

REF 400-ab10: NEPA/SEPA Legal Case Summaries

These summaries review court cases related to legal challenges filed against NEPA/SEPA documentation in Washington State. They are provided to help authors and project teams address NEPA/SEPA legal issues and include additional details above the information provided in the NEPA/SEPA Report Legal Issues Review Checklist. These summaries cover legal issues that have been filed in court. It is hoped that they will avoid legal challenges or sustain the NEPA/SEPA documents through a legal challenge.

Project: SR520 Bridge Replacement

Case: Coalition for a Sustainable 520 vs. FHWA

Date: 7/25/2012

Washington State Department of Transportation (WSDOT) proposed to replace the SR 520 Bridge across Lake Washington. WSDOT and the Federal Highway Administration (FHWA) prepared an EIS for the project. The plaintiffs challenged two aspects of the NEPA process and documentation. One was that the analysis of project alternatives was insufficient and the second was a failure to comply with Clean Air Act requirements. The summary judgment was to deny the plaintiff's motion.

Improper Alternatives Analysis: The plaintiff alleged that the EIS did not rigorously explore and objectively evaluate all reasonable alternatives:

- **Range of Alternatives:** The FEIS did not include a four lane alternative and therefore did not include a range of alternatives. The court standard of review was that NEPA and SEPA mandates the agency to "rigorously explore and objectively evaluate all reasonable alternatives". The court determined that the state did objectively evaluate reasonable alternatives. A 4 lane alternative was evaluated in the DEIS but dropped because it did not meet all factors in the project's "purpose and need" statement.
- **Purpose and Need Statement:** The "purpose and need" statement was challenged as being too narrowly defined. The court found that the "purpose and need" statement was not contrary to NEPA or SEPA. The project's stated purpose of improving mobility is not unreasonably narrow and fits within the finding of the 1999 Trans-Lake Washington Study.

Compliance with Clean Air Act: The plaintiff alleged that the agency did not adequately analyze "hot spots" for CO as mandated by the Clean Air Act. The court found that the location of air monitoring is a technical issue not regulated by NEPA and SEPA and is a claim without merit.

Project: Columbia River Crossing**Case:** Hayden Island Livability Project etc vs. FHWA and FTA**Date:** Case pending

Washington State Department of Transportation (WSDOT) and Oregon State Department of Transportation (ODOT) propose to replace the I-5 Bridge across the Columbia River. The State agencies, the Federal Highway Administration (FHWA), and the Federal Transit Administration (FTA) prepared an EIS for the project. The plaintiffs challenged two aspects of the NEPA process and documentation. The first claim was that the EIS failed to disclose and take a hard look at impacts to low-income community. The second claim was a failure to comply with Clean Air Act requirements. No judgment has been made on the plaintiff's motion (10/02/2012).

EIS – Support for ROD: The plaintiff alleged that the EIS did not take a hard look at construction impacts to the low income community and failed to follow NEPA procedure.

- **Low Income Impacts:** The EIS failed to evaluate an alternative that avoided direct impacts to Hayden Island residents (i.e. loss of the grocery store; the denial EMS services during portions of construction, and noise and vibration impacts during construction). The court has not made a determination on this point.
- **Public Comment:** Disclosure and opportunity for public comment was inadequate for construction alternatives (i.e. locations staging, cement mixing and bridge fabrication). The court has not made a determination on this point.
- **Low income classification:** The plaintiff also alleges that a neighborhood on Hayden Island is a low income neighborhood and that it was not considered an environmental justice issue in the EIS. The court has not made a determination on this point.

Compliance with Clean Air Act: The plaintiff alleged that the agency arbitrarily decided not to perform a site-specific air quality analysis ("hot-spot" analysis) to assess localized impacts to air quality from construction activities in violation of federal regulations. The court has not made a determination on this point. The SR 520 case included a similar plaintiff claim that was ultimately found to be without merit for the SR 520 bridge replacement project.

Project: Columbia River Crossing**Case:** Thompson Metal Fab, Inc. vs. USDOT, FTA, and FHWA**Date:** Case pending

United States Department of Transportation (USDOT), Federal Transit Administration, Federal Transit Administration (FTA), and Federal Highway Administration (FHWA) are lead federal agencies for the Columbia River Crossing bridge replacement. These agencies along with Washington State Department of Transportation (WSDOT) and Oregon State Department of Transportation (ODOT)

prepared an EIS for the project. The plaintiffs challenged under NEPA and Administration Procedure Act (APA). The claim was that the bridge will negatively affect the plaintiff's business and navigation because the new bridge has a lower vertical clearance. The court found that the plaintiff lacks prudential standing and the case was dismissed.

NEPA – Economic Affects: The plaintiff contends that its economic interest falls within NEPA because the project requires an EIS and this assesses the affects to the “human environment” (i.e. 's social, natural, physical effects and economic effects). The courts found that purely economic injuries, do not have standing to challenge an agency action under NEPA.

Project: City of Seattle, Fort Lawton Redevelopment Plan (FLRP)

Case: Magnolia Neighborhood Planning Council vs. City of Seattle

Date: 29 March 2010

The City of Seattle proposed to receive the Army Reserve Center (ARC) property, adopt the Fort Lawton Redevelopment Plan (FLRP), and redevelop the property into a new mixed-income community. The ARC property was a part of the Department of Defense's Fort Lawton property known as Discovery Park and was available under the 2005 Defense Base Closure and Realignment (BRAC). The City planned to conduct the required SEPA evaluation and documentation when zoning and permitting the FLRP property. The plaintiff contends that the adoption of the FLRP is in violation of SEPA procedures and the FLRP is inconsistent with the 1986 Discovery Point Master Plan. The summary judgment upheld the plaintiff's motion. WSDOT is preparing an appeal for the Washington State Supreme Court.

Violation of SEPA procedures:

- Plaintiff standing: The city claimed that the plaintiff did not have standing to assert a SEPA claim because claims were speculative. The court disagreed. A non-profit's right to challenge government action is firmly established in federal jurisprudence.
- Project Action: the Plaintiff contended that the adoption of the FLRP violated SEPA because the city failed to conduct an environmental review of the FLRP when they approved the plan. The city assumed that SEPA could occur when rezoning and permit documents were filed. The court standard of review was whether the FLRP is a “project action” or a “policy, plan, or program for which approval must be obtained from any federal agency prior to implementation”. The court found that City's plan to obtain federal property and its planned residential development of the property (as described in the FLRP), which will bind the City's use of the property upon federal approval, is a “project action” and subject to SEPA at the time the plan is approved.
- Preemption of SEPA: The city argued that BRAC preempts SEPA review at this stage of the process. The courts did not agree with this argument. BRAC explicitly states that this transfer of property should not exclude state and local regulations.

Consistency of the FLRP with the Discovery Point Master Plan: The trail court required the city to publically determine if the 1986 Discovery Point master plan applies to the FLRP property. The court

agreed with the city in that the master plan created no enforceable right or duty. Therefore, there was no legal authority for the trial court's "public determination" requirement. Upon appeal the trial court ruling was determined to be without legal basis

Appeal for the Washington State Supreme Court: The WSDOT and the City are considering an appeal of the above case to the State Supreme Court on several points:

- The case lacks subject matter jurisdiction for courts to rule. Therefore the case should be dismissed.
- The Council's approval of the FLRP was part of the application and therefore a "preliminary decision" not a "project action". Preliminary steps are allowed under SEPA prior to completion of SEPA Review. Specifically, the project had yet to have an "action" and preliminary steps in development do not require SEPA analysis until a "meaningfully evaluated" of effects can occur.
- The Agency must have made a decision that commits the Agency to that action before an appeal can be reviewed under SEPA. The state contends that the specific decision for the project action would occur during the NEPA review. .

The appeal has not gone before the Court at this time (October 8, 2012).

Project: Bigelow Gulch Road

Case: Hamilton v. USDOT

Date: 3/8/2010

Spokane County proposed to expand from 2 to 4 lanes an 8.5 miles portion of a road, known as Bigelow Gulch Road, which connects I-90 to US 2 and SR 395. Washington State Department of Transportation (WSDOT) and the Federal Highway Administration (FHWA) prepared an EA for the project. In this case the plaintiffs challenged several aspects of the NEPA process and documentation. The four main challenges were improper NEPA/SEPA documentation, inadequate environmental analysis to support the FONSI, failure to analyze cumulative impacts, and inadequate alternatives analysis. Ultimately the summary judgment was to deny the plaintiff's motion.

Improper NEPA and SEPA Documentation: The plaintiffs challenged the agencies' use of an EA instead of an EIS. The arguments included:

- The length of the EA was 300 pages: This was challenged as indicating that an EIS should have been conducted. The court concluded that length of an EA was not legal proof of need.
- The draft EA issues: FHWA's (i.e. Federal Lead Agency) legal council's comments on an internal draft of the EA were construed by the plaintiff to indicate that the EA is inadequate. The court rejected all arguments related to the council draft comments. The court found the comments were irrelevant in light of changes made for the final documents.
- The definition of Class I documents in 771.115(a)(2): Class I actions normally require an EIS. The FHWA description of this class of projects includes "a highway project of four or more lanes on a new location". The court determined that the Bigelow Gulch project was not a new road but a

two lane road converted to a four lane road. Therefore the EA determination was within the Agencies discretion.

EA – Support for FONSI: The plaintiff argued that the EA did not take a hard look at four environmental impacts and was insufficient to support the FONSI. The disciplines challenged were wetlands, noise, community, and visual:

- Wetlands: the EA deferred detailed wetland delineation and classification to a later time. The court found substantial wetland analysis in the final EA and that wetlands identified by the plaintiff were outside the project area.
- Noise: the plaintiff argued that 20 homes would have increased noise. The court found that 19 of those houses would also have increased noise under the no build alternative. Therefore a decision of no significant noise impact was not arbitrary and capricious.
- Impacts to the community: The court found that the EA considered these impacts and that the conclusion of limited and positive impacts described was reasonable.
- Visual: The court determined that the visual evaluation was adequate for NEPA/SEPA.

Cumulative Impacts: The plaintiff argued that cumulative impacts were not considered. Specifically, the affect of the road improvement on the North Spokane Corridor was not addressed. The court found that the EA addressed cumulative impacts adequately and that speculative impacts related to the North Spokane Corridor were not relevant.

Alternatives Analysis: The plaintiff argued that the alternatives analysis was inadequate because it only considered 2 alternatives (preferred and no build). The court found that the EA goes beyond brief discussion of reasonable alternates required by law. Other alternatives were rejected because they did not meet the “purpose and need” statement for the project.

Project: I-5 - South DuPont Interchange

Case: West v. Secretary of DOT

Date: 3/20/2000

The City of Du Pont proposed to add a new interchange over I-5 which was Stage 1 of a 2 Stage project. After the city prepared an EIS under the Growth Management Act, Washington State Department of Transportation (WSDOT) and Federal Highway Administration (FHWA) developed NEPA documents for a “documented Categorical Exclusion”. In this case the plaintiffs challenged that this interchange was not categorically excluded from NEPA and filed an injunction requiring work to cease on the project until the agencies prepared an Environmental Impact Statement. The summary judgment initially denied the plaintiff’s motion but Ninth Circuit reversed and upheld the motion. The reversal occurred after Stage 1, construction of the interchange, had been completed.

Categorical Exclusions: While the court initially denied the plaintiff's request because the analysis did not indicate significant impacts, the reversal by the Ninth Circuit was based on the procedural requirements for using a categorical exclusion. The court found it "axiomatic that a new, fully-directional interchange cannot simultaneously relieve traffic congestion and yet have no significant impact on travel patterns." The issue, however, is not just whether the interchange will cause a significant environmental impact, but whether the path taken to reach that conclusion was the right one in light of NEPA's procedural requirements.

Litigation Procedure and Mootness: The court found that the case was not moot, even though the interchange has been built. The court concluded that effective relief could still occur because Stage 2 of the project has not been completed. A full EIS on the interchange could result in restricted use of the interchange, changes in design to reduce impacts, or removal of the interchange. Because Stage 2 has not been started, the court determined that FHWA could prepare a separate environmental analysis for that stage of the project.

WA State Ferries, Eagle Harbor Remodeling Project

Case: WSDOT vs. City of Bainbridge Island

Date: 10/2/2007

The state proposed to remodel the existing maintenance facility on Eagle Harbor, completed a SEPA checklist, and DNS. The City of Bainbridge Island independently assumed lead agency status over this state project, modified the project description, and issued a Determination of Significance (DS). The remodel project included replacement of creosote piles with Ammoniacal copper zinc arsenate (ACZA) treated timber piles, replacement of exterior lighting, and substantial interior work. In this case WSDOT challenged the city's statutory authority to assume lead agency status, the validity of the DS, other procedural aspects of SEPA, and the standard of review assumed by the Hearing Examiner. The Hearing Examiner denied WSDOT's motion.

Statutory Authority: WSDOT argued that the City's assumption lead agency status under SEPA is in direct conflict with WSDOT's legislative authority to acquire property for, design, build and operate a maintenance facility for the state ferry system. WSDOT's argument is supported by the following points:

- The City has no authority to determine whether or not the ferry maintenance project goes forward.
- SEPA is an overlay statute that does not alter the underlying substantive authority of WSDOT to build and operate the state highway system and supporting maintenance facilities.
- A local agency's SEPA authority over a state essential public facility should be construed consistently with its authority under the Growth Management Act.
- The SEPA rule allowing one agency to assume lead agency status from another assumes that both agencies have equal substantive authority over the project. It does not overcome the state pre-emption of local authority or the rule that makes an agency proponent the lead agency for its own projects.

City's Modification of the Project Description for the DS: The project description was modified prior to the Hearing Examiner's review. The Hearing Examiner based his DS determination on the city's re-characterization of the project, therefore the analysis is erroneous. In addition the Hearing Examiner's decision to evaluate the case without the City's project description was outside the Hearing Examiners authority.

City's DS is not Supported by Studies: The determination of significance issued by the City was not supported by WSDOT's SEPA check list or the findings from the Hearing Examiner. The City did not provide any substantive support to warrant a determination of significance. The following environmental points were addressed during the hearing:

- **Water Quality:** The use of ACZA treated piles were considered a best management practice (BMP) and would not result in significant adverse impact to Eagle Harbor. The use of these piles was also accepted by agency review under ESA and Superfund.
- **Wildlife:** Agency review of listed species and proposed BMPs could affect but is unlikely to adversely affect species and was therefore acceptable. The HPA accepted the use of ACZA treated piles and set 28 conditions to protect wildlife.
- **Noise:** The SEPA check list described the proposed reasonable and economically feasible available technology and control methods to mitigate construction noise impacts. These include vibratory pile driving, time restrictions, bubble curtain use, and monitoring.
- **Lighting:** New outside lighting will be installed. The design was adopted in response to local citizen complaints and is designed to reduce light pollution in the surrounding neighborhood.
- **Transportation:** The project will not affect the existing transportation facilities or access to the Maintenance Facility. There will be temporary parking for construction crews, and most materials for the project will arrive via water.
- **Aesthetics:** All aesthetic issues raised by the City were for future work not described in WSDOT's project description.
- **Public Services:** No public services will change because of the remodel project.

No project impacts in these areas are "significant" as that term is defined in the SEPA Rules. The SEPA Rules define "significant" as "a reasonable likelihood of more than a moderate adverse impact on environmental quality." Therefore no support for a DS was provided by the City.

SEPA Procedural Rules: The City did not comply with the requirements of WAC 197-11-948 in its attempt to assume Lead Agency Status, and therefore the attempt is void. The agency with jurisdiction does not assume the role of lead agency until it has sent both the DS and the Notice of Assumption of Lead Agency Status to the original lead agency. Assumption of Lead Agency Status shall occur only during the 14-day comment period on the DNS. The 14-day comment period for WSDOT's DNS ended March 22. The City's DS was not sent to WSDOT until April 19, eight weeks later. Therefore the City failed to comply with SEPA procedural rules.

Standard of Review: The Hearing Examiner applied the incorrect standard of review by requiring WSDOT to show that the City's issuance of a DS was arbitrary and capricious. Although the Hearing

Examiner correctly stated that the purpose of the hearing was to determine whether the City Planning Director's decision was clearly erroneous; the Hearing Examiner also erred by contending that:

- WSDOT "created the City's confusion" regarding the City's position that the maintenance and remodeling project included other future projects.
- Mitigation measures were not addressed in enough specificity in WSDOT's checklist.
- NMFS concurrence and EPA approval should not be considered in the DS determination.
- the Planning Director's "concern" about the use of ACZA-treated piles was supported by the the environmental analysis in the record.
- The maintenance and remodeling project will affect the operation of the facility.
- That the project would affect transportation. WSDOT presented evidence there would be minimal additional traffic during construction and there was no evidence presented to the contrary.

The courts ultimately ruled that the City did not have statutory authority to assume Lead Agency Status. Other aspects of the case were not visited.