

How Many Consultants, Lawyers and Years Does it Take to Permit a Project in Washington?



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IMPEDIMENTS TO PERMITTING

- Permitting in Washington State has become very politicized.
- Core Problem: the Washington economy no longer relies primarily on natural resource-based industries

PERMITTING CHALLENGES

1. Growing Power of Environmental NGOs
2. Tribal Activism
3. Climate Change Mitigation Programs
4. Endangered Species Act

ENVIRONMENTAL NGOs

- The Trump Backlash
- Rulemaking (e.g. *Foster v. Ecology*, SSM SIP Call)
- Permit Appeals (e.g. *Ocean Advocates*)
- Citizen Suits (e.g. GHG RACT)

TRIBAL ACTIVISM

- Tribal reserved treaty rights include the right to fish at “usual and accustomed” fishing sites
- Federal agencies will not permit projects that interfere with U & A fishing rights (e.g. Gateway)
- Courts extend the obligation to include habitat preservation and enhancement (e.g. the culverts case)

TRADITIONAL CULTURAL PROPERTIES

- NHPA requires federal agencies to assess the effects of their actions on historic and archaeological resources
- Agencies must consult with tribes before issuing permits for projects that may affect a property to which a tribe may attach “religious or cultural significance”
- What defines a “Traditional Cultural Property”?

MORE TRIBAL ISSUES...

- CWA: New Water Quality Standards for Washington based on increased fish consumption rates for tribal members
- CAA: Reservations redesignated as Class I Areas

CLIMATE CHANGE POLICY & ENLARGED SEPA SCOPE

- EIS required for proposed action with “probable significant adverse environmental impacts”
- SEPA used to study and mitigate greenhouse gas emissions
- Ecology employing “cradle to grave” scope, capturing upstream and downstream sources of GHG emissions in stream of commerce

SEPA MODELED AFTER NEPA WITH SUBSTANTIVE KICKER

- SEPA modeled after NEPA
- Except that SEPA contains substantive component authorizing state and local agencies to reject a project that does not sufficiently mitigate significant adverse effects.

PROJECT APPLICANTS AT THE MERCY OF ENVIRONMENTAL REVIEW

- “[E]nvironmental impacts are like ripples following the casting of a stone in a pool. The simile is useless as a standard. So employed it suggests that the entire pool must be considered each time a substance heavier than a hair lands upon its surface. This is not a practical guide.” *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400 (9th Cir. 1989)

CLEAN AIR RULE FOR NEW FACILITIES

- New entities enter CAR based on:
 - 1st year the 3 year average is above the threshold,
or
 - Benchmarking = baseline GHG emissions set at emissions rate of the 90% most efficient facility
- Compliance pathway set at 1.7% reduction annually from the baseline
- The CAR establishes a Reserve of ERUs that *may* be used to cover initial operating emissions of new facilities

ESA CONSULTATION

- Projects with a “Federal Nexus” Must Evaluate Impacts to Listed Species and Critical Habitat
 - e.g., *Tulalip Tribes v. Kelly*
- Formal Consultation Can take Years to Complete
- Issue De Jour is Wake Stranding
- Another Litigation Trigger

ABOUT US

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