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NEPA, SEPA, AND THE EVERGREEN-HOUSE GAS
STATE: HOW WASHINGTON'S STATE
ENVIRONMENTAL POLICY ACT AND THE
ABSENCE OF GREENHOUSE GAS CALCULATION
GUIDANCE NEGATIVELY IMPACTS FUTURE
PROJECT PROPOSALS

Macee Utecht*

10 WASH. J. ENVTL. L. & POL'Y 67 (2020)

ABSTRACT

The National Environmental Policy Act (NEPA) requires all federal agencies to consider the environmental effects of a proposed action that may significantly affect the environment. In addition to outlining the important pieces of NEPA, this article explores the State Environmental Policy Act (SEPA), Washington's state-equivalent to NEPA. Established in 1971 and modeled after NEPA, SEPA requires that an Environmental Impact Statement (EIS) be prepared for any governmental project proposal that significantly affects the environment. Currently under both state and federal law, there is no rule or guidance that instructs project applicants on how to calculate greenhouse gas emissions in a manner that satisfies statutory requirements. The Washington Department of Ecology

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rescinded its only guidance in 2016 with regard to adequate greenhouse gas calculation to be included in an EIS. As a result, project applicants must make an educated guess and rely on previous case law and administrative decisions when measuring greenhouse gas emissions for their EIS. The lack of a clear, uniform rule under SEPA will continue to foster confusion about how to calculate the direct and indirect effects of greenhouse gas emissions for an EIS. This article argues that Washington's Department of Ecology—or any other lead agency—should establish a rule on how to quantify, analyze, and mitigate greenhouse gas emissions under SEPA.

INTRODUCTION

President Nixon signed the National Environmental Policy Act (NEPA) into law in 1970 to ensure that federal agencies considered environmental impact before any major action.¹ NEPA requires Environmental Impact Statements (EISs) be prepared for any federal action that significantly impacts the environment.² The Act created the Council on Environmental Quality (CEQ) to ensure that federal agencies follow NEPA procedures.³ The assessments and impact statements allow public officials to obtain information and to take a “hard look” at the potential environmental impacts of a project.⁴ Additionally, the public has the opportunity to comment on the environmental impact evaluations.⁵ NEPA covers a range of agency actions including adjudication of permit applications, adoption of land management actions, and construction of public infrastructure.⁶

Washington State has a process that mirrors that of NEPA. The State Environmental Policy Act (SEPA) aids state and local agencies in assessing environmental impacts of the projects they undertake.⁷ Passed by the Washington Legislature in 1971, SEPA applies to decisions made by state and local entities including cities, counties, ports, and school and water districts.⁸ However, SEPA allows some exemptions for minor projects depending on their size.⁹

Recent court decisions, particularly in the D.C. Circuit, interpret the NEPA statute and set precedent regarding which requirements federal agencies must necessarily meet in order to comply with NEPA

¹ Alvin Alm, *1988 Article on NEPA: Past, Present, and Future*, U.S. ENVTL. PROT. AGENCY (Mar. 14, 2018, 7:04 PM), <https://archive.epa.gov/epa/aboutepa/1988-article-nepa-past-present-and-future.html>.

² *Id.*

³ *Id.*

⁴ *The National Environmental Policy Act*, NEPA.GOV (Mar. 14, 2018 7:06 PM), <https://ceq.doe.gov/>.

⁵ *What is the National Environmental Policy Act?*, U.S. ENVTL PROT. AGENCY (Mar. 14, 2018, 7:07 PM), <https://www.epa.gov/nepa/what-national-environmental-policy-act>.

⁶ *Id.*

⁷ *Overview of Washington State Environmental Policy Act (SEPA)*, WASH. ST. DEP'T OF ECOLOGY (Mar. 14, 2018, 7:10 PM) <https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-review/SEPA-guidance/Basic-overview>.

⁸ *Id.*

⁹ *SEPA Guidance on Categorical Exemptions*, WASH. ST. DEP'T OF ECOLOGY (Feb. 23, 2020, 10:30 PM) <https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-review/SEPA-guidance/Guide-for-lead-agencies/Exemptions>.

procedures.¹⁰ Part I of this Note explores the history and mechanics of NEPA. Part II highlights judicial precedent and NEPA statutory interpretation, particularly with regard to greenhouse gas emissions. Part III of this Note then examines SEPA function and makes a comparison between Washington's SEPA and the federal NEPA. Part IV argues SEPA should create a rule that provides how to quantify, analyze, and mitigate greenhouse gas (GHG) emissions; part IV also discusses other states that similarly struggle with the lack of a rule outlining proper GHG emissions analysis for an Environmental Impact Statement (EIS) under their SEPAs. Finally, this Note concludes with a prediction that the implementation of a proper rule under SEPA will allow applicants to sufficiently analyze GHG emissions impact and mitigation measures without expensive litigation; a rule will also help eliminate uncertain piecemeal policy resulting from legal interpretation of SEPA by giving courts a reference point to base their legal conclusions.

I. HISTORY AND BACKGROUND OF NEPA

As the United States became increasingly aware of negative environmental impact from human action, Congress enacted NEPA as a procedural safeguard to address some of those concerns. Outlined in the purpose statement, NEPA serves to facilitate balance between human development and the preservation of the environment.¹¹ Federal agencies subsequently have been required to enact policies implementing the goals of NEPA, which require the agencies to create a comprehensive statement of environmental impacts before proceeding with a project.¹²

A. NEPA Enactment History

Public concern about the impact of human activity on the environment increased in the 1950s and 60s, and Congress reacted with legislation that would force agencies to consider the environmental impacts of their actions.¹³ Before NEPA, there was no federal policy that required agencies to consider the environment before making decisions;

¹⁰ See, e.g., *Sierra Club v. Federal Energy Regulatory Commission*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (holding that FERC failed to reasonably estimate the amount of power-plant carbon emissions that pipelines would make possible).

¹¹ 42 U.S.C. § 4321 (2012).

¹² *Agency NEPA Implementing Procedures*, NATIONAL ENVIRONMENTAL POLICY ACT (Feb. 23, 2020, 11:47 PM) https://ceq.doe.gov/laws-regulations/agency_implementing_procedures.html.

¹³ LINDA LUTHER, CONG. RESEARCH SERV., RL33152, THE NATIONAL ENVIRONMENTAL POLICY ACT: BACKGROUND AND IMPLEMENTATION, 3 (2008).

this new legislation would compel agencies to create procedures to comply with the statute's Environmental Impact Statement (EIS) requirement before implementing federal action.¹⁴

After Nixon signed NEPA into law in 1970, many agencies faced difficulties assembling an adequate EIS.¹⁵ As a result, litigation quickly began playing a significant role in interpreting NEPA and clarifying measures that agencies were required to undertake to remain in compliance with the statute.¹⁶ Courts determined that NEPA is a procedural statute with the goals of 1) requiring agencies to consider environmental impact of major action and 2) giving notice to the public that they properly considered environmental impact in their decision-making process.¹⁷ While all agencies must consider environmental impacts before taking action, NEPA does not require agencies to prioritize environmental concerns over all others; it purely asks that federal agencies consider environmental impacts and possible alternatives before proceeding.¹⁸

NEPA also created the Council on Environmental Quality (CEQ).¹⁹ An executive order in 1977 authorized the CEQ to issue regulations regarding the preparation of EISs applicable to federal agencies.²⁰ The CEQ now oversees and provides guidance for NEPA implementation with regard to EISs.²¹ The Council also provides advice related to environmental matters to the president and generally monitors the state of the environment.²²

There is no individual agency charged with enforcing NEPA environmental review requirements. This lack of an enforcement body is sometimes cited as the reason why litigation is the primary avenue chosen by individuals and groups who believe an agency improperly followed NEPA procedures.²³ Because NEPA is a procedural statute, groups may file complaints against various agencies if, for example, they believe that an agency inadequately assessed environmental impact.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ In an early case interpreting NEPA, the D.C. Circuit noted that agencies are “[N]ot only permitted, but compelled, to take environmental values into account,” and that “[T]he ‘detailed statement’ is to... advise the public of the environmental consequences in the planned federal action.” *Calvert Cliffs’ Coordinating Committee, Inc. v. United States Atomic Energy Comm’n*, 449 F.2d 1109, 1112-1114 (D.C. Cir. 1971).

¹⁸ LUTHER, *supra* note 13, at 3.

¹⁹ 42 U.S.C. § 4342 (2012).

²⁰ Exec. Order No. 11991, 3 C.F.R. 123 (197)

²¹ LUTHER, *supra* note 13, at 3.

²² *Id.* at 6.

²³ *Id.*

Critics of NEPA argue that individuals or groups that disapprove of a project will use NEPA as the basis of litigation to delay or stop a project.²⁴

1. *The Mechanics of NEPA*

NEPA is divided into two parts: Title I outlines the purpose of the statute and some of its requirements²⁵ and Title II creates the Council for Environmental Quality (CEQ).²⁶ These major statutory provisions are described below.

a. *Title One: A Declaration of a National Environmental Policy*

Title I of NEPA declares that the Federal Government will use “all practicable means and measures,” including monetary and technological support, in a manner that is consistent with the general welfare and in conjunction with state and local governments.²⁷ It is the responsibility of the Federal Government to “improve and coordinate Federal plans, functions, programs, and resources”²⁸ to help protect the environment, minimize degradation,²⁹ “preserve important historic, cultural, and natural aspects of our national heritage,”³⁰ and to “achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities.”³¹ Title I also codifies Congressional recognition that each individual should enjoy and take responsibility for enhancing a healthy environment.³² Further, the statute provides that federal actions that significantly affect the environment must provide: “a detailed statement...on (i) the environmental impact of the proposed action, (ii) any adverse environmental effects that cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s 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

²⁴ *Id.*

²⁵ 42 U.S.C. § 4331 (2012).

²⁶ 42 U.S.C. § 4341 (2012).

²⁷ 42 U.S.C. § 4331(a) (2012).

²⁸ 42 U.S.C. § 4331(b) (2012).

²⁹ 42 U.S.C. § 4331(b)(3) (2012).

³⁰ 42 U.S.C. § 4331 (b)(4) (2012).

³¹ 42 U.S.C. § 4331(b)(5) (2012).

³² 42 U.S.C. § 4331(c) (2012).

implemented.”³³

b. Title Two: The Creation of the Council for Environmental Quality

Title II provides that the president shall provide an Environmental Quality Report that informs Congress about “(1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation,” and “(2) [the] current and foreseeable trends in the quality, management and utilization of such environments.”³⁴ The report must also contain an update on “the adequacy of available natural resources,” a review of federal, state, and local programs and activities, and a program for fixing problems with current action and programs.³⁵ Title II of NEPA also establishes the Council for Environmental Quality (CEQ) and lays out its duties and functions.³⁶ Some of those functions include assisting the president with the creation of the Environmental Quality Report, gathering information about current and prospective conditions of environmental quality, reviewing and appraising various programs, conducting studies relating to ecological systems and environmental quality.³⁷

i. Important Regulations that Implement NEPA

Eight years after the creation of NEPA, CEQ issued regulations to implement the Act.³⁸ These regulations remain binding on all federal agencies and address the procedural requirements of NEPA.³⁹ Part 1502 outlines regulations regarding the EIS and statutory requirements for the statements.⁴⁰ Part 1502 also includes information relevant in the preparation of an EIS, including the most useful ways to prepare an EIS,⁴¹ the requirements of a description of the “affected environment,”⁴² and the requirements for a proper discussion of environmental impacts and alternatives.⁴³ Other important parts of the regulations include Part

³³ 42 U.S.C. § 4332(C)(i)-(v) (2012).

³⁴ 42 U.S.C. § 4341 (2012).

³⁵ *Id.*

³⁶ 42 U.S.C. §§ 4342–4347 (2012).

³⁷ 42 U.S.C. § 4344 (1)-(6) (2012).

³⁸ *What is the National Environmental Policy Act?*, *supra* note 5.

³⁹ *Id.*

⁴⁰ 40 C.F.R. § 1502.2-1502.3 (2018).

⁴¹ 40 C.F.R. § 1502.4 (2018).

⁴² 40 C.F.R. § 1502.15.

⁴³ 40 C.F.R. § 1502.16.

1501, which outlines when to prepare an environmental assessment,⁴⁴ whether to prepare an EIS,⁴⁵ and a description of lead agency duties.⁴⁶ It is important to note that, while important regulations that implement NEPA exist, the statutory provisions themselves do not provide specifics on how NEPA should be properly executed and much of the statutory language is ambiguous or not clearly defined.⁴⁷ As a result, courts have played a major role in interpreting and enforcing NEPA requirements.

II. JUDICIAL PRECEDENT AND NEPA STATUTORY INTERPRETATION

A. *Sierra Club v. Federal Energy Regulatory Commission*

In August 2017, the D.C. Circuit issued an opinion holding that the Federal Energy Regulatory Commission (FERC) failed to reasonably estimate the amount of power-plant carbon emissions that three new interstate natural-gas pipelines would make possible or explain specifically why it could not make an estimate.⁴⁸ FERC was required to balance “public benefits against the adverse effects of the [pipeline] project,” including environmental effects.⁴⁹ FERC argued that it was “impossible to know exactly what quantity of greenhouse gases will be emitted as a result of this project being approved.”⁵⁰ FERC claimed that, depending on when it should start and end measuring the number of greenhouse gases emitted,⁵¹ the quantity of predicted greenhouse gases could vary significantly. But FERC had already measured how much gas the pipelines would transport and “gave no reason why this number could not be used to estimate greenhouse-gas emissions from the power plants.”⁵² FERC “even cited a Department of Energy report that gives

⁴⁴ 40 C.F.R. § 1501.3 (2018).

⁴⁵ 40 C.F.R. § 1501.4.

⁴⁶ 40 C.F.R. § 1501.5.

⁴⁷ For example, the Ninth Circuit has interpreted the meaning of taking a “hard look” at the environmental impacts of a project, as required by NEPA. *Marble Mountain Audubon Soc. v. Rice*, 914 F.2d 179, 182-83 (9th Cir.1990) (finding that the Forest Service failed to take a “hard look” of a selected salvage and harvest alternative by omitting discussion of maintaining biological corridors in its EIS).

⁴⁸ *Sierra Club v. Fed. Regulatory Energy Comm’n*, 867 F.3d 1357, 1373 (D.C. Cir.2017).

⁴⁹ *Id.*

⁵⁰ *Id.* at 1373-74.

⁵¹ *Id.* For example, should the Commission start to measure the gases when it is being transported to its destination? What about after it is burned? When the calculation begins and ends will determine the final GHG calculation result, and alteration of the start and end points will also change the final result.

⁵² *Sierra Club*, 867 F.3d 1357 at 1374.

emissions estimates per unit of energy generated for various types of plant.”⁵³

However, the D.C. Circuit explained that “the phrase ‘reasonably foreseeable’ [was] the key here.”⁵⁴ Environmental effects from greenhouse gases are “reasonably foreseeable” if they are “sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision.”⁵⁵ The court next must inquire as to what kinds of activities involved in the project will produce “reasonably foreseeable” effects, such as transporting the natural gas through the pipelines and, as the court found, subsequently burning the natural gas in the power plants.⁵⁶ The pipeline developers denied that they had any obligation to consider the GHG emissions produced after being burned in the plants and relied on *Department of Transportation v. Public Citizen*,⁵⁷ where the Supreme Court held that “when [an] agency has no legal power to prevent a certain environmental effect, there is no decision to inform, and the agency need not analyze the effect in its NEPA review.”⁵⁸ However, the Supreme Court noted that the primary rule from *Public Citizen* is that “an agency has no obligation to gather or consider environmental information if it has no statutory authority to act on that information,” (emphasis in original).⁵⁹ Here, FERC was not limited in statutory authority because it has the broad power to consider “the public convenience and necessity” when deciding whether to grant permits for the construction and operation of interstate pipelines.⁶⁰ Further, FERC must balance public benefits against the adverse impacts of the project, including adverse environmental impacts.⁶¹ FERC is a “legally relevant cause” of the direct and indirect environmental effects of pipelines it approves because the agency has the discretion to deny permits for projects considered “too harmful” to the environment.⁶² Thus, *Public Citizen* does not excuse FERC from failing to consider the reasonably foreseeable indirect effects of the pipeline.⁶³

There is currently no rule under NEPA that provides how far down the road agencies must look when calculating indirect effects. While

⁵³ *Id.*

⁵⁴ *Id.* at 1371.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1371-1372.

⁵⁷ *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752 (2004).

⁵⁸ *Sierra Club*, 867 F.3d 1357 at 1372 (citing *Public Citizen*, 541 U.S. 752 at 770).

⁵⁹ *Id.* (citing *Public Citizen*, 541 U.S. 752 at 767-68).

⁶⁰ *Id.* at 1373.

⁶¹ *Id.* at 1373.

⁶² *Id.*

⁶³ *Id.*

GHG guidance was temporarily issued in 2016, it was subsequently withdrawn in 2017.⁶⁴ Applicants must therefore rely on the guidance of “reasonably foreseeable” and court decisions like *Sierra Club* to determine what constitutes an indirect effect. As this note explores below, Washington, and other states that have implemented state environmental policy acts similar to NEPA, also struggle with ambiguous language contained in their Environmental Policy Acts.

III. SEPA FUNCTION AND COMPARISON WITH NEPA

The following section addresses the history of SEPA implementation in Washington, the SEPA process, some of the key procedural similarities between SEPA and NEPA, and a comparison between judicial interpretations of SEPA and NEPA.

A. SEPA History

Washington State adopted the State Environmental Policy Act in 1971 after the public outcry that decisions made by state and local entities did not reflect environmental concerns.⁶⁵ SEPA was modeled after NEPA and, like NEPA, contains broad policy statements but little detail on SEPA implementation.⁶⁶ The Washington Legislature subsequently created the Council on Environmental Policy in 1974 to aid in writing rules and implementing SEPA.⁶⁷ The Council then adopted regulations called the SEPA Guidelines under WAC Chapter 197-10.⁶⁸ The regulations introduced procedural requirements, categorical exemptions, lead agency responsibilities, and a system used to determine whether a project will have significant environmental effects- the “threshold determination process.”⁶⁹

Created by the Washington State Legislature in 1981, the Commission on Environmental Policy, a second committee, was tasked “to evaluate and suggest possible amendments to SEPA and the SEPA Guidelines.”⁷⁰ The Commission later adopted the SEPA Rules in 1984

⁶⁴ *Final Guidance on Greenhouse Gases and Climate Change*, NEPA.GOV (Mar. 14, 2018, 7:14 PM), https://ceq.doe.gov/guidance/ceq_guidance_nepa-ghg-climate_final_guidance.html.

⁶⁵ *State Environmental Policy Act Handbook*, WASH. STATE DEP’T OF ECOLOGY, 3 (2003) <https://fortress.wa.gov/ecy/publications/documents/98114.pdf>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 3.

that replaced the SEPA Guidelines.⁷¹ In 1997, a second set of SEPA Rule amendments became effective which included the requirements of ESHB 1724, which amended laws such as the Growth Management Act, the Shoreline Management Act, the Local Project Review Act, the Permit Assistance Center, and the Land Use Study Commission.⁷² The Local Project Review Act emphasized SEPA requirements that documents be “clear, concise, and to the point.”⁷³

1. SEPA Process and Similarities to NEPA

SEPA’s declaration of policy is identical to NEPA’s except that it adds that “The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment.”⁷⁴ The Washington Supreme Court stressed the importance of this language in *Leschi Imp. Council v. Washington State Highway Comm’n*, when it stated that SEPA “indicates in the strongest possible terms the basic importance of environmental concerns to the people of this state.”⁷⁵ The Court emphasized that SEPA’s policy act is a “far stronger policy statement” than that provided in NEPA.⁷⁶ The Court later clarified that while SEPA has a stronger policy statement than that of NEPA, “SEPA was clearly not intended to prevent the consideration of competing factors when making a decision that potentially affects the environment.”⁷⁷

SEPA requires that applicants prepare an EIS with projects involving government action that will likely have a significant, adverse effect on the environment.⁷⁸ “Significant” means a “reasonable likelihood of more than a moderate adverse impact on environmental quality.”⁷⁹ Governmental action on public or private proposals that are not exempt from preparing an EIS may be conditioned or denied under SEPA by a governmental agency.⁸⁰

SEPA gives the Department of Ecology the authority to adopt rules of interpretation and implementation; these rules must also create

⁷¹ WASH. ADMIN. CODE § 197-11-500 (1984).

⁷² State Environmental Policy Act Handbook, *supra* note 65, at 4.

⁷³ *Id.*

⁷⁴ WASH. REV. CODE § 43.21C.020(2)(3) (2009).

⁷⁵ 84 Wash.2d 271, 280, 525 P.2d 774 (Wash. 1974).

⁷⁶ *Id.*

⁷⁷ *Kucera v. State Dep’t of Transp.*, 140 Wash.2d 200, 224, 995 P.2d 63, 75 (Wash. 2000).

⁷⁸ WASH. REV. CODE § 43.21C.031 (2012).

⁷⁹ WASH. ADMIN. CODE § 197-11-794 (1) (2018).

⁸⁰ WASH. ADMIN. CODE § 197-11-660 (2018).

categorical exemptions from the impact statement requirement.⁸¹ The rules must define potentially ambiguous terms such as “elements of the environment” that must be addressed in an impact statement.⁸² SEPA also provides that a lead agency shall be designated when an agency is developing or is presented with a proposal, and that lead agency is responsible for the threshold determination and the preparation of the environmental impact statement.⁸³ The lead agencies are directed to finish the environmental impact statements in the quickest manner possible without jeopardizing “the integrity of the analysis.”⁸⁴

Like NEPA, SEPA encourages public involvement and requires that notice of any action taken by a government agency must be published in accordance with the rules set by the Department of Ecology.⁸⁵ NEPA recognizes that states have their own versions of environmental review before major action, and it requires consistency with local regulation rather than preemption.⁸⁶ Federal regulations also provide that where states have enacted environmental impact statement requirements that are in addition to, but do not conflict, with those in NEPA, federal agencies must cooperate in fulfilling those additional requirements.⁸⁷ Standing requirements under SEPA and NEPA are similar, and Washington has followed organization standing rules in federal case law.⁸⁸

2. *SEPA Judicial Interpretation: Differences/Similarities with NEPA Interpretation.*

In *Calvert Cliffs’ Coordinating Committee, Inc. v. U.S. Atomic Energy Comm’n*, the D.C. Circuit held that courts have the power to require agencies to comply with procedural directions of NEPA.⁸⁹ The

⁸¹ WASH. REV. CODE § 43.21C.110 (2012); WASH. REV. CODE § 43.21C.110(1)(A) (2012).

⁸² See WASH. REV. CODE § 43.21C.110(1)(F) (2012).

⁸³ WASH. REV. CODE § 43.21C.460 (2012).

⁸⁴ WASH. REV. CODE. § 43.21C.0311 (2012).

⁸⁵ WASH. REV. CODE § 43.21C.080 (2012).

⁸⁶ See *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wash. App 305, 230 P.3d 190, 197 (Wash. Ct. App. 2010).

⁸⁷ 40 C.F.R. 1506.2(b) (1977).

⁸⁸ Constitutional standing requires that a party suffer an “injury in fact” from a challenged action, and the injury falls within the “zone of interests to be protected or regulated by the statutes that the agencies were claimed to have violated.” *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). The Washington Court of Appeals reaffirmed the “injury in fact” test in *KS Tacoma Holdings, LLC v. Shorelines Hearing Bd.*, 166 Wash. App. 117, 129, 272 P.3d 876, 882-883 (Wash. Ct. App. 2012). The Washington Court of Appeals affirmed organizational standing in *Conservation Northwest v. Okanogan County*, No. 33194-6-III, 2016 WL 3453666, at *21 (Wash. Ct. App. June 16, 2016).

⁸⁹ 449 F.2d 1109, 1129 (D.C. Cir. 1971).

Court held that the Commission's rules, which precluded review consideration of non-radiological environmental issues unless specifically raised, did not comply with NEPA.⁹⁰ The Court ordered the Commission to revise its rules.⁹¹ Two years later, the Washington Supreme Court noted that because much of the language from SEPA is taken verbatim from NEPA, it looks to federal cases applying NEPA provisions for guidance.⁹²

The Washington Supreme Court has interpreted SEPA to give broad authority to agencies to base their decisions upon environmental impact; for example, in *Polygon Corp. v. City of Seattle*, the Court held that SEPA allowed the City of Seattle the discretion to deny a permit on the basis of adverse environmental impact.⁹³ Further, the court has rejected narrow interpretations of SEPA.⁹⁴ In *Stempel v. Dept. of Water Resources*, the Department of Water Services argued that SEPA required only that it consider the public welfare after the Department approved an application to take water from a lake to serve adjacent residential development and did not prepare an EIS.⁹⁵ The Washington Supreme Court disagreed, finding that SEPA required the Department to consider "the total environment and ecological factors to the fullest extent" when taking such a major action.⁹⁶ The following section discusses SEPA's take on climate change and, like NEPA, the lack of regulation or guidance to measure greenhouse gas emissions.

IV. SEPA ON CLIMATE CHANGE

Policy implications behind SEPA suggest that climate change be considered, as each person has an "inalienable right" to a healthful environment,⁹⁷ and it is the continuous responsibility of Washington State to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."⁹⁸ Despite requirements that applicants consider air quality and climate when conducting an EIS,

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Eastlake Cmty. Council v. Roanoke Associates, Inc.*, 82 Wash.2d 475, 488, 513 P.2d 36, 44-45, n.5 (Wash.1973).

⁹³ 90 Wash.2d 59, 69-70, 578 P.2d 1309, 1315 (Wash. 1978).

⁹⁴ *See Stempel v. Dep't of Water Resources*, 82 Wash.2d 109, 117, 508 P.2d 166, 171 (Wash. 1973).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ WASH. REV. CODE. § 43.21C.020(2)(3) (2009).

⁹⁸ WASH. REV. CODE. § 43.21C.020(2)(a) (2009).

SEPA does not explicitly require the consideration of climate change or greenhouse gas emissions.⁹⁹

A. *Lack of GHG Calculation Guidance*

In 2008, former Director of the Department of Ecology Jay Manning wrote a letter that addressed Washington's lack of an applicable rule or methodology in calculating the impact of greenhouse gas emissions, and proposed a solution by creating a SEPA working group composed of Climate Advisory Team members and other government, business, and environmental representatives.¹⁰⁰ SEPA's environmental checklist requests information describing the proposed action's impact on "climate," but does not specifically state what "climate" means or what climate change impacts are to be addressed.¹⁰¹ The group's purpose was to "1) clarify how, where, and when to incorporate climate change considerations into the environmental review of a proposal; 2) recommend changes to the SEPA rules and/or the environmental checklists, threshold determinations, and/or Environmental Impact Statements (EIS); and 3) provide instructions or guidance to local and state governments on how to determine possible mitigation strategies, and whether or not the impacts of climate change impacts may affect the project over its lifetime."¹⁰² Manning's letter demonstrates that Washington's Department of Ecology was aware of issues stemming from the absence of a formal rule outlining GHG calculation under SEPA, but has been reluctant to adopt rules allowing for uniform, predictable GHG evaluation in EISs.

B. *The 2011 Guidance Regarding Greenhouse Gas Emissions*

While the Washington Department of Ecology has yet to pass a clear numerical rule for quantifying greenhouse gas emissions under SEPA, it does continue to issue guidance; in June 2011 the WA Department of Ecology issued a document titled "*Guidance for Ecology — Including Greenhouse Gas Emissions in SEPA Reviews*."¹⁰³ Ecology's Guidance is

⁹⁹ WASH. ADMIN. CODE. § 197-11-444(1)(b) (2018).

¹⁰⁰ Jay Manning, *Letter RE: Climate Change—SEPA Environmental Review of Proposals*, WASH. STATE DEP'T OF ECOLOGY (Apr. 30, 2008), http://web.archive.org/web/20130410084633/http://www.ecy.wa.gov/climatechange/docs/sepa/04302009_JayManning_letter.pdf.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ WASH. DEP'T OF ECOLOGY, *GUIDANCE FOR ECOLOGY—INCLUDING GREENHOUSE GAS EMISSIONS IN SEPA REVIEWS* (2011).

not binding, and is only applicable to itself when it is a lead SEPA agency.¹⁰⁴

The 2011 Guidance provides that new emissions that are predicted to average at least 10,000 metric tons of carbon dioxide (CO₂) equivalents per year, and are proximately caused by the project, should be disclosed under SEPA.¹⁰⁵ The Guidance constructs three categories with differing GHG disclosure requirements, which include: 1) if GHG emissions are predicted to be less than an average of 10,000 metric tons of CO₂ a year, the applicant is not required to address GHG emissions under the SEPA checklist, 2) if the predicted average emissions range between 10,000 metric tons and 25,000 metric tons of CO₂ per year, the applicant should include a qualitative disclosure of GHG emissions in the SEPA checklist, and 3) if the predicted average emissions are greater than 25,000 metric tons a year, the applicant should include a quantitative disclosure of GHG emissions in the SEPA checklist.¹⁰⁶ These categories created by the Department of Ecology are based on both direct and indirect emissions from the project, and an applicant should consider both short and long-term emissions when attempting to place themselves within one of the categories.¹⁰⁷

The Department of Ecology rescinded the 2011 Guidance in 2016. Ecology removed the Guidance from its website because the department determined that it “needed to be updated to incorporate new scientific information, as well as be consistent with federal greenhouse gas emissions guidance and Ecology policies.”¹⁰⁸ The lack of a clear rule that informs project applicants about the specifics of what they should be calculating regarding GHGs leaves those applicants on unstable ground. It is likely that they will face litigation in the future for failing to do the proper GHG calculations, despite the lack of a clear rule that informs applicants of proper GHG calculations.

Applicants in Washington State may face similar litigation results as those in *Sierra Club*, where the FERC failed to give a quantitative estimate of the downstream GHGs that result from burning the natural gas that the pipelines would transport.¹⁰⁹ The FERC had the tools it

¹⁰⁴ *Id.* at 1.

¹⁰⁵ *Id.* at 3.

¹⁰⁶ *Id.* at 3-4.

¹⁰⁷ *Id.* at 5.

¹⁰⁸ *Columbia Riverkeeper v. Cowlitz City.*, No. 17-010c (Wash. Shorelines Hr'gs Bd. Aug. 18, 2017).

¹⁰⁹ *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1374 (D.C. Cir. 2017).

needed to give that calculation,¹¹⁰ but there is no rule under NEPA providing that the agency must give that specific calculation. The Supreme Court in *Sierra Club* justified its reasoning by stating that the Court has previously held that a NEPA analysis necessarily involves “reasonable forecasting” and that agencies may need to make “educated assumptions about an uncertain future.”¹¹¹ This problem was resolved with piecemeal litigation that could have been prevented with a rule clearly stating necessary requirements with regard to GHG emission impacts.

1. Ecology’s Guidance Has Proven Not to be an Adequate Representation of Proper GHG Calculation under SEPA.

The Shorelines Hearing Board, a Washington administrative agency that reviews permit decisions, found that a final EIS conducted by the Port of Kalama (hereinafter “the Port”) failed to adequately conclude that the project would result in significant adverse environmental impact.¹¹² Northwest Innovation Works (NWIW) and the Port proposed to build a methanol manufacturing facility and new marine terminal alongside the Columbia River; the project proposed to manufacture methanol gas supplied by a lateral pipeline.¹¹³ The methanol would be stored at the site and then subsequently shipped to Asia where it would be used to produce olefins, a primary chemical used to make plastic goods, clothing, and furniture.¹¹⁴ NWIW and the Port applied for a permit with Cowlitz County for the project; Cowlitz County and the Port served as co-lead agencies under SEPA.¹¹⁵ The lead agencies found that the project could have substantial environmental impact and that an EIS needed to be prepared. A final EIS was issued on September 30, 2016.¹¹⁶

The Final EIS of the project contained the 2011 Department of Ecology document that provided guidance for greenhouse gas emissions

¹¹⁰ The D.C. Circuit highlighted the fact that FERC “already estimated how much gas the pipelines will transport... but gave no reason why this number could not be used to estimate greenhouse-gas emissions from power plants.” FERC also cited a Department of Energy report that “gives emissions estimates per unit of energy generated for various types of plant.” *Id.* Essentially, FERC had cited itself the tools it needed to estimate GHG emissions from power plants in its EIS but failed to take the extra step and use these tools to make the calculation.

¹¹¹ *Id.*

¹¹² *Columbia Riverkeeper v. Cowlitz Cty.*, No. 17-010c, at 12 (Shorelines Hearings Bd. Sept. 15, 2017) (Order on Motion for Partial Summary Judgment).

¹¹³ *Id.* at 6.

¹¹⁴ *Id.* at 7-8.

¹¹⁵ *Id.* at 8.

¹¹⁶ *Id.*

in SEPA reviews.¹¹⁷ The Final EIS outlines that it applied the Ecology Guidance to instruct assessment of the project's GHG impacts because the 2011 document is the only state guidance available that informs applicants about how determinations of significance should be made for greenhouse gas impacts and when mitigation is required.¹¹⁸ A project's proposed greenhouse impacts are considered not significant under Ecology's Guidance if the project incorporates mitigation measures to reduce its greenhouse gas emissions by about 11 percent below its estimated emissions without the mitigation measures.¹¹⁹ The use of Ultra Low Energy (ULE) technology in the project results in significant reductions; there is a thirty-one percent reduction in GHG emissions that allows the project to meet the eleven percent Ecology-recommended goal.¹²⁰ The Final EIS determined that the project meets Ecology's Guidance and as a result, the project's GHG impact would not have been significant.¹²¹

Despite NWIW and the Port's adherence to Ecology's 2011 GHG Guidance, the Shorelines Hearing Board concluded the Final EIS failed to adequately analyze the project's GHG impacts.¹²² Riverkeeper, a challenger to the project, argued that the Final EIS and the Department of Ecology mistakenly relied on Ecology's Guidance to conclude that the project would not have significant adverse impacts.¹²³ Riverkeeper further argued that the Final EIS did not comply with SEPA's case-by-case environmental impact analysis because it terminated the analysis of environmental impacts prematurely.¹²⁴ The Department of Ecology stated that its GHG Guidance was removed from its website in 2016 "to allow for its revision," to incorporate new scientific information, and to be consistent with federal GHG emissions guidance and Ecology policies.¹²⁵ The Department of Ecology also acknowledged that the 2011 GHG Guidance was of limited value.¹²⁶ Ultimately, the Board found that reliance on the Guidance stopped the EIS analysis too early and resulted

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 9.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 18.

¹²³ *Id.* at 13.

¹²⁴ *Id.*

¹²⁵ *Id.* at 15.

¹²⁶ *Id.* at 16.

in the failure to fully analyze the GHG impacts from the project, and to consider whether further mitigation was required.¹²⁷

The Final EIS's conclusion that there would be no significant impacts from the project was based nearly entirely upon Ecology's 2011 Guidance.¹²⁸ Because Ecology's 2011 Guidance was the only state GHG emissions mitigation guidance available and it was rescinded in 2016,¹²⁹ NWIW and the Port had no other state document to rely upon to ensure that they remained consistent with SEPA EIS analysis.¹³⁰ The lack of a clear GHG emissions rule renders applicants vulnerable to decisions such as these, where applicants rely on guidance without knowing whether the guidance is sufficient to adhere to SEPA EIS requirements. Further, when guidance is rescinded, applicants have nothing to rely upon to instruct them about the requirements of a sufficient GHG emissions analysis.

2. *Washington Case Law on GHG Emissions Calculations is Narrow and Unhelpful Guidance for Future Project Proposals.*

The Supreme Court of Washington has previously considered whether the Department of Ecology properly considered the effects of greenhouse gas emissions when it concluded that no EIS was necessary for a proposed energy cogeneration project.¹³¹ There, Port Townsend Paper Corporation (PTPC), a paper mill, burned fossil fuel and woody biomass to produce steam to be used in the papermaking process.¹³² PTPC applied to the Department of Ecology for a notice of construction permit, which would allow PTPC to build a cogeneration project at the mill to minimize the burning of fossil fuel, to increase the burning of woody biomass, and to add an electrical turbine.¹³³ Ecology reviewed the proposal under SEPA and determined that the project would not require preparation of an EIS.¹³⁴

Environmental Groups, collectively "PT Air Watchers," appealed the determination to the Pollution Control Hearings Board, which granted

¹²⁷ *Columbia Riverkeeper v. Cowlitz Cty.*, No. 17-010c, at 18 (Shorelines Hearings Bd. Sept. 15, 2017) (Order on Motion. for Partial Summary Judgment).

¹²⁸ *Id.* at 15.

¹²⁹ *Id.* at 16.

¹³⁰ *Id.* at 8.

¹³¹ *PT Air Watchers v. State Dept. of Ecology*, 319 P.3d 23, 25 (Wash. 2014).

¹³² *Id.* at 25.

¹³³ *Id.*

¹³⁴ *Id.*

summary judgment to Ecology.¹³⁵ The Washington Supreme Court affirmed the judgment, finding that the Board and Ecology properly considered SEPA analysis concerning whether an EIS is required for a project proposal.¹³⁶ The Court considered the invocation of RCW 70.235.020(3), which provides that, for reporting purposes, carbon dioxide emissions from burning wood by-products are not “considered a greenhouse gas as long as the region’s silvicultural sequestration capacity is maintained or increased.”¹³⁷ The Court noted the Legislature’s preference for burning woody biomass over other fuels and found that Ecology appropriately considered legislative policy behind RCW 70.235.020(3) in concluding that PTPC’s project would not make a significant environmental impact.¹³⁸ While the owner of the paper mill did not provide an estimate of a specific GHG emissions calculation, “SEPA does not require the reporting of specific emissions.”¹³⁹ Therefore, the evaluation of general change of GHG emissions was sufficient.¹⁴⁰

The Court in *PT Air Watchers* noted that it might have reached a different conclusion had Ecology and the Board failed to consider the impact of greenhouse gas emissions altogether.¹⁴¹ There, however, the Court found that Ecology and the Board properly considered RCW 70.235.020(3) in their SEPA analysis and conclusion that greenhouse gas emissions would not create significant environmental impact.¹⁴²

The Washington Court of Appeals found that Puget Sound Regional Council’s (PSRC) EIS properly assessed alternative actions and mitigation measures to reduce the environmental impact of T2040, a 30-year action plan to address transportation needs in King, Kitsap, Pierce, and Snohomish Counties.¹⁴³ Cascade Bicycle Club challenged T2040, arguing in part that the prepared EIS was inadequate under SEPA; namely, it failed to consider alternatives or mitigation to comply with

¹³⁵ *Id.* at 26. The Groups then filed a petition for review under the Administrative Procedure Act (APA) in Thurston County Superior Court, which denied the review and affirmed the judgment. The Washington Court of Appeals, Division II, certified the matter pursuant to RCW 2.06.030, and the Supreme Court subsequently accepted certification.

¹³⁶ *Id.* at 27.

¹³⁷ *Id.* at 28.

¹³⁸ *Id.*

¹³⁹ *Id.* at 29.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 28.

¹⁴² *Id.*

¹⁴³ *Cascade Bicycle Club v. Puget Sound Regional Council*, 306 P.3d 1031, 1041 (Wash. Ct. App. 2013).

GHG emissions limits under RCW 70.235.020(1)(a).¹⁴⁴ The Court disagreed, reasoning that PSRC's jurisdiction is limited and that it cannot address emission levels throughout Washington State, outside the scope of the Council's transportation planning authority.¹⁴⁵

Both decisions are narrow in scope and unlikely to help future applicants for project proposals adequately assess GHG emissions under SEPA. First, not all projects will involve the application of RCW 70.235.020(3), which specifically addresses the "combustion of biomass in the form of fuel wood."¹⁴⁶ Nor will all projects involve the mitigation of GHG emissions, thus eliminating the requirement for an EIS, like the project in *PT Air Watchers*. Additionally, reasonable alternative or mitigation measures may not always be outside the scope of an applicant's jurisdiction, such as in *Cascade Bicycle Club*. Both cases leave unanswered questions: which alternative measures must be considered when conducting an EIS; what is considered a "significant" amount of GHG emissions under SEPA to trigger the requirement of an EIS; what is the scientific standard when calculating GHG emissions; what is considered sufficient calculation of GHG emissions (in other words, what types of emissions must be considered); whether SEPA requires mitigation of GHG emission, and if so, how much mitigation is sufficient; and whether physical impacts resulting from GHG emissions should be included in the EIS statement? Because the case law fails to address these questions and because there is currently no guidance issued by Ecology to help answer these questions, applicants are left guessing and hoping that their projects are exempt from an EIS under SEPA or that the GHG calculations within their EIS are sufficient.

Applicants may rely on other potential sources to help guide proper GHG emissions calculation, such as administrative decisions and federal case law interpreting NEPA; however, even if an applicant relies on these non-binding sources, a Washington Court may still decide that the applicant's GHG analysis is insufficient.¹⁴⁷ These sources may or may not be persuasive in a Washington court and the court may still find a GHG analysis in an EIS insufficient even after an applicant has relied on prior administrative decisions and NEPA case law. A Washington rule

¹⁴⁴ *Id.* at 1037. WASH. REV. CODE. § 70.235.020 provides reporting requirements for GHG emissions reductions. For example, WASH. REV. CODE. § 70.235.020(1)(a)(i) states that by 2020, the State shall reduce GHG emissions in the state to 1990 levels.

¹⁴⁵ *Id.* at 1039.

¹⁴⁶ WASH. REV. CODE. § 70.235.020(3) (2008).

¹⁴⁷ See *Columbia Riverkeeper v. Cowlitz Cty.*, No. 17-010c, at 16 (Shorelines Hearings Bd. Sept. 15, 2017) (Order on Motion for Partial Summary Judgment).

directly outlining proper GHG calculation for an EIS would bind Washington courts and allow applicants more predictability.

C. Other States Also Struggle with the Lack of a Rule that Clarifies GHG Calculations Under their SEPAs.

Seventeen states plus the District of Columbia, New York City, Guam, and Puerto Rico all have their own SEPA.¹⁴⁸ Moreover, “most states follow the NEPA model by requiring agencies to prepare an EIS on a major action if the action ‘may’ or ‘will’ have a significant impact on the environment,” and SEPAs may vary in what types of actions trigger the EIS process.¹⁴⁹ Like Washington, California continues to struggle with uncertainties such as which emissions are appropriately attributed to the project, what constitutes a “significant” contribution to climate change, and how to assess whether a project is contributing a “fair share” to GHG reduction goals.¹⁵⁰

Recently, California issued a notice of proposed amendment of regulations, thus implementing the California Environmental Quality Act (CEQA Guidelines) to reflect legislative changes, clarify existing Guidelines, and update the Guidelines to be consistent with court decisions.¹⁵¹ The proposed legislation’s authority arises from § 21083.05 of the Public Resources Code, which requires the Office of Planning and Research and the Natural Resources Agency to “periodically update the guidelines for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions” not limited to effects associated with transportation or energy consumption.¹⁵² The California notice states that “[s]pecifically, proposed section 15064.4 provides that a lead agency must use its best efforts to calculate or estimate the greenhouse gas emissions resulting from a project,” and “[i]n estimating the emissions

¹⁴⁸ *State NEPA Contacts*, COUNCIL ON ENVNTL. EQUALITY (Mar. 14, 2018, 7:35 PM), https://energy.gov/sites/prod/files/2013/09/f2/States_NEPA_Like_22June2013.pdf.

¹⁴⁹ *Chapter 5: How Does MEPA Compare with Other State Environmental Policy Acts?*, MONTANA LEGISLATURE 65 (Mar. 14, 2018, 7:37 PM), http://leg.mt.gov/content/publications/Environmental/2000mepa_report/chapter5.pdf.

¹⁵⁰ California passed the Global Warming Solutions Act in 2006 which sought to reduce GHG emissions levels by 2020- it is currently unclear how to determine whether a project is fairly contributing towards the reduction goals outlined in the Act. Marina D. Cassio, *Pending Updates To California Climate Change Analysis to Provide Limited Answers to Difficult Questions*, MARTEN LAW (Feb. 14, 2018), <http://www.martenlaw.com/newsletter/20180214-california-climate-change-analysis>.

¹⁵¹ *See Title 14: Notice of Proposed Rulemaking- Amendments and Additions to the State CEQA Guidelines*, CALIFORNIA NATURAL RESOURCES AGENCY (Jan. 26, 2018), <http://resources.ca.gov/ceqa/docs/update2018/notice-of-proposed-rulemaking.pdf>.

¹⁵² CAL. PUB. RES. CODE § 21083.05 (2018).

resulting from a project, a lead agency would have the discretion to perform a quantitative or a qualitative analysis based on the circumstances surrounding the project.”¹⁵³ Note, however, that this is a notice of proposed changes to current CEQA guidelines. Like Washington, California does not have a rule or direct guidance that clearly states what is required and how to calculate those requirements with regard to GHG emission impact analysis.

V. A RULE SHOULD OUTLINE HOW TO QUANTIFY, ANALYZE, AND MITIGATE GREENHOUSE GAS EMISSIONS UNDER SEPA.

Since the Department of Ecology rescinded the 2011 Guidance, applicants have narrow case law to guide them on how to properly evaluate GHG emissions under SEPA. The Department of Ecology should adopt one macro-rule to help applicants in conducting GHG emissions calculations. The rule should include answers to some of the questions unanswered by Washington case law, such as how to adequately calculate greenhouse gas emissions for an EIS or how to calculate whether mitigation is required. Additionally, a macro-rule would help litigators and Washington courts by creating clear standards to follow and clarify. The public could contribute to and comment on Ecology’s proposed rule during the rulemaking process; this would allow affected parties to sue during the rulemaking process, or they could litigate as an as-applied challenge.

On the other hand, the Department of Ecology is not the only state agency capable of creating a GHG emissions rule under SEPA. Any lead agency could develop a rule or system to calculate GHG emissions under SEPA, and if it withstands challenge in the courtroom, other agencies could adopt the same rule. Washington could find itself with a clearly defined rule if a challenge reaches the Supreme Court.

CONCLUSION

The lack of a clear rule both federally and in some states with “little NEPAs” regarding GHG emissions impact analysis leaves project applicants with little guidance; essentially, they must make an educated guess as to what calculations NEPA or SEPA requires with regard to GHG impact on the environment. In Washington, the piecemeal policy

¹⁵³ *Notice of Public Hearings and Notice of Proposed Amendment of Regulations Implementing the California Environmental Quality Act*, CALIFORNIA RESOURCES AGENCY (Mar. 14, 2018, 7:43 PM), http://resources.ca.gov/ceqa/docs/Notice_of_Proposed_Action.pdf.

created by judicial interpretation of SEPA leaves applicants to do what courts have required in previous cases, but Washington case law on GHG emissions is narrow and may only apply to a specific set of facts. Environmental impact varies between projects, and judicial precedent might not serve as an accurate guideline. As demonstrated by the decision rendered by Washington's Shorelines Hearings Board, guidelines issued by the Department of Ecology may have limited value when determining proper GHG emissions impact in compliance with SEPA requirements. By creating a clear rule under SEPA that outlines the proper calculations of GHG emissions impact, Washington project applicants will no longer have to cross their fingers and hope that their EIS meets the statutory standards.