recognize the worldwide and long-

range character of environmental problems and, where consistent with state policy, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of the world environment. (RCW 43.21C.030)

Also,

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. (WAC 197-11-060(4)(b))

Additionally, in 2011, Ecology released a guidance document (which is not an adopted rule) “to assist Ecology staff in determining which projects should be evaluated for greenhouse gas emissions” under SEPA (Ecology 2011).

The guidance suggests that a review consider any new GHG emissions caused by a proposal and the “effects of a changing climate on the proposal’s new infrastructure,” as a result of things like increased sea levels, reduced snowpack, and changes in water availability (Ecology 2011).

The guidance notes that “If the emissions are proximately caused by the project, they should be disclosed regardless of their location” (Ecology 2011). Specifically,

For projects with ongoing operations that include transporting products from outside the state, such as a port, a more thorough and perhaps more defensible analysis would include the transportation emissions from the source location outside of Washington to the final destination *if either is known and the extent to which either is known.* Whether or not SEPA requires the transportation analysis to include these out-of-state transportation emissions is an unsettled question under SEPA case law. (Ecology 2011, emphasis in original)

The guidance does not discuss extending

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such analysis to the end-use of a product.

Case-by-case. Director Bellon writes,

... 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. The criteria to be applied are the same in every case: namely, what are the probable, significant, adverse environmental impacts from the proposal. (Bellon 2013)

SEPA reviews are conducted on a case-by-case basis, but generally projects are evaluated in the same way. Now that a global consideration has been used for a few projects, the same could be done for any future project. These global review cases have been brought on, in part, by thousands of comments from people who oppose the particular projects or the commodity involved.

“Case-by-case,” then, appears to mean that at regulators’ discretion any controversial project may suddenly become subject to global review. In regulatory matters, discretion undercuts certainty.

As Eric Johnson of the Washington Public Ports Association said,

We are watching this review very carefully because of the precedent that it creates for our other cargoes. The state is expanding its review to both the transportation and the use of cargo outside of the state. This policy could have big consequences for a trade-dependent state like ours. Ecology says don’t worry, it is just for coal, but they can’t control that. (Smith 2013)

In a letter to Sen. Ericksen regarding the preliminary scope of environmental review for the Gateway Pacific Terminal, Director Bellon tried to allay such questions, writing (about a future Boeing plant),

Ecology believes it would be likely that a lead agency would determine that greenhouse gas emissions associated with production at the [777X wing] plant would be determined to be insignificant We also expect a lead agency would be unlikely to perform

an in-depth analysis of potential greenhouse gas emissions associated with the finished product (plane operations) for a variety of reasons, including:

- An expectation that improved efficiency of this particular commodity . . . will use less fuel than existing parts . . . ;
- Life-cycle analyses of component parts and processes associated with a finished product would likely require more assumptions than a single-purpose commodity such as coal . . . ;
- Uncertainty about what fuel planes will use . . . ;
- Uncertainty about whether the wings will be installed in planes that are additive to the fleet or displace older, less efficient models. (Bellon 2013)

Director Bellon wrote that “Ecology has considered other projects and commodities in a manner and process consistent with our preliminary assessment for GPT” (Bellon 2013). Namely: the Westway Terminal Tank Farm Expansion project and the Imperium Bulk Liquid Terminal Facility. In both these cases, which would expand existing storage facilities for bulk liquids (including crude oil), Ecology and the city of Hoquiam did not require an EIS. They “concluded neither the Westway nor Imperium projects would produce significant, adverse environmental impacts, and issued what is called a Mitigated Determination of Nonsignificance [MDNS]” (Bellon 2013). The MDNS’s were issued in spring of 2013. (More on these projects below.)

According to Director Bellon, these examples

tell us that the scope of SEPA analysis will vary depending on the specifics of the proposals. Thus, in making our decision on the GPT project, we did not set or establish a new regulatory threshold or standard—we applied the standards of SEPA to the project proposal. (Bellon 2013)

Precedents

Scopes may vary depending on specifics, but there are no direct precedents in Washington or any other state of including the end-use of a product in an environmental review.

Still, in legislative testimony, Director Bellon claimed that the Sumas Energy 2 (SE2) project is an example of where a SEPA analysis has considered impacts beyond Washington’s borders (Bellon 2014).

The SE2 natural gas power generation project was proposed in 1999 in Sumas, which is close to the Canadian border in the Lower Fraser River Valley. In 2001, following environmental review, EFSEC recommended that Gov. Locke deny its application. (It was eventually approved by the governor, but a transmission line into Canada was denied by Canada.) EFSEC’s analysis concluded that SE2’s “proposals for mitigation are insufficient to address the environmental impacts of this facility”—including those of GHG emissions. EFSEC wrote,

The Lower Fraser Valley air shed is an area shared by the British Columbia Lower Mainland and Whatcom County in Washington State. The Council recognizes that the Canadian portion of the Lower Fraser Valley would receive much of the potentially harmful air emissions from SE2’s plant. (EFSEC 2001)

In this case, the review was for the generation facility itself—not a facility that merely exported the power.

Director Bellon and others have also claimed precedence in three projects subject to the NEPA:

1. Bureau of Land Management Buckskin Mine Hay Creek II coal lease EIS: The EIS looked at GHG emissions from combustion of the coal.

Assuming that all coal produced would be burned to generate electricity, GHG emissions that could be attributed to coal production resulting from mining the proposed tract or an alternative tract configu-

ration, as well as from the forecast coal production from all coal mines in the Wyoming PRB [Powder River Basin], were estimated. (BLM 2011)

The EIS notes that Buckskin Mine coal is not sold internationally; so, this analysis was within U.S. jurisdiction.

2. Surface Transportation Board’s Tongue River Railroad EIS: The proposal was to build a new rail line to transport coal from the Powder River Basin, with the coal going mainly to U.S. domestic electric utilities (but also potentially exported). The final scope was published March 22, 2013. Among other things, the EIS will

Evaluate the potential air quality impacts resulting from the proposed new rail line and the proposed operations, as well as combustion of the coal proposed to be transported Evaluate the air emissions associated with the proposed action, including coal dust and diesel emissions from locomotives Include a life-cycle analysis of potential GHG emissions. (STB 2013)

3. State Department’s Keystone XL pipeline EIS: The final supplemental EIS for Keystone evaluated “the potential increase in indirect lifecycle (wells-to-wheels) GHG emissions associated with the . . . crude oil that would be transported by the proposed Project” (Walker 2014).

These three federal cases are clearly more relevant to the Washington projects than Sumas is.

Additionally, regarding the potential cumulative scope for the Gateway project, the U.S. Chamber of Commerce commented to the Corps that “There is no precedent for conducting a programmatic EIS with such a vast scope, and there is certainly no compelling reason to set such a precedent” (Kovacs 2013). (A programmatic EIS is one that looks at regional, cumulative impacts.)

Impacts of the Broad Review

Now that Ecology has included end-use GHG emissions in a scope, it could potentially do the same for any future project dealing with any commodity. This could impact international trade and interstate commerce, as well as increase uncertainty for business and reduce the timeliness of the SEPA process. Ultimately, Washington's competitiveness will suffer.

More projects could be subject to expanded review. Prior to the Corps' GPT scoping decision, the National Association of Manufacturers wrote,

The NAM believes that by expanding this focus to include the environmental impact of the cargo, and all similar cargo transported through the region, the Corps could be laying the foundation for similar exercises for just about any port or rail expansion to transport any type of cargo. For instance, what if the cargo at issue was not coal but cars, or tractors, or even airplanes? Would the Corps need to perform a Programmatic EIS to determine the lifecycle environmental impact of that cargo? What if the cargo was an agricultural or animal product; should methane emissions be considered? The possibilities are endless and deeply troubling to manufacturers and their employees. (Yost 2013)

The expansion could lead to project denial or cancellation.

Above, we mentioned the Westway project, which Ecology Director Bellon raised to argue that no new standard is being set. Since she wrote that letter, the expanded review has come into play.

In May 2013, the Quinault Indian Nation, Friends of Grays Harbor and others filed petitions for review of the Westway Terminal permit with the Shorelines Hearings Board (SHB). An August 2013 filing in the case from Earthjustice cited the announced scope of review for the Gateway project. Of Ecology's Westway decision, the filing notes,

Ecology's attempt here to both down-

play its errors and omissions in its greenhouse gas calculations and to downplay the serious concern about greenhouse gas emissions in the face of its own contrary actions in the past is arbitrary agency decision-making. (Boyles 2013b)

In November 2013, the SHB found the Westway MDNS to be not valid. The MDNS "considered the cumulative impacts from the Westway and Imperium projects together, but they did not consider the additional impacts from USD [U.S. Development]" (SHB 2013). USD had proposed a similar project nearby but had not yet submitted a permit application. Even so, the SHB "concludes the MDNS is clearly erroneous for failing to consider the cumulative impacts of all three projects" (SHB 2013). Additionally, the summary judgment notes:

Although these matters will not proceed to hearing at this time, the Board notes that there are areas of the existing SEPA review, in addition to the failure to consider cumulative impacts from USD, and the failure to require the RTIA [Rail Transportation Impact Analysis] and VTIA [Vessel Transportation Impact Analysis] prior to the issuance of the MDNS, that it finds troubling. In particular, the current record before the Board presents troubling questions of the adequacy of the analysis done regarding the potential for individual and cumulative impacts from oil spills, seismic events, greenhouse gas emissions, and impacts to cultural resources prior to making the threshold determination. (SHB 2013)

Clearly, Washington's expanded review is already having ripple effects. And, although no other state has included lifecycle emissions of an exported product in the review of a project, Oregon's Gov. John Kitzhaber would like to follow Washington's lead. In a speech to the Oregon League of Conservation Voters, he said,

I commend Governor Inslee for assuring that Washington's review of the coal export facilities proposed in his state reflect a full examination of the

"Arbitrary agency decision-making."

upstream and downstream impacts of coal: from rail congestion and coal dust to the air pollution we now experience on the west coast from burning coal in Asia.

Unfortunately, Oregon law is more limited in terms of what we can consider in reviewing large-scale projects such as the proposed Ambre coal export facility. I assure you, however, that we are carefully reviewing all of the issues under our authority, and that I will do all that I can within the context of existing Oregon law to ensure that we do not commit ourselves to a coal-dependent future.

Furthermore, I have asked my staff to develop proposals for the 2015 Oregon Legislature that, going forward, will assure that there is a comprehensive public review of the costs and benefits of significant development proposals like the coal export facilities now on the drawing boards. (Kitzhaber 2014)

The Oregonian newspaper, in a sharply-worded editorial, called Kitzhaber's efforts to block Ambre Energy's Morrow Pacific project "counterproductive pandering." Regarding his speech to the League of Conservation Voters, the Oregonian asked "Can you say permit paralysis?" The editorial concludes,

Fair-minded Oregonians shouldn't expect the Kitzhaber to alter his dislike of coal exports. But is it too much to ask the governor, who claims to care about rural jobs, to deal civilly and in good faith with businesses eager to create some? (Oregonian)

Legal questions. Despite the statutory authority claimed by Ecology, Washington may not be on solid legal ground here. In legislative testimony, Director Bellon said,

For Gateway, the Army Corps of Engineers chose not to study greenhouse gases. That is consistent with the Corps' policy to only study impacts associated with its own direct authorities. However, in their scoping comments, the federal Environmental Protection Agency and other agencies with

air expertise asked Washington state to study greenhouse gases associated with coal combustion. (Bellon 2014)

Comments on the Millennium (MBTL) scope written by Rob McKenna for the Attorneys General of Montana and North Dakota ("the States") note:

Contrary to this summary of the law, there is, in fact, no legal difference in the scope of review required to be conducted by the Corps of Engineers and Ecology. The National Environmental Policy Act ("NEPA") requires consideration of all foreseeable impacts, and does not limit such review to national boundaries. It also authorizes and requires federal agencies to consider environmental impacts outside of the scope of their geographical and subject matter jurisdiction. (McKenna 2013)

McKenna's comments also note that

Ecology's EIS scope for the Cherry Point Project is unrealistically broad, includes speculative impacts, requires impossible assessments of foreign environmental impacts, and appears to have been designed to hinder the development of that terminal. (McKenna 2013)

Further,

A scoping decision that delays, burdens or prevents the completion of the MBTL Project would deny citizens of the States access to international markets, burden or prevent interstate commerce and usurp the prerogatives of the United States government with respect to international trade and foreign policy. (McKenna 2013)

Additionally, two trade attorneys considered the expanded EIS and came to the conclusion that "a WTO panel will likely find the government actions at issue to constitute export restrictions" (Bacchus and Jeong 2013). Further,

. . . for the Gateway Pacific Terminal project, the federal government decided to limit the scope of its review only to the local environmental impacts, while state/local governments decided on a more expanded scope that in-

cludes the impact of burning coal outside the United States. These divergent decisions indicate that the criteria for reviewing coal export terminals have been determined on a discretionary basis. Furthermore, the outcome from the reviews is uncertain, and approval is not assured. This uncertainty and the delay affect investment plans, create a disincentive to export and limit competitive opportunities to export. (Bacchus and Jeong 2013)

Timeliness. The Department of Ecology notes that the timeline for the SEPA process can vary considerably by project:

The time needed to review your proposal will depend on the permits needed, the complexity of the project, the amount of information already available, and the need to complete additional analysis or studies. In many cases, project review may be completed in two or three months. On the other hand, completing project review for some complex projects may take years. (Ecology 2014)

Expanded review will likely push projects to that longer time frame:

It is expected that the draft EIS will take approximately two years to complete, and the preparation of the final EIS will take an unknown amount of additional time. The projects must also secure various other state and local permits prior to construction. However, the vastly expanded scope of the Washington State environmental review appears poised to cause significant additional delays or restrictions to the projects—delays that could stretch well beyond what is customary or reasonable. Prolonged delay, according to supporters of the projects, will have detrimental impacts on the economy without considerable environmental benefits. (Bacchus and Jeong 2013)

As Ted Sprague of the Cowlitz Economic Development Council said,

If we are going to expand our economic base we need to be timely and consistent in our permitting process. Adding unnecessary and overly burden-

some ‘cradle to grave’ permitting will put a chill on future economic development projects in our state. (Smith 2014)

Comment

The Department of Ecology’s approach to the SEPA review of recent projects is troubling. It represents an expansion of the process that no other state has done, yet it is representative of the approach some agencies and environmentalists are advocating at the federal level.

As the National Association of Manufacturers told the Corps, “A Programmatic EIS for coal export projects in the Pacific Northwest would create a major disincentive for manufacturers to export their products, impacting jobs and economic growth” (Yost 2013).

Kris Johnson, president of the Association of Washington Business similarly says,

Businesses want certainty. They want clear guidelines so they can make the appropriate investments of time and resources. Unfortunately, this decision leaves much in doubt. Which elements of a project will be judged? Washington state is the most trade dependent state in the nation. Having a reliable, predictable system is critical to our state’s ability to be competitive. (Smith 2014)

By expanding SEPA in these cases, Washington risks its competitiveness by making the process more uncertain for future projects.

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