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
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