

MITIGATION UNDER SEPA

Prepared for the August 28, 2008,
Meeting of the SEPA Implementation
Working Group

VOLUNTARY MITIGATION

- Issuance of a mitigated determination of non-significance (MDNS)---very common
- Applicant can request notice before agency issues determination of significance (DS) so that applicant can change proposal to avoid DS/EIS
- Even without request for early notice, lead agency can specify mitigation measures that applicant can choose to include to avoid DS/EIS
- Often results in negotiation of mitigation
- See WAC 197-11-350(5)

MANDATORY MITIGATION

- “Substantive SEPA” allows for mitigation or denial of action under an agency’s substantive SEPA policy
- Whether to require mitigation is generally a discretionary decision
- Required mitigation measures must: (1) mitigate for specific adverse impacts identified in the documents; and (2) be reasonable and capable of being accomplished

MANDATORY MITIGATION- Cont'd

- Agencies must first consider whether other local, state, or federal requirements already mitigate an identified impact
- Ecology's model ordinance (Chapter 173-806 WAC) probably broad enough to encompass climate change
- For substantive SEPA authority, see RCW 43.21C.060 and WAC 197-11-660

JURISDICTIONS THAT PLAN UNDER GROWTH MANAGEMENT ACT

- 1995 Regulatory Reform: streamlined environmental review and permitting processes for individual projects
- RCW 43.21C.240: Prohibits mitigation under a substantive SEPA policy if jurisdiction determines that environmental impacts were “adequately addressed” at the planning stage (i.e., avoided, mitigated, or designated as acceptable)
- Applies only to jurisdictions that plan under GMA

QUESTIONS FOR THE IWG

1. Should the IWG prepare guidance on what mitigation strategies are reasonable and capable of being accomplished? If not, should the IWG recommend that Ecology prepare such guidance?
2. If the IWG or Ecology prepares guidance which provides a path for applicants to propose different mitigation, should the guidance also allow for development of mitigation options by the applicant if it meets the objectives of the Ecology guidance on mitigation? As an alternative, should the guidance describe objectives only, and allow applicants to come up with mitigation strategies consistent with the objectives?

QUESTIONS-cont'd

3. WAC 197-11-660 requires that mitigation can be imposed on the applicant only to the extent attributable to the adverse impacts of a proposal. Should this section be repealed and/or amended? If not, should Ecology provide guidance on how to apply this rule within the climate change context?
4. Should Ecology provide a recommended threshold for when mitigation should be required?

QUESTIONS-cont'd

5. Should the use of offsets as mitigation be “capped” or otherwise minimized?
6. Should there be mitigation sequencing for climate change impacts, similar to what other jurisdictions have implemented (i.e., avoidance of GHG emissions; minimization of GHG emissions; compensation for GHG emissions)?

QUESTIONS-cont'd

7. Should there be geographical limits of offsets used for mitigation?
8. Who should enforce to ensure effectiveness of mitigation measures?
9. Should capped sources within a cap and trade system be exempt from providing additional mitigation under SEPA?