ACTION PURSUANT TO STATE ENVIRONMENTAL POLICY ACT

Environmental Checklist

The Washington State Legislature adopted the State Environment Policy Act in 1971 as a means to create a process to identify possible environmental impacts that may accompany governmental actions. These actions include issuing permits for private projects, constructing public facilities, or adopting ordinances, regulations, policies, or plans. Information provided during the SEPA review process enables agencies, applicants, and the public to assess how a proposed action will affect the environment.

The assembled information may lead to a change in a proposal to reduce impacts or to condition or deny a proposal because of adverse environmental impacts. SEPA recognizes the broad policy "that each person has a fundamental and inalienable right to a healthful environment." RCW 43.21C.020 (3). State agencies are required to use "all practicable means" to achieve the following goals:

> (a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (b) Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
>
> (c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

Over forty years ago, with the adoption of SEPA, we first read in Washington law that each generation is a trustee of the environment for succeeding generations. ***Lands Council v. Wash. State Parks & Recreation Comm 'n***, 176 Wn. App. at 807-08 (2013).

Contrary to popular belief, SEPA does not demand a particular substantive result in government decision making. Instead, the act ensures that environmental values are given appropriate consideration. ***Stempel v. Dep't of Water Res.***, 82 Wn.2d 109, 118, 508 P.2d 166 (1973); ***Moss v. City of Bellingham***, 109 Wn. App. 6, 14, 31 P.3d 703 (2001).

SEPA imposes on the government agency a duty to assemble and review full environmental information before rendering a decision. ***Davidson Serles & Assocs. v.City of Kirkland***, 159 Wn. App. 616, 634-35, 246 P.3d 822 (2011). Briefly stated, the procedural provisions of SEPA constitute an environmental full disclosure law. ***Norway Hill Pres. & Prot. Ass 'n v. King County Council,*** 87 Wn.2d 267, 272, 552 P.2d 674 (1976). SEPA attempts to shape the state's future environment by deliberation, not default. ***Stempel v. Dep't of Water Res***., 82 Wn.2d at 118; ***Loveless v. Yantis***, 82 Wn.2d 754, 765-66, 513 P.2d 1023 (1973). In essence, SEPA requires that the "presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations." RCW 43.21C.030(2)(b); *see also* ***Norway Hill***, 87 Wn.2d at 272 (1976).

RCW 43.21C.030(2)(c), a critical section of SEPA, requires all counties to:

> Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:
>
> (i) the environmental impact of the proposed action;
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
> (iii) alternatives to the proposed action;
> (iv) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Thus, under RCW 43.21C.030(2)(c), major actions significantly affecting the quality of the environment require an environmental impact statement. ***Cheney v. Mountlake Terrace***, 87 Wn.2d 338, 344, 552 P.2d 184 (1976); ***Davidson Serles & Assocs. v. City of Kirkland***, 159 Wn. App. at 634 (2011).

An administrative rule implementing SEPA defines "major action" circularly:

> "Major action" means an action that is likely to have significant adverse environmental impacts. "Major" reinforces but does not have a meaning independent of "significantly" (WAC 197-11-794).

WAC 197-11-764. WAC 197-11-704, in turn, defines "actions" as:

> (1) "Actions" include, as further specified below:
> (c) Legislative proposals.
>
> (2) Actions fall within one of two categories:
> (a) Project actions....
> (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;

(Emphasis added) (Boldface omitted). The City of Burlington agrees that its adoption of an Ordinance constitutes an action within the meaning of SEPA. The city, however, contends the ordinance does not significantly impact the environment.

If SEPA covers a local governmental action, the government next determines if the action will "significantly affect" the environment. SEPA does not define "significantly affecting." ***Davidson Serles v. City of Kirkland***, 159 Wn. App. at 634.

WAC 197-11-794 reads:

> (1) "Significant" as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality.
>
> (2) Significance involves context and intensity (WAC 197-11-330) and does not lend itself to a formula or quantifiable test. The context may vary with the physical setting. 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.

Under case law, the agency should prepare the environmental impact statement whenever more than a moderate effect on the quality of the environment resulting from the governmental action is a reasonable probability. ***King County v. Wash. State Boundary Review Ed. for King County***, 122 Wn.2d 648,664,860 P.2d 1024 (1993).

Under SEPA, evaluation of a proposal's environmental impacts requires examination of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area. ***Norway Hill***, 87 Wn.2d at 277 (1976); ***Narrowsview Pres. Ass 'n v. City a/Tacoma***, 84 Wn.2d 416,423, 526 P.2d 897 (1974).

The decision of whether a governmental action will significantly impact the environment is called the threshold determination. ***Moss v. City of Bellingham***, 109 Wn. App. at 14 (2001). The lead agency must make its threshold determination based on information reasonably sufficient to evaluate the environmental impact of a proposal.

WAC 197-11-335; ***Moss v. City of Bellingham***, 109 Wn. App. at 14. The agency issues a determination of nonsignificance if it determines that the project will have no probable significant adverse environmental impacts. WAC 197-11-340(1); ***Lanzce G. Douglass, Inc. v. City of Spokane Valley***, 154 Wn. App. 408, 422, 225 P.3d 448 (2010). If the local government decides that a proposal "may have a probable significant adverse environmental impact," the agency issues a determination of significance and identifies the areas on which an environmental impact statement must focus. RCW 43 .21 C.031; WAC 197-11-360(1); ***Lanzce G. Douglass***, 154 Wn. App. at 422. A determination of significance mandates the preparation of a full environmental impact statement. ***Moss v. City of Bellingham***, 109 Wn. App. at 15 (2001).

Before reaching the determination of significance or nonsignificance, the government agency reviews an environmental checklist. WAC 197-11-315; ***Moss v. City of Bellingham***, 109 Wn. App. at 14 (2001). When the local governmental action constitutes the granting of a development permit, the applicant of the permit completes the environmental checklist. If the action entails an ordinance, the local government prepares and reviews the checklist. This appeal centers on the environmental checklist prepared by Burlington's SEPA official Margaret Fleek.

By way of the environmental checklist, the responsible agency must show that it considered the relevant environmental factors and that its decision to issue any determination of nonsignificance was based on information sufficient to evaluate the proposal's environmental impact. RCW 43.21C.030(2)(c); ***Wenatchee Sportsmen Ass 'n v. Chelan County***, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The purpose of the checklist is to ensure an agency, at the earliest possible stage, fully discloses and carefully considers a proposal's environmental impact before adopting it. ***Spokane County v. E. Wash. Growth Mgmt***. Hr 'gs Bd., 176 Wn. App. 555, 579, 309 P.3d 673 (2013), review denied, 179 Wn.2d 1015, 318 P.3d 279 (2014). If the checklist does not contain sufficient information to make a threshold determination, the preparer may be required to submit additional information. WAC 197-11-335(1); ***Moss v. City of Bellingham***, 109 Wn. App. at 14 (2001).

Plaintiff realleges all paragraphs above as if set forth here.

The State Environmental Policy Act (SEPA) generally requires a thorough and complete analysis and study of the various environmental factors that accompany a project. Such analysis should include the risk of exposure to toxic or hazardous materials and substances, and remediation of them.

The original SEPA in this matter called for a full environmental review, called an environmental impact statement (EIS).

The original EIS in this matter did not include any analysis of risk factors that might exist because of the "old quarry" in the middle of the subdivision site, nor of the previously apparently unmitigated activities of Asbestos-Talc Products of Washington, Inc. at the site. Current information about its actual activities has always been available at the Washington State Department of Natural Resources and the United States Bureau of Mines.

The original EIS here did not include any analysis of what risk might be aggravated by the development itself with regard to asbestos, either naturally occurring at the site, or artificially occurring, by Asbestos-Talc Products of Washington, Inc. or by the activities involved in the development itself, either in its initial stages or in the Hillcrest Drive realignment between 2006-2008.

The initial development and the realignment involved displacement of vast quantities of rock and earth that likely contained concentrations of asbestos.

The original SEPA was grossly insufficient insofar as it failed to account in any manner for the potential release of asbestos during the initial project. The city's adoption of the original SEPA for the road realignment was also insufficient as it failed to address in any manner the potential for artificial release of asbestos during the project.

The city of Burlington was the lead agency for the original SEPA and for the adoption of that environmental review for the realignment project in 2006.

Residents of the development and others are potentially exposed to airborne asbestos.

The original SEPA and the 2006 adoption of that SEPA for the realignment project are void insofar as they fail to address the issues of asbestos exposure and contamination in and around the Tinas Coma development.

The city of Burlington should be compelled to prepare, at its own cost, an amended, new, or supplemental SEPA specifically incorporating and addressing the risks of asbestos exposure from the various activities already occurring.

In accordance with SEPA the city of Burlington should be compelled to publish and deliver the results of such amended, new or supplemental preliminary or draft SEPA to the original parties on the original distribution list of the original SEPA, and also the current residents of the development, to the former residents of the development, and to all those living within 600 feet of the outer boundaries of Tinas Coma, and provide evidence to the court of such publication and delivery.

In accordance with SEPA, the city of Burlington should be compelled to conduct one or more public hearings, following appropriate notice, to the current residents of the development, to the former residents of the development, and to all those living within 600 feet of the outer boundaries of Tinas Coma, following the publishing and delivery of its amended, new or supplementary preliminary SEPA, and incorporate appropriate public comment on the contents of the document.

In accordance with SEPA, the city of Burlington should be compelled to complete the EIS process a new, as described above, and provide proof and evidence of the same to this court.