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February 23, 2010

The Honorable Tim Rasmussen
Stevens County Prosecuting Attorney
215 S Oak Street Room 114
Colville, WA 99114

Dear Prosecutor Rasmussen:

By letter previously acknowledged, you have requested an opinion on a question I have paraphrased as follows:

If a proposal involving the conversion of forest land under RCW 43.21C.037(2) requires a license from a local jurisdiction, must the local jurisdiction assume lead agency status for the proposal? [1]

BRIEF ANSWER

Yes. When a local jurisdiction requires a license in connection with any proposal involving the Class IV forest practices identified in RCW 43.21C.037(2)(a)–(c), the local jurisdiction is the lead agency for considering the environmental factors and determining whether an environmental impact statement must be prepared.

ANALYSIS

Your question involves the application of the State Environmental Policy Act (SEPA), RCW 43.21C, in the context of forest practices, which are governed by the Forest Practices Act (FPA), RCW 76.09. SEPA establishes a process for ensuring that state and local governments consider environmental values and consequences in making decisions, and requires that the policies, regulations, and laws of the state be interpreted and administered in accordance with SEPA. RCW 43.21C.030(1). FPA is a statewide system of laws and forest practices rules designed to manage and protect the State's natural resources and to ensure a viable timber

[1] Your question arose because of a particular forest practice application, for which the Department of Natural Resources and Stevens County each contended that the other was the appropriate lead agency. The Department of Ecology determined that Stevens County was the appropriate lead agency under WAC 197-11-946 (authorizing agencies to petition Ecology to determine which agency is the proper lead agency). This opinion does not attempt to resolve the specific dispute over that application, but does set forth my legal analysis of the question of law that you have presented. Additionally, I have paraphrased your question to highlight the legal issue presented, without considering any factual question. For example, the question of whether any particular application would require a license from a local jurisdiction would require an examination of the facts surrounding that application, a task for which Opinions of the Attorney General are not well suited.

industry. *Alpine Lakes Prot. Soc'y v. Dep't of Ecology*, 135 Wn. App. 376, 387, 144 P.3d 385 (2006); RCW 76.09.010(1). Certain provisions of SEPA integrate and refer directly to FPA.

Your question arises in the context of a dispute over lead agency status between Stevens County and the Departments of Natural Resources (DNR) and Ecology (Ecology). The proposal that gives rise to your question involves tree harvesting for conversion of land to non-forestry use, including a road and construction of a residence. You ask whether the appropriate lead agency would be DNR or the county, when such a project requires both a forest practices permit and a local license. This question is significant because the lead agency has the responsibility to prepare a "detailed statement" regarding the environmental impacts of the proposed project. RCW 43.21C.030(2)(c). For the reasons described below, the appropriate lead agency for such a project would be the county.

The SEPA process for forest practice applications and designation of lead agency status is governed by RCW 43.21C.037 and WAC 197-11-938(4), respectively. RCW 43.21C.037 has three subsections. The first subsection exempts certain forest practice application classes from SEPA's procedural requirements, and the second and third subsections apply to forest practice application classes that are subject to SEPA. The applications that are subject to SEPA involve the potential conversion of forest land to non-forest uses, and forest practices that, because of factors such as the topography, the presence of sensitive species, or other environmental circumstances, may have the propensity for greater environmental effects than the exempt application classes.

The circumstance you ask about, involving a proposal to convert forest land to another use that would require a license from a local jurisdiction, is governed by RCW 43.21C.037(2), which provides as follows:

> When the applicable county, city, or town requires a license in connection with any proposal involving forest practices (a) on lands platted after January 1, 1960, as provided in chapter 58.17 RCW, (b) on lands that have or are being converted to another use, or (c) on lands which, pursuant to RCW 76.09.070 as now or hereafter amended, are not to be reforested because of the likelihood of future conversion to urban development, then the local government, rather than the department of natural resources, is responsible for any detailed statement required under RCW 43.21C.030(2)(c).

Such forest practices are known as Class IV–general applications. *See* WAC 222-16-050(2)(a)–(c). The statute assigns the local government the responsibility for the "detailed statement" for Class IV–general applications when a local license is required in connection with the proposal.

The use of the term "detailed statement" might be construed to mean that the local government is responsible only for preparing a final environmental impact statement, and not for

making the initial determination of whether an environmental impact statement must be prepared. Such a conclusion could be based on RCW 43.21C.037(3), which requires DNR to make the determination of whether a detailed statement must be prepared for certain Class IV forest practice applications, or WAC 197-11-738, which provides that the "detailed statement" refers to a final environmental impact statement. However, for the reasons discussed below, the better reading of the phrase "responsible for any detailed statement" in RCW 43.21C.037(2) is that it means the entire SEPA environmental review process.

Although RCW 43.21C.037(3) could be read as requiring DNR to make the initial determination of whether or not a final environmental impact statement must be prepared for all Class IV forest practice applications, a close look at this statute reveals that DNR's responsibility is more limited. Subsection (3) provides, in relevant part:

> Those forest practices determined by rule of the forest practices board to have a potential for a substantial impact on the environment, and thus to be Class IV practices, require an evaluation by the department of natural resources as to whether or not a detailed statement must be prepared pursuant to this chapter.

RCW 43.21C.037(3). DNR's responsibility for making such a determination is triggered by "[t]hose forest practices *determined by rule* of the forest practices board to have a potential for a substantial impact on the environment, and thus to be Class IV forest practices." RCW 43.21C.037(3) (emphasis added). As described above, the forest practices board identifies by rule certain forest practices that, by their very nature have the potential for a substantial impact on the environment. Such forest practices are known as Class IV–special applications and are listed in WAC 222-16-050(1). Under the plain language of the statute, RCW 43.21C.037(3)'s designation of DNR as the agency responsible for evaluating whether or not a detailed statement must be prepared means that DNR must conduct the environmental review for Class IV–special applications. This does not mean that DNR is responsible for making the initial determination for Class IV–general applications under RCW 43.21C.037(2) when a local license is required.

Another basis on which one could conclude that the local government is not responsible for the initial environmental review for Class IV–general applications, is WAC 197-11-738. This regulation states that the "detailed statement" refers to a final environmental impact statement. But other Ecology SEPA rules make clear that a lead agency's responsibility for a proposal includes meeting all of SEPA's procedural requirements, including the procedural steps that come before an environmental impact statement is prepared. *See* WAC 197-11-758 (defining "lead agency"); WAC 197-11-050 (the lead agency "shall be the only agency responsible for the threshold determination and preparation and content of environmental impact statements").

Ecology also promulgated WAC 197-11-938(4)(c), which clarifies the statutory phrase "responsible for any detailed statement" in RCW 43.21C.037(2) as establishing the lead agency

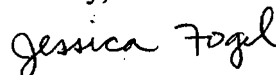
status, not just the agency responsible for preparing the environmental impact statement. Courts give considerable weight to an agency's interpretation of an ambiguous statute when the legislature charged that agency with the statute's administration. *Weyerhauser Co. v. Dep't of Ecology*, 86 Wn.2d 310, 315, 545 P.2d 5 (1976). Accordingly, Ecology's interpretation of SEPA in WAC 197-11-938(4)(c) is entitled to considerable weight because the legislature charged Ecology with promulgating rules of interpretation and implementation of SEPA. RCW 43.21C.110.

This conclusion is also consistent with Washington case law, which holds that the responsibility for preparing a detailed statement under RCW 43.21C.030(2)(c) necessarily includes the responsibility for evaluating a proposal to make a threshold determination and preparing an environmental impact statement if necessary. Washington courts have held that RCW 43.21C.020(2)(c) necessarily requires a threshold consideration of environmental factors by the appropriate governing body in the course of all state and local government actions before determining whether an environmental impact statement must be prepared. *Juanita Bay Valley Comm. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140 (1973); *see also Sisley v. San Juan Cy.*, 89 Wn.2d 78, 83-84, 569 P.2d 712 (1977) (recognizing that preparing a "detailed statement" involves an initial threshold determination of a project's environmental significance to assess whether an environmental impact statement is necessary). While the threshold determination process is not expressly set forth in the statute, the words describing when a "detailed statement" must be prepared "necessarily impl[y] a preliminary requirement to determine whether the environmental significance threshold has been crossed and an [environmental impact statement] must be prepared." Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, ch. 13, § 13.01 (Mathew Bender 2009).

Based on these principles, the responsibility for "preparing the detailed statement" under RCW 43.21C.037(2) means the responsibility for both conducting the initial review of environmental factors to make a threshold determination and preparing an environmental impact statement if necessary. Therefore, the local jurisdiction is the lead agency for the forest practices listed in RCW 43.21.037(2) when a local license will also be required for the proposal.

I trust that the foregoing information will prove useful. This is an informal opinion and will not be published as an official Attorney General Opinion.

Sincerely,



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