

MITIGATION UNDER SEPA: A SHORT OVERVIEW

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Mitigation under SEPA generally arises in two contexts: (1) voluntary mitigation at the threshold determination stage; and (2) mandatory mitigation by an agency¹ under a substantive SEPA policy. Regarding the first context, anecdotal evidence suggests that lead agencies now issue MDNSs more frequently than they require preparation of environmental impact statements (EIS). As for the second context, mitigation under a substantive SEPA policy typically comes into play after completion of an environmental review document that identifies environmental impacts that are capable of being mitigated. For cities and counties that plan under the Growth Management Act (GMA), mitigation under SEPA may be limited to the extent that a local government determines that its development regulations and comprehensive plan already adequately address adverse environmental impacts. Each of these scenarios is discussed below.

Voluntary Mitigation Measures under SEPA

When a proposal is likely to have significant environmental impacts and result in a determination of significance (DS), an applicant or lead agency can identify mitigation measures that would reduce environmental impacts below the significance threshold. When these mitigation measures are incorporated into the proposal through clarifications, changes, or conditions, a DS and EIS are not required. In these instances, the threshold determination is referred to as a mitigated determination of non-significance (MDNS). *See* WAC 197-11-350. An applicant may request that the lead agency provide notice before issuing a DS so that the applicant will have the opportunity to change the proposal to avoid a DS determination. WAC 197-11-350(2). Even if an applicant does not request early notice, the lead agency can specify mitigation measures that would allow it to issue a DNS and give the applicant an opportunity to incorporate those measures into the proposal. WAC 197-11-350(3). Agencies can also incorporate mitigation into their own proposals to result in a MDNS determination. WAC 197-11-350(5).

In practice, the MDNS option often results in negotiation of mitigation measures between the applicant and the lead agency before the agency makes the threshold determination. The Washington Supreme Court has recognized that negotiating to resolve environmental problems is a sensible approach under SEPA.² However, some practitioners worry about the potential for abuse in the negotiations and are concerned that a negotiated approach undermines SEPA's goal of ensuring that environmental impacts are fully disclosed and considered. The counterargument is that mitigation measures that effectively mitigate below the level of significance serve another key goal of SEPA: the avoidance or minimization of adverse environmental impacts.

¹ "The definition of "agency" includes local governments and their agencies in addition to state agencies. WAC 197-11-714(1).

² *Hayden v. City of Port Townsend*, 93 Wn.2d 870, 880-81 (1980).

Mandatory Mitigation under SEPA

In addition to SEPA's procedural requirements, SEPA contains substantive authority that authorizes a lead agency to require mitigation as a condition of approving a proposal. RCW 43.21C.060. This is often referred to as "substantive SEPA." By including this substantive component, SEPA differs from its federal analog, NEPA, which contains only procedural requirements. SEPA also differs from the California analog, CEQA, which *mandates* mitigation whenever the environmental review documents identify adverse environmental impacts. In Washington, the decision whether to require mitigation is generally a *discretionary* one that resides with an agency with jurisdiction over the proposal.

Any mitigation imposed by an agency must be based on a substantive SEPA policy that is "incorporated into regulations, plans, or codes which are formally designated by the agency...as possible bases for the exercise of [substantive] authority." RCW 43.21C.060. Mitigation measures must: (1) mitigate for specific adverse environmental impacts identified in the environmental review documents; and (2) must be reasonable and capable of being accomplished. *Id.* Furthermore, mitigation may only be imposed to the extent attributable to the adverse impacts of the proposal. Before requiring mitigation, agencies must consider whether local, state, or federal requirements would already mitigate an identified impact. WAC 197-11-660(1)(e) and (f). An agency can also use its substantive SEPA authority to deny a proposal if an EIS identifies significant adverse environmental impacts that cannot reasonably be mitigated. RCW 43.21C.060.

The way that this typically works in practice is that the EIS (or other environmental review document) identifies adverse environmental impacts. The EIS also identifies and discusses the possible mitigation measures, voluntary mitigation that the proponent is undertaking, and impacts that cannot be mitigated. The agency then decides whether additional mitigation is required under its substantive SEPA policies and, if so, how much mitigation. The agency then conditions approval of the proposal on implementation of the required mitigation measures (or potentially denies the proposal based on the identification of significant impacts that cannot be mitigated).

Under Ecology's model ordinance, substantive SEPA decisions can be based on any of the following broad policies: (1) fulfilling the responsibilities of each generation as trustee of the environment for succeeding generations; (2) assuring for Washingtonians safe, productive, healthful, and aesthetically and culturally pleasing surroundings; (3) attaining the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (4) preserving important historic, cultural, and natural aspects of our national heritage; (5) maintaining, whenever possible, an environment that supports diversity and variety of individual choice; (6) achieving a balance between population and resource use which will permit high standards of living and wide sharing of life's amenities; and (7) enhancing the quality of renewable resources and approaching the maximum attainable recycling of depletable resources. WAC 173-806-160(4)(a). For those agencies that have adopted the model or similar language, the policy statements appear broad enough to allow for mitigation of climate change impacts. Therefore, these agencies may not need to amend their ordinances or rules to require mitigation for this purpose.

Special Considerations for Local Governments that Plan under the GMA

Under the Local Project Review Act, passed as part of a 1995 regulatory reform bill, local jurisdictions are directed to review individual projects for consistency with the jurisdiction's development regulations and comprehensive plan. RCW 36.70B.040. If the project is not consistent, the local jurisdiction can place conditions on the project to achieve consistency or can deny the project. RCW 36.70B.030 and .040. The purpose of the Local Project Review Act is to streamline the environmental review and permitting process for individual projects. RCW 36.70B.010. Its premise is that local governments conduct extensive environmental review during their planning processes and, therefore, additional review at the project level may be duplicative.

As part of the same regulatory reform bill, the legislature enacted RCW 43.21C.240, an amendment to SEPA that is also intended to streamline environmental review and the permitting process. RCW 43.21C.240 applies to local governments that plan under the GMA. In addition to avoiding duplicative environmental review, it also seeks to avoid duplicative mitigation measures. Specifically, it prohibits GMA jurisdictions from requiring additional mitigation under a substantive SEPA policy if the jurisdiction concludes that environmental impacts are adequately addressed by the government's development regulations and/or comprehensive plan. "Adequately addressed" means that impacts were identified at the planning stage and avoided, mitigated, or designated as acceptable. If the jurisdiction determines that only some impacts were adequately addressed at the planning stage, the jurisdiction can still require mitigation under SEPA for those impacts that were not addressed.