MILLENNIUM BULK TERMINALS: WASHINGTON POLLUTION CONTROL HEARINGS BOARD AFFIRMS THE DEPARTMENT OF ECOLOGY'S USE OF SUBSTANTIVE SEPA AUTHORITY TO DENY WATER QUALITY CERTIFICATION

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A previous version of this article was featured in *Western Water Law & Policy Reporter*
Volume 22, No. 10
August/September 2018
www.argentco.com

In an Order on Summary Judgment issued August 15, 2018, the Washington Pollution Control Hearings Board endorsed the Department of Ecology's use of Washington's "little NEPA" statute, the State Environmental Policy Act (SEPA), to deny a Section 401 water quality certification for a proposed coal export terminal based on non-water quality-related impacts. The Board's decision in *Millennium Bulk Terminals-Longview, LLC v. Department of Ecology*, PCHB No. 17-090, raises some interesting questions about application of SEPA that may have far-reaching consequences for water right applications and other actions that are "categorically exempt" under the state's SEPA Rules.

SEPA requirements and categorical exemptions

SEPA, Chapter 43.21C RCW, requires state and local agencies to prepare an environmental impact statement (EIS) for legislation and other "major actions significantly affecting the quality of the environment." RCW 43.21C.031. SEPA's review procedures are designed to ensure that governmental agencies "conscientiously and systematically consider environmental values and consequences in their decision-making processes." R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* (2017), § 3.01[2].

The process of deciding whether an EIS must be prepared – called a "threshold determination" – results in either a "determination of significance" or DS (requiring preparation of an EIS) or a "determination of nonsignificance" or DNS (after which an EIS is not required). The threshold determination is made after review of an "environmental checklist" disclosing the anticipated impacts of the proposal. The environmental checklist, DNS, DS, and EIS are all referred to as "environmental documents" prepared under SEPA.

RCW 43.21C.060 authorizes agencies to impose conditions on governmental actions or deny those actions altogether, but only in specified circumstances. First, any conditions or denials must be based on formally-designated SEPA policies. An action may be conditioned only to mitigate specific adverse environmental impacts identified in environmental documents prepared under SEPA. To deny a proposal, an agency must find that it would result in significant adverse impacts identified in an EIS, and that reasonable mitigation measures are insufficient to mitigate the identified impact. Although conditions may be based on impacts disclosed in an environmental checklist or DNS, an agency cannot deny a proposal unless an EIS has been prepared.

Some actions are exempt from the threshold determination process, either through statutory exemptions in SEPA or through categorical exemptions set forth in the SEPA Rules promulgated by Ecology. Since SEPA's enactment in 1971, the Legislature has added numerous exemptions to the statute itself. For example, in 1974, SEPA was amended to provide that an EIS is not required for appropriation of 50 cfs or less for agricultural irrigation projects by any person, private firm, private corporation or private association without federal or state subsidies. RCW 43.21C.035.

Also in 1974, the Legislature for the first time authorized the now-defunct Council on Environmental Policy to adopt "rules of interpretation and implementation" of SEPA as "guidelines" to all branches of government. The council's rule-making powers included rules addressing categories of "potential major actions significantly affecting the quality of the environment as well as categories of actions exempt from such classification, including categories pertaining to applications for water right permits." Laws 1974, 1st ex.s. ch. 179 §6, codified at RCW 43.21C.110(1)(a).

In 1983, the Legislature amended RCW 43.21C.110, changing its rule-making directives and shifting rule-making authority to Ecology. The new SEPA Rules were to include the following:

> Categories of governmental actions which are *not* to be considered as potential major actions significantly affecting the quality of the environment, including categories pertaining to applications for water right permits pursuant to chapters 90.03 and 90.44 RCW. The types of actions included as categorical exemptions in the rules shall be limited to those types which are not major actions significantly affecting the quality of the environment. *The rules shall provide for certain circumstances where actions which potentially are categorically exempt require environmental review*.

Washington Laws 1983, ch. 117 §7(1)(a) (emphasis added).

In a section-by-section analysis that accompanied the 1983 legislation, the Special Counsel to the Commission on Environmental Policy described this provision as follows:

> Paragraph (a) continues the existing authorization for categorical exemptions enacted in 1974. Categorical exemptions are just that: *types* of activities which do not have significant environmental impacts. . . . This paragraph maintains the status quo and adds an additional protection by noting that the rules shall provide for certain circumstances where routinely exempt actions would require environmental review (such as a segment of a series of actions which together have a significant impact, or certain actions in designated "environmentally sensitive" areas).

K. Weiner, Section-by-Section Summary of S.S.B. 3006, in R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* (2017), Appendix B (emphasis in original).

In 1984, Ecology complied with the Legislature's mandate by promulgating new SEPA Rules in Chapter 197-11 of the Washington Administrative Code (WAC). The Rules define "categorical exemption" in WAC 197-11-720 as follows:

> "Categorical exemption" means a type of action, specified in these rules, which does not significantly affect the environment . . .; categorical exemptions are found in Part Nine of these rules. Neither a threshold determination nor any environmental document, including an environmental checklist or environmental impact statement, is required for any categorically exempt action . . . . These rules provide for those circumstances in which a specific action that would fit within a categorical exemption shall not be considered categorically exempt . . . .

Part Nine lists numerous categorical exemptions, including appropriation of one cubic foot per second or less of surface water, or 2,250 gallons per minute of groundwater, for any purpose (WAC 197-11-800(4)), and the "granting or denial of water quality certifications under the Federal Clean Water Act" (WAC 197-11-800(9)).

To comply with RCW 43.21C.110(1)(a), the SEPA Rules include exceptions to the exemptions, i.e., circumstances under which categorically exempt actions require environmental review. WAC 197-11-305(1) provides:

> If a proposal fits within any of the provisions in Part Nine of these rules, the proposal shall be categorically exempt from threshold determination requirements . . . *except* as follows:
>
> (a) The proposal is *not exempt* under WAC 197-11-908, critical areas.
>
> (b) The proposal is a segment of a proposal that includes:
>
> (i) A series of actions, physically or functionally related to each other, some of which *are categorically exempt* and some of which *are not*; or
>
> (ii) A series of exempt actions that are physically or functionally related to each other, and that together may have a probable significant adverse environmental impact in the judgment of an agency with jurisdiction. . . .

For such proposals, the agency or applicant may proceed with the *exempt aspects of the proposals*, prior to conducting environmental review, if the requirements of WAC 197-11-070 are met. (Emphasis added.)

In 1995, the Legislature amended SEPA again, adding a single sentence to the end of RCW 43.21C.110(1)(a), immediately following the language requiring the SEPA Rules to provide for certain circumstances where categorically exempt actions require environmental review: "An action that is categorically exempt under the rules adopted by the department may not be conditioned or denied under this chapter." Laws 1995, ch. 347 § 206. This prohibition against using SEPA authority to deny an action that is categorically exempt under the SEPA Rules set the stage for the Millennium dispute.

The Millennium Bulk Terminals project

Millennium Bulk Terminals-Longview, LLC (Millennium) proposed a coal export terminal on an existing industrial site along the Columbia River near Longview, Washington. Cowlitz County, where the proposed project is located, and the Department of Ecology served as co-lead agencies for environmental review under SEPA and prepared an Environmental Impact Statement (EIS) for the project. The EIS identified significant adverse environmental impacts resulting from construction and operation of the proposed coal export terminal, even after implementation of mitigation measures. The areas of identified impact are:

- social and community resources
- cultural resources
- tribal resources
- rail transportation
- rail safety
- vehicle transportation
- vessel transportation
- noise and vibration
- air quality

The EIS did not identify any significant adverse impacts to water quality.

Millennium's proposed project required numerous approvals and permits, including a water quality certification under Section 401 of the Clean Water Act, 33 U.S.C. § 1341. Ecology denied the 401 certification based on (1) significant adverse impacts identified in the EIS; and (2) lack of reasonable assurance that the project would meet applicable water quality standards. Millennium appealed Ecology's denial to the PCHB.

Both Millennium and Ecology moved for summary judgment on the issue of whether Ecology can use its substantive authority under SEPA to deny the 401 certification based on the adverse impacts identified in the EIS. Ecology contended that "an agency can use its substantive SEPA authority to deny a permit even though all criteria for the permit have otherwise been met."

The PCHB decision

The Board sided with Ecology. It ruled that the 401 certification for the Millennium project "is not categorically exempt from SEPA" and that Ecology's substantive SEPA authority is broad enough to enable Ecology to deny the 401 certification on non-water quality-related grounds. (The Board also rejected Millennium's argument that the Section 401 of the Clean Water Act precludes Ecology's reliance on its substantive SEPA authority.)

The Board acknowledged the SEPA prohibition in RCW 43.21C.110(1)(a) against using SEPA authority to deny an action that is categorically exempt under the SEPA Rules. The Board overcame that prohibition by reasoning that because the SEPA Rules required environmental review of the entire Millennium terminal project, the 401 certification is not an action that is categorically exempt under the SEPA Rules.

The Board's approach raises some interesting questions about SEPA authority where categorically exempt actions are at issue. The Board appears to have misunderstood the distinction between an "action that is categorically exempt under the rules" and the concept of specified circumstances under which a categorically exempt action nevertheless undergoes environmental review. The Board tautologically collapsed these two concepts, accepting Ecology's argument that the specified circumstances identified in WAC 197-11-305(1)(b)(i) (i.e., the 401 water quality certification is a segment of a larger proposal that includes a series of physically or functionally related actions, some of which are categorically exempt and some of which are not categorically exempt) "negates" the categorical exemption. Voilà: the 401 certification cannot be an "action that is categorically exempt" under the SEPA Rules, so the prohibition in RCW 43.21C.110(1)(a) does not apply.

The Board appears to have made no attempt to analyze the actual language in WAC 197-11-305(1)(b)(i), which – unlike subsection (1)(a) – does not provide that such a proposal is "not exempt." Under the rule, categorically exempt actions that are segments of a larger proposal consisting of some exempt and some non-exempt actions are still referred to as "categorically exempt" ("some of which *are categorically exempt* and some of which are not"). The rule also provides that for such proposals, the agency "may proceed with the *exempt aspects* of the proposals, prior to conducting environmental review," if certain requirements are met. If the requirement for environmental review of a larger proposal "negates" a categorical exemption for a segment of that larger proposal, there would be no "exempt aspects" remaining. The Board's interpretation cannot be squared with the actual language of the rule.

The Board also did not address the legislative intent in the prohibition in RCW 43.21C.110(1)(a). The plain meaning of that prohibition can be derived in part by the fact of its insertion, in 1995, as a stand-alone amendment at the end of a section explicitly directing Ecology to include in the SEPA Rules provision for "certain circumstances" where actions which potentially are categorically exempt require environmental review. If, as the Board reasoned,

an action that requires environmental review loses its character as an exempt action and thus can never be an action "that is categorically exempt under the rules," then what exactly is the point of this prohibition that the Legislature added in 1995?

If the prohibition in RCW 43.21C.110(1)(a) does not address agency decisions on categorically exempt actions after environmental review, i.e., if it addresses only decisions on categorically exempt actions that do not require environmental review, then the amendment would be completely superfluous. At the time of the 1995 amendment of RCW 43.21C.110(1)(a) to add this prohibition, SEPA already provided (in RCW 43.21C.060) that an action may not be conditioned or denied unless environmental review has occurred. Washington rules of statutory construction require statutes to be interpreted so that no provision is rendered superfluous. *Whatcom County v. City of Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996). The Board appears not to have considered these basic rules of statutory construction or the plain meaning of the statutory prohibition.

Conclusion and Implications

The Millennium appeal starkly presents the scenario of an agency using SEPA to deny an application for a categorically exempt action based on environmental impacts unrelated to the applicable permit criteria. The Board's approach would enable use of SEPA to deny other Section 401 water quality certifications and many other permits identified as categorically exempt actions under the SEPA Rules. For example, Ecology could potentially deny water right applications under SEPA, based on grounds that have nothing to do with the four-part test under the Water Code (RCW 90.03.290). If the Board's decision is not reversed by the courts, the Legislature may have to step in to clarify SEPA substantive authority under these circumstances.

Millennium Bulk Terminals-Longview, LLC v. Dept. of Ecology, PCHB No. 17-090 (Order on Summary Judgment, August 15, 2018). To view the PCHB's decision, see http://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=2468.