
AN EVALUATION OF WASHINGTON STATE ENVIRONMENTAL POLICY ACT IMPLEMENTATION (SEPA)

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An evaluation of the Washington State Environmental Policy Act's (SEPA) use by King County shows that the substantive provisions of SEPA are seldom used. Because of this lack of use, the fundamental purposes of the act are being undermined and ecological damage continues without accountability. We propose a simple approach to increase the use of the substantive provision. The approach requires that administrators make precise interpretations of often vague environmental policies. This will result in increased use of applied science in the adaptive management paradigm and fulfilling the substantive intent of SEPA.

Introduction

Washington State's Environmental Policy Act (SEPA) was passed in 1971 as a response to a nationwide environmental movement. During the 1960s and 1970s numerous federal laws protecting the environment were passed, including the National Environmental Policy Act of 1969 (NEPA). NEPA stated a federal commitment to "encourage productive and enjoyable harmony between man and his environment."¹ NEPA and the environmental movement also spurred the development of "little NEPAs," including Washington State's SEPA, having purposes similar to NEPA.

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¹ National Environmental Policy Act.

With a little over 20 years experience with Washington State's SEPA, people are asking "How well is SEPA working?" Many recognize that SEPA has increased environmental awareness in government agencies and use of environmental considerations in decision-making, and brought about higher public participation in public decisions through its procedural requirements. Significant changes have occurred in many single purpose agencies, where interdisciplinary teams now review plans to determine program and project impacts. Having achieved environmental awareness in government agencies through procedural provisions, the question is now "How well are SEPA's substantive provisions being used in decisions on government actions?"

Earlier reviews of Washington's SEPA have particularly touted its substantive "bite," claiming that it can be used as the basis for decisions more than NEPA or other little NEPAs (Rogers 1984). The Polygon case,² in which a condominium was denied a permit on the basis of environmental impacts, not on the basis of established zoning codes, is frequently used to illustrate the power of the substantive provisions in Washington's SEPA. This case is probably more of an exception than the rule, however, as government agencies rarely apply the law's "bite." Not using the law fully impairs its effectiveness. SEPA is not being used effectively, and it must be if we are to maintain a quality environment.

To make SEPA effective, administrators making decisions on actions must interpret vaguely written policies specifically. Decisions must be based on specific guidelines within policies and specific impacts illustrated to support the interpretations made. Use of research and well-documented previous case studies relating actions to specific environmental impacts will then be necessary as a basis for decisions.

The Current Condition

SEPA promotes rational decision-making based on the effects of alternatives through the discretionary authority it grants to approve an action, to approve it with conditions, or to deny it.³ This goes far beyond its procedural requirements. Conditioning or denying an action through an environmental impact statement (EIS) must be based on the impacts recorded in the EIS and on policies regarding those impacts incorporated into formally adopted plans, regulations, or codes.⁴

To deny a proposal, the agency must find that the action would result in significant environmental impacts, and that reasonable mitigation would not reduce or eliminate those impacts sufficiently.⁵ This requires that the policies, regulations, and plans used as bases for conditioning or denying a permit include some statement of the degree of impact that could be considered sufficient to deny a permit or place conditions on a project.

² *Polygon Corporation v. City of Seattle*, 11 E.R.C. 1689 (Sup. Ct., Wash. 1978).

³ RCW 43.21C.060.

⁴ RCW 43.21C.060.

⁵ WAC 197.11.660 (1) (f).

Because policies for conditioning or denying are not written as strict rules,, administrators seldom invoke them as a basis to deny or condition an action. Without some clear definition of “substantial” or “significant” in a policy, it is difficult to incorporate the policy in a rational decision-making process. Vague or loosely termed policies are easier to write and easier to pass through a legislative body, but they effectively leave the administrators responsible for reviewing EISs with no turn- down or conditioning policy.

Many agencies and local governments have specific rules and ordinances that are frequently used to condition actions. Often, however, only the conditions to be placed, or the mitigations to be taken, are stated specifically. The circumstances under which those conditions in the ordinance are no longer sufficient mitigation for the impacts of the action are seldom listed. These ordinances and regulations apply to all projects, not just those requiring an EIS. Because they contain no policy detailing when it is appropriate to condition or deny a permit, the regulations are of no more help than vague policies.

Without quantitative or specific turn-down and conditioning policies available to administrators, SEPA’s effectiveness for aiding decision-making and planning is seriously hampered. First, the substantive power of SEPA is lost. Projects could proceed by fulfilling only procedural requirements and would no longer be vulnerable to denial or special conditions. In effect, the EIS becomes a glorified mitigated determination of non-significance (MDNS). Second, the incentive for improving understanding of environmental impacts through research and information programs as directed by SEPA is lost.⁶

These impacts to SEPA are probably more significant than initially perceived. Without substantive authority, conditions placed on projects being reviewed under SEPA must be based on ordinances and regulations that apply to all similar government actions. Special conditions relating to particular impacts caused by a project or action, *even one requiring an EIS*, cannot be placed without policies requiring them.

Research improves understanding of the environment. Not conducting research runs contrary to several statements in SEPA and to the basic intentions of SEPA. Poor understanding of the environment also undermines any attempt at rational decision- making, as ignorance usually leads to unintended impacts and *de facto* losses of resources. Unintended impacts to resources over which offending agencies had no authority was one of the major reasons that NEPA and SEPA were originally passed.

Example

King County has a set of plans and ordinances all unified by the county’s comprehensive plan. The comprehensive plan, the functional plans, and the community plans all carry broad policy statements. These policies serve primarily

⁶ WAC 197-11-080, RCW 43.21C.010(4).

as guidance to writing other plans and ordinances, and are frequently not specific enough to deny a permit. The ordinances include zoning codes, the sensitive areas ordinance, and the drainage manual. These documents state the rules with which all developments must comply. Whether or not a development requires an EIS, it must comply with these ordinances.

An example from the comprehensive plan of policy statement is "Water quality and natural drainage systems should be protected by controlling the quality and quantity of stormwater runoff" (King County 1985). With this policy as a directive, the county has developed ordinances with specific design criteria to reduce runoff quantities. When an EIS is required, however, this vaguely written policy provides no direction beyond the requirements in the ordinance, and those requirements must be non-site-specific enough to apply to every development.

Examination of EISs from residential developments reveals that predictions of impacts to water quantity and quality stated in EISs are not quantitative. Furthermore, no alternative mitigations to those required under ordinance are listed. Statements such as "the project will comply with drainage manual requirements" are encountered frequently. Such a statement is intended to read "We will do all the mitigation the ordinances require, therefore we are free of further conditions." Even now, when it is recognized that mitigations as given in the ordinances do not fully mitigate high flows or water quality impairment, particularly for large projects, no policies are invoked in EIS review to deny or further condition projects. SEPA provides the authority, but the policies are not specific enough to determine whether the mitigations required in the ordinances would still result in unacceptable impacts.

As mentioned earlier, with no ability to specific conditions or deny permits based on EIS contents, the EIS requirement becomes solely a procedural one. In King County this prediction has been borne out. In fact, during a meeting discussing SEPA use in King County, a director of the division where SEPA reviews are done said that EISs only serve a procedural role, and are basically red tape. He continued that once filled out, EISs are "only good for killing mice."

Another result of not having clear denial and conditioning policies is that needed research is not done. Quantitative evaluations of mitigation performance or specific impacts of development on flow and water quality are not required for deciding between alternative mitigations and permit denial. Even if a policy did provide some criterion or standard, current knowledge about impacts of residential development is too poor to predict whether reasonable mitigation would comply with the standards. In the last few years, the county has attempted to initiate monitoring programs to collect the data for the purpose of improving mitigation. Most people opposed to monitoring agree that the information does not exist, but cite the fact that it is not needed for decision-making as a primary argument against monitoring. The county does not even use experience from projects implemented in the past to condition new ones, they don't even want to know.

This sad-ending tale of imprecise policies leading to non-implementation of SEPA's substantive provisions and research requirements, is precisely the kind of story that led initially to the passage of NEPA and the SEPAs. As residential developments propagate through the county, fish habitat is slowly being degraded. One of the last wild Chinook runs in the county, in Bear Creek, is slowly disappearing, and unless special protection measures are taken, it will be gone in the near future. Water quality and flow are important parameters to fish and fish habitat, particularly anadromous fish such as Chinook salmon. Several new residential developments are being planned in the headwaters of Bear Creek. Enough observations exist to realize that if those developments rely only on normal flow controls such as required in county ordinances, that Chinook habitat in Bear Creek will be degraded to the point that the Chinook could disappear.

The Solution

Precise interpretation of legislated policies at the administrative level is necessary if SEPA is to be used effectively to protect the environment. The main reason for this is that legislative bodies responsible for preparing policies will probably not write prescriptive policies because of political constraints. If administrators take the step of interpreting policies specifically, research will be necessary to support their decisions, and an adaptive management style, where experience from past projects is used to condition new projects (Walters 1986), will result.

Environmental legislation has historically not been prescriptive (Mandelker 1984). That is, administrators dealing with resources and environmental management are usually given significant discretion in how they handle legislative direction. Often, environmental legislation includes some direction to agencies to promulgate the specific rules. If local governments and agencies legislated broad policies for use with SEPA and directed administrators to provide the specifics, it would fit in with this well-established model.

One reason that legislative bodies grant agencies discretion in environmental issues is that it is difficult to prescribe actions and conditions *a priori* to variability in the environment and to the relatively poor degree of understanding we have of the environment. Policies interpreted by administrators are more flexible, and they can change more easily as new information becomes available, because they need not pass through the political process. This flexibility is essential if an adaptive management style is used. If an administrator abuses this discretion, under SEPA, his or her actions are subject to review by the public.

Precise interpretation of policies at the administrative level has been supported by the courts in cases like *Polygon*.⁷ Precise interpretations yield specific conditions that can be understood by developers and courts alike. In a recent court case, King County's attempt to use the vague policies of the comprehensive plan

⁷ *Polygon Corporation v. City of Seattle*, 11 E.R.C. 1689 (Sup. Ct., Wash. 1978).

to deny a project was prevented because the county was not specific about how the policies were being violated by the project.⁸ Had the administrators been prepared with specific unacceptable impacts and required actions to attach to the policy with clear logic, it appears probable, based on the court's statement, that the court would have ruled in favor of the county.⁹

To use the example cited in an earlier section, we could combine the original policy on water flow and quality with other policies and the general charter of the county to protect life, health and property, yielding an interpretation along the lines of "Water quality and natural drainage systems should be protected by controlling the quantity of stormwater runoff such that it poses no threat to human health or to ecological balances." Even when interpreted this generally, the policy could be used to apply special conditions to a development requiring an EIS that would potentially impact water resources.

Scientific research and standards derived from other agencies, such as the state's water quality standards, would provide quantitative definitions for "human health" and "ecological balances" for the policy. Precise definitions of policies made on scientific bases would have a firm footing if challenged. Applied research and adaptive management strategies would become necessary to improve interpretations and conditions placed on developments over time. On this firm, scientific basis, a manager could list specific practices that the developer would have had to meet in order for the project to have acceptable impacts.

Results of the Solution

Once policies are written or interpreted more precisely, environmental protection will improve for three reasons. Administrators will become directly responsible for performance standards on environmental conditions directed by policies and will no longer be able to rely on compliance with design standards as "good enough." EISs will become useful decision-making documents, because administrators must use the material presented in the EIS as the basis for their decision. Third, research and monitoring will become important tools to support and guide decisions.

Administrators will rely more on performance standards, which are based on a goal to protect the environment, rather than on design standards, which are based on expectations that are seldom tested. When presented with directions from ordinances that read, "oil-water separators will be installed," the tendency is to believe that oil-water separators work, or that they are the only method available. When presented with directions from policies that state, "oil concentrations will be maintained at less than five parts per billion," the tendency is to try and find every feasible method of keeping oil out of water to meet that goal, and select the method that performs at that level with the least cost.

⁸ *Cougar Mountain Associates v. King County*, 111 Wn2d 742 (Sup. Ct., Wash. 1988).

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EISs become a decision-making tool. Administrators must make their decisions based on material presented in the EIS. If material is missing from the EIS, it can be appealed as incomplete. If material in the EIS suggests that the decision made contradicts policy, it may be appealed on that basis. In this manner, the interests of the people in the environment are protected.

Uncertainty makes decision-making difficult. In the case of the oil-water separators, how will a decision-maker know whether they are sufficient, or if additional mitigation is required? Or how, for example, will the courts know that a decision that is appealed really does contradict county policy, if the magnitude of the impact is uncertain?

To reduce and deal with uncertainty, research and monitoring will be necessary. The model of adaptive management, in which each proposed project is viewed as an experiment, would be a logical approach to filling this need. Previous projects provide information on how such projects affect the environment in general, both individually and cumulatively. For projects under consideration, the EIS would act as a hypothesis of how much impact would occur from the project given the various mitigations. Implementing the project and monitoring its effects test the hypothesis, and provide information on how to reformulate the hypothesis for the next project.

This model could be applied to practices, like the use of detention ponds, and it can likewise be applied to developers. Because the EIS is an agency document, the administrator making the decision is, in the end, responsible for reporting all likely environmental impacts. If after a development is completed, environmental damage in excess of that predicted in the EIS occurs, not because a particular design or practice was poor, but because the developer failed to perform mitigations, then the developer is a primary factor in determining the level of impact from the project. In this case, the developer should be explicitly incorporated into the equations that predict impact from projects. For example, if developer "A" has not used adequate erosion control practices in two previous projects and then applies for another permit, the EIS for that permit should include a statement to that effect. Further conditioning or even permit denial can then be based on that statement.

Conclusion

SEPA has worked well to increase environmental awareness in government agencies, encourage consideration of environmental values in decision-making, and increased public access to public decision-making. Through its substantive provisions SEPA can be a powerful tool available to planners to ensure implementation of environmental policies and plans. However, the powerful substantive provisions of SEPA are underused, and the consequences of not using those provisions seriously undermine the purposes of the act. SEPA is

supplementary to agency and county ordinances and regulations, and unless its substantive provisions are used, it adds little but red tape to the tools available to protect the environment.

One reason that SEPA's substantive provisions are not used is that the policies in plans are often too vague to enforce under SEPA. The vagueness is probably a result of the necessity of passing the plans through the political process and the difficulties of writing prescriptive policies for environmental issues. To realize SEPA's full potential, administrators must interpret policies in plans with precise meanings based on scientific reasoning that can be used to deny or condition actions.

When precise meanings are given to policies to be used under SEPA, the purposes of the act will be better realized. Agencies will need to conduct research and apply adaptive management to relate actions and alternative actions to specific environmental impacts. Agencies will have to deny and condition action that do not fit within policies. And rational decisions will be made, better balancing specific environmental concerns with other values of land. All that has to be done is to say how much is too much.

References

- King County Planning Department. 1985. King County Comprehensive Plan, Seattle, Washington.
- Mandelker, Daniel R. 1984. *NEPA Law and Litigation*.
- Rogers, William H. 1984. The Washington Environmental Policy Act. *Washington Law Review* 60(33):33-68.
- Walters, Carl. 1986. *Adaptive Management of Renewable Resources*.