

2023 WPPA CLE

SEPA: Updates and Strategies

PRESENTED BY

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Agenda

- SEPA 101
- SEPA legislative updates
- SEPA rule revisions
- SEPA strategies

SEPA 101

Purpose and Intent

- SEPA is intended to ensure that environmental impacts are considered during state and local government decision-making.
- RCW 43.21C.030
 - “The legislature authorizes and directs that, . . . (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall: . . .
 - (b) Identify and develop ***methods and procedures*** . . . which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.”

SEPA 101

Purpose and Intent (con't)

- Before taking a particular course of action, SEPA requires lead agencies to
 - Identify and evaluate probable impacts (including cumulative, short-term, long-term, direct and indirect impacts), alternatives and mitigation measures
 - Involve public
 - Prepare environmental documents that are concise, clear, and to the point.
 - Integrate SEPA with existing agency planning and licensing procedures so procedures run concurrently rather than consecutively.
 - Integrate SEPA with agency activities at the earliest possible time to ensure planning and decisions reflect environmental values, avoid delays later in the process, and seek to resolve potential problems.

SEPA 101

When does SEPA apply? When there is an action per WAC 197-11-704.

- (1) "Actions" include
 - (a) New and continuing activities (including projects and programs) entirely or partly financed, assisted, conducted, regulated, licensed, or approved by agencies;
 - (b) New or revised agency rules, regulations, plans, policies, or procedures; and
 - (c) Legislative proposals.
- Two types of actions.

SEPA 101

When does SEPA apply? When there is an action per WAC 197-11-704.

- (2)(a) **Project actions.** A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area. Projects include and are limited to agency decisions to:
 - (i) License, fund, or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract.
 - (ii) Purchase, sell, lease, transfer, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified.
- (b) **Nonproject actions.** Nonproject actions involve decisions on policies, plans, or programs.
 - (i) The adoption or amendment of legislation, ordinances, rules, or regulations that contain standards controlling use or modification of the environment;
 - (ii) The adoption or amendment of comprehensive land use plans or zoning ordinances;
 - (iii) The adoption of any policy, plan, or program that will govern the development of a series of connected actions (WAC 197-11-060), but not including any policy, plan, or program for which approval must be obtained from any federal agency prior to implementation;
 - (iv) Creation of a district or annexations to any city, town or district;
 - (v) Capital budgets; and
 - (vi) Road, street, and highway plans.

SEPA 101

Lead Agency vs. Project Sponsor

- “Lead agency” status is determined by the “first agency receiving an application for or initiating a nonexempt proposal” unless the determination previously has been made, or is in the process of being made by another agency. WAC 197-11-714(3).
- Lead agency has main responsibility for complying with SEPA’s procedural requirements and sole responsibility for threshold determination and EIS preparation / content.
- Rules contain an elaborate system of criteria for determining lead agency status. WAC 197-11-926, -928, -930, -932, -934, -936, -938.
- Two or more agencies may, by agreement, share or divide lead agency responsibilities as long as one is the nominal lead agency and other agencies with jurisdiction are notified of the agreement. WAC 197-11-944.

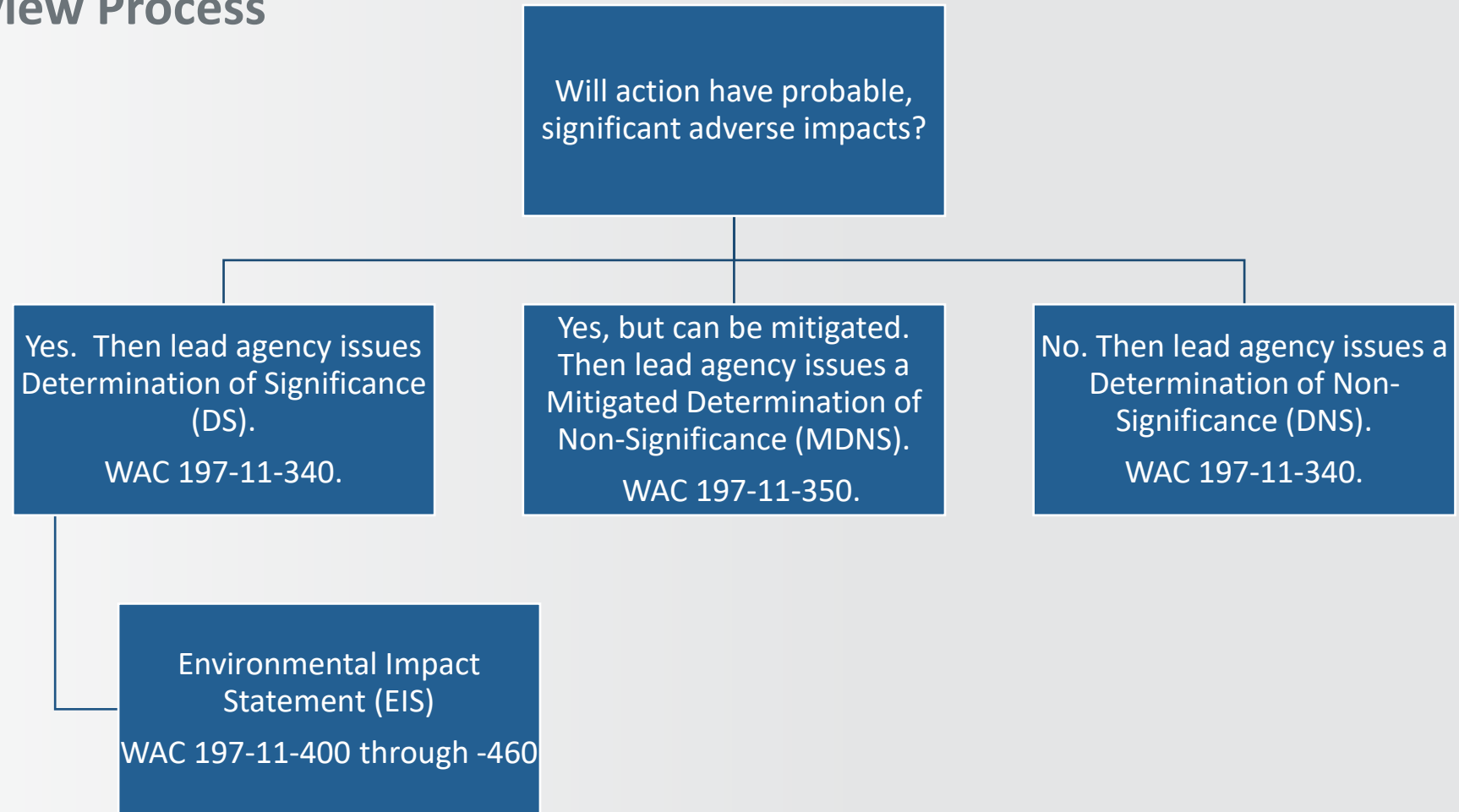
SEPA 101

Exemptions and Planned Actions

- Statutory SEPA Exemptions, RCW 43.21C.035, .037, .038, 0.381--.0384
- Administrative / Regulatory Categorical Exemptions, WAC 197-11-800
- Planned Actions
 - Environmental Impact Statement (EIS) prepared for a specific geographic area before individual projects are proposed.
 - If individual projects fit within the parameters of the project analyzed, no additional environmental review may be needed.
 - Helpful for master plans and other planning documents.

SEPA 101

Environmental Review Process



SEPA 101

Impacts

- **RCW 43.21C.031: Significant impacts.**
- “(1) An environmental impact statement . . . shall be prepared on proposals for legislation and other major actions having a probable significant, adverse environmental impact. . . .
- “(2) An environmental impact statement is required to analyze only those probable adverse environmental impacts which are significant.”

SEPA 101

Probable

- **WAC 197-11-782:** “Probable means likely or reasonably likely to occur . . . Probable is used to **distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative.** This is not meant as a strict statistical probability test.”
- **WAC 197-11-060 Content of Environmental Review:** “(4) **Impacts.** (a) SEPA's procedural provisions require the consideration of ‘environmental’ impacts . . . , with attention to impacts that are **likely, not merely speculative.**”

SEPA 101

Significant

- **WAC 197-11-794**
 - “[A] reasonable likelihood of more than a moderate adverse impact on environmental quality.”
 - “Significance involves both context and intensity . . . Intensity depends on the magnitude and duration of an impact.”
 - “The severity of an impact should be weighed along with the likelihood of its occurrence. An impact may be significant if its chance of occurrence is not great but the resulting environmental impact would be severe if it occurred.”

SEPA 101

Scope of Impact

- **WAC 197-11-060(4)(b-c)**
 - Geographic scope not limited to SEPA lead agency's jurisdiction
 - Duration of impacts may exceed lifetime of project
- **WAC 197-11-060(4)(d-e)**
 - Indirect impacts
 - (d) A proposal's effects include direct and indirect impacts caused by a proposal. Impacts include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions.
 - Cumulative impacts
 - (e) "The range of impacts to be analyzed in an EIS (direct, indirect, and cumulative impacts, WAC 197-11-792), may be wider than the impacts for which mitigation measures are required of applicants (WAC 197-11-660). This will depend upon the specific impacts, the extent to which the adverse impacts are attributable to the applicant's proposal, and the capability of applicants or agencies to control the impacts in each situation." *(emphasis added)*

SEPA 101

Types of EISs and Using Previous SEPA Documents

- Project-level
 - Most typical; prepared for individual project actions
- Programmatic EISs
 - **Provide the basis for future project decisions** - Environmental analysis for nonproject actions forms the basis for later project review and provides greater predictability.
 - **Expedite project analysis and decisions** -The more detailed and complete the environmental analysis during the nonproject stage, the less review will be needed during project review. The project review can focus on those environmental issues not adequately addressed during the nonproject stage.
- Addenda—Definition.
 - Environmental document used to provide additional information or analysis that does not substantially change the analysis of significant impacts and alternatives in the existing environmental document. WAC 197-11-706
- Addenda—Procedures. WAC 197-11-625.
 - An agency is not required to prepare a draft addendum.
 - An addendum for a DEIS shall be circulated to recipients of the initial DEIS under WAC 197-11-455.
 - Agencies are encouraged to circulate addenda to interested persons. Unless otherwise provided in these rules, however, agencies are not required to circulate an addendum.

SEPA 101

Appeals

- Administrative appeals before the Port
 - Optional
 - May eliminate appeals altogether
 - May offer one open-record appeal
 - May offer one open-record and one-closed record appeal
- GMHB or SHB
- Judicial appeals
 - To superior court, usually under LUPA
 - To Court of Appeals by agreement of parties

SEPA Legislative Updates

Appeal Exemptions and CatExs (CEs)

- 2019-2022
 - RCW 43.21C.501 exempted certain residential, multi-family, and mixed-use projects from SEPA appeals based on
 - Transportation impacts
 - Aesthetic and light/glare impacts
- 2023
 - SEPA Infill Exemption, HB 5412
 - Establishing a new categorical exemption for residential development.
 - Project Permit Review Periods, SB 5290
 - Local governments must achieve specified timelines or refund up to 20% of permit fees.

SEPA Legislative Updates

HB 1216 – Clean Energy Project Siting

- **Goal:** To ensure that the siting of new clean energy projects happens in an efficient, sustainable, and equitable manner.
- **Key Components**
 - **Streamlined Clean Energy Permitting Authority:** Establishes the Interagency Clean Energy Siting Council – co-chaired by the Departments of Ecology and Commerce – dedicated to consolidating the siting and permitting processes for clean energy projects.
 - **Expedited Environmental Review Process:** Amends SEPA to direct lead agencies to complete EISs for clean energy projects within 2 years.
 - **Clean Energy Projects of Statewide Significance:** In order to expedite the development of certain clean energy projects, the Department of Commerce is required to establish a new program for the designation of Clean Energy Projects of Statewide Significance (CEPSS).

SEPA Legislative Updates

HB 1216 – Clean Energy Project Siting

- Ecology is developing three state-wide PEISs for
 - Utility scale solar energy projects
 - Utility scale on-shore wind energy projects
 - Green electrolytic and renewable hydrogen projects
 - These will also include battery storage systems co-located at a facility.
- PEIS Process Benefits
 - Proponents for specific projects will still need to complete a project EIS for their individual clean energy project
 - Each programmatic EIS will help local governments and state agencies conduct their environmental reviews and make permit decisions.

SEPA Legislative Updates

HB 1216 – Clean Energy Project Siting

- Timelines

- Early 2024: Scoping starts for green electrolytic and renewable hydrogen programmatic EIS
- Summer 2024: Draft PEISs for utility-scale solar energy and utility scale wind energy released for public review and comment
- June 30, 2025: All three programmatic environmental reviews finalized and released

SEPA Rule Revisions

- Created a new categorical exemption level for single-family home construction for cities and towns fully planning under GMA in RCW 36.70A.040;
- Included four attached single-family residential units in WAC 197-11-800 (1)(b)(i);
- Increased flexibility for multifamily residential exemption in cities and towns fully planning under GMA in RCW 36.70A.040;
- Incorporated new procedural standards for raising categorical exemption levels in WAC 197-11-800 that require cities, counties, and towns to reach out to the Washington State Department of Transportation;
- Removed parking as a required consideration for analyzing traffic impacts for proposals;
- Updated planned actions, WAC 197-11-164, to be consistent with state SEPA law, chapter 43.21C RCW.

SEPA Rule Revisions

- Ecology amended and added new language to:
 - WAC 197-11-800(1)(b), (c), and (d) – Minor new construction – Flexible thresholds
 - WAC 197-11-444(2)(c) – Elements of the environment
 - WAC 197-11-960 – Environmental Checklist
 - WAC 197-11-164(1)(b) – Planned actions – Definition and criteria
 - WAC 197-11-172(1)(b) – Planned actions – Project review

SEPA Rule Revisions

Minor new construction – Flexible thresholds

WAC 197-11-800(1)(b), (c), and (d)

Project Types	Fully Planning GMA Counties			All other counties
	<u>Incorporated UGA</u>	Incorporated and Unincorporated UGA	Other unincorporated areas	Incorporated and unincorporated areas
Single family residential	<u>30 units</u>	30 units	20 units	20 units
<u>Single family residential with the total square footage less than 1,500 square feet</u>	<u>100 units</u>	<u>30 units</u>	<u>20 units</u>	<u>20 units</u>
Multifamily residential	<u>200 units</u>	40,000 square feet	40,000 square feet	40,000 square feet
Barn, loafing shed, farm equipment storage, produce storage or packing structure	<u>40,000 square feet</u>	40,000 square feet	40,000 square feet	40,000 square feet
Office, school, commercial, recreational, service, storage, building, parking facilities	<u>30,000 square feet and 90 parking spaces</u>	30,000 square feet and 90 parking spaces	12,000 square feet and 40 parking spaces	12,000 square feet and 40 parking spaces
Fill or excavation	<u>1,000 cubic yards</u>	1,000 cubic yards	1,000 cubic yards	1,000 cubic yards

SEPA Rule Amendments

Parking – No Longer An Element of the Environment

WAC 197-11-444(2)(c) and WAC 197-11-960

- WAC 197-11-444 – Elements of the environment.
 - (1)(c) – “Transportation: (i) Transportation systems; (ii) vehicular traffic; (iii) waterborne, rail, and air traffic; ~~(iv) Parking;~~ (iv) Movement/circulation of people or goods; (v) Traffic hazards.”
- WAC 197-11-960 – Environmental Checklist
 - (B)(14) – Eliminated subsection (c) of the transportation questions on SEPA checklists – “How many additional parking spaces would the completed project or nonproject proposal have? How many would the project or proposal eliminate?”

SEPA Rule Amendments

Planned Actions

WAC 197-11-164(1)(b) – Planned actions – Definition and criteria

Former Version	Amended Version
<p>“Under RCW 43.21C.440, GMA counties/cities may designate a planned action. A planned action means one or more types of project action that:</p> <p>(b) Have had the significant environmental impacts adequately addressed in an EIS prepared in conjunction with:</p> <ul style="list-style-type: none">(i) A comprehensive plan or subarea plan adopted under chapter 36.70A RCW; or(ii) A fully contained community, a master planned resort, a master planned development, or a phased project.”	<p>“Under RCW 43.21C.440, GMA counties/cities may designate a planned action. A planned action means one or more types of a project action that:</p> <p>(b) In conjunction with, or to implement, a comprehensive plan or subarea plan or subarea plan adopted under chapter 36.70A RCW, or a fully contained community, a master planned resort, a master planned development, or a phased project, have had the significant impacts adequately addressed:</p> <ul style="list-style-type: none">(i) In an environmental impact statement under the requirements of this chapter, or(ii) In a threshold determination or, where one is appropriate, in an environmental impact statement under the requirements of this chapter, if the planned action contains mixed use or residential development and encompasses an area that: (A) Is within one-half mile of a major transit stop; or (B) Will be within one half mile of a major transit stop no later than five years form the date of the designation of the planned action.”

SEPA Rule Amendments

Planned Actions

- WAC 197-11-172(1)(b)
 - “Planned action project review shall include: (b) Verification that the probable significant adverse environmental impacts of the project have been adequately addressed in the EIS or threshold determination prepared under WAC 197-11-164(1)(b) through review of an environmental checklist or other project review form as specified in WAC 197-11-315, filed with the project application.”

SEPA Issues and Strategies for Ports

Ports as Lead Agency

- Port SEPA policies
- Optional DNS Process, WAC 197-11-355
- SEPA responsible official
- Managing litigation risk

SEPA Issues and Strategies for Ports

Preparing Joint SEPA/NEPA documents

- NEPA and SEPA have important differences
 - SEPA does not take into account economic impacts.
 - NEPA requires analysis of socioeconomic impacts.
- NEPA EISs usually include analyses not found in SEPA EISs
 - Environmental justice
 - Section 4(f)
- NEPA and SEPA analyses may have different standards
 - CEQ has issued GHG guidance.
 - Ecology has not yet re-issued.
- Analysis should clearly state when it is only for NEPA or SEPA
- Lots of changes in NEPA recently, which could increase litigation risk. Do you want to do a joint document? Do you have a choice?

SEPA Issues and Strategies for Ports

Ports as Project Sponsor

- Optional DNS Process under RCW 43.21C.080
- Reducing litigation risk
 - MDNS or EIS?
- MTCA and SEPA Integration
 - Lead agency
 - Ecology if cleanup is happening under an order, agreed order, or consent decree.
 - Local government if cleanup is part of a development proposal.
 - Analysis
 - If just the cleanup is at issue, typically the analysis will be solely on the cleanup. However, Ecology has started questioning whether impacts associated with the development the cleanup will allow should also be included.

SEPA Issues and Strategies for Ports

Ports as Part of P3s

- Coordinating Timing of SEPA Process with P3 Procurement
 - No final design prior to SEPA completion; actions can't undermine SEPA by making decision a foregone conclusion
 - Delays in SEPA process hampers procurement; SEPA litigation could result in contract damages if P3 contract is in place.
 - Easiest approach is to finish SEPA and permitting, then start procurement.
- Determining Role of P3 Partner in SEPA Process
 - Public agencies must remain in control of SEPA process.
 - P3 partners can provide technical input, environmental data and reports
- Managing Supplementation Risks
 - If new information substantially changes the analysis of significant impacts and alternatives in the existing environmental document, supplementation is required.
 - When is an addendum required? How to handle large number of design changes?
- Managing Litigation Risks
 - SEPA litigation must be brought at the first available opportunity; usually when the first permit is issued.



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