

FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

H. Larry Penberthy

FILE NO. W-85-003

from an environmental determination
of Seattle City Light

Introduction

Appellant challenged a declaration of significance issued (DS) for disposal of 811,000 gallons of PCB contaminated fuel oil containing an average of seventy five ppm of PCB. The DS was issued by Seattle City Light.

The appellant exercised the right to appeal pursuant to Section 25.05.680, Seattle Municipal Code.

Parties to the proceedings were: appellant, pro se, and Seattle City Light by assistant city attorney Elizabeth Edmonds.

This matter was heard before the Hearing Examiner on October 9, 1985.

After due consideration of the evidence elicited during the public hearing, the following shall constitute the findings of fact, conclusions and the decision of the Hearing Examiner on this appeal.

Findings of Fact

1. Seattle City Light owns and operates the Lake Union Steam Plant which is located on the east shore of Lake Union near the intersection of Eastlake and Fairview Avenues East. It was constructed in the 1920's to burn fuel oil to produce steam. Steam was then converted to electricity. Presently the plant is kept as a winter standby and is infrequently used.

2. Following a March, 1984 oil spill and testing, City Light learned that 811,000 gallons of fuel oil stored at the Lake Union plant had been contaminated with polychlorinated biphenyls (PCB's). The average toxic level was determined to be seventy five parts per million (ppm).

3. City Light then notified the Federal Environmental Protection Agency (EPA), and EPA required City Light to dispose of the PCB contaminated oil within one year of the discovery.

4. Because City Light did not dispose of the oil within the one year, EPA is currently assessing a \$5,000.00 per month fine against City Light. By the EPA City Light consent agreement, by which City Light has agreed to dispose of the contaminated oil by December 1, 1986, City Light is to elect a method of disposal by January 15, 1986. Resolution 27290 approves City Light's participation in the consent agreement (Exhibit 9, June, 1985).

5. The subject oil is called "Bunker C" oil. It is heavy and viscous. Heat is required to facilitate its flow. The PCB is dispersed throughout this Bunker C oil at a molecular level.

6. On June 28, 1985, City Light issued a Determination of Significance (DS) and Request for Comments on Scope of EIS. Appellant submitted this appeal to the Hearing Examiner on July 11, 1985, asserting in essence that the DS and an environmental impact statement should be "denied as an unjustified expense of public funds."

7. On July 15, 1985, the Hearing Examiner issued notice of the August 6, 1985, public hearing. The prehearing conference date of July 31, 1985 was also provided by the same notice.

8. On July 23, 1985, counsel for City Light moved for continuance of the hearing. She indicated that notice of the DS had not been published, and that additional time was needed to correct the error.

9. By Order entered July 26, 1985, which recited appellant's concurrence, the Hearing Examiner granted the continuance. The matter was subsequently scheduled for the ultimate hearing date of October 9, 1985.

10. Publication of the DS subsequently occurred on July 18, 1985. City Light issued the Draft Environmental Impact Statement (DEIS) on October 4, 1985.

11. By his pre-hearing submittal and hearing presentation, appellant complained that City Light had already issued a purchase order for the EIS July 30, 1985. Appellant urged that the EIS order and the DEIS operated to supersede and render meaningless any subsequent Hearing Examiner's decision as to whether the EIS should be issued. Therefore, requested appellant, summary judgement and punitive action should be the decision against City Light. The Hearing Examiner denied summary judgement and proceeded to the hearing on the merits.

12. Appellant's next request was that the Hearing Examiner determine that the Declaration of Significance should be set aside. According to appellant the danger relative to the PCB contaminated oil supply is grossly exaggerated.

13. In support of his position appellant testified that:

- a. the subject PCB level only exceeds the regulated amount by a small percentage.
- b. existing storage of contaminated oil poses no threat.
- c. the relative insignificance of the PCB issue is reflected in the comparatively small fine assessed against City Light (i.e., \$5 thousand per month, versus \$700 thousand or \$7 million fines assessed on other projects), and by the fact that EPA extended the compliance date to December, 1986. Much of the City Light fine is subject to waiver.
- d. Some evidence exists that the cancer rate for groups exposed to PCB is lower (exhibit 3).
- e. with the extra attention given this proposal, off site removal of the contaminated oil would be "doubly safe".

14. Further, according to appellant, it is possible to separate the twenty gallons of the PCB from the 811,000 gallons of oil by use of a mixer settler and twenty per cent alcohol agitation.

15. Regulations promulgated by the EPA pursuant to the Federal Toxic Substances Control Act establish specific prohibitions and requirements for the storage, disposal, manufacture and other handling of PCB's and PCB items. 40 C.F.R. Section 761.1. Exhibit 10. The regulations state in part that:

The Administrator hereby finds, under the authority of Section 12 (a)(2) of TSCA, that the manufacture, processing, and distribution in commerce of PCBs at concentrations of fifty ppm or greater and PCB Items with PCB concentrations of fifty ppm or greater present an unreasonable risk of injury to health within the United States...

16. In 1976, Congress banned the manufacture of PCBs in the United States, labeling the substance as an environmental contaminant. However, PCB manufactured before that date is permitted to be used under strict guidelines.

17. Some effects traceable to PCB exposure include chloracne, a painful skin condition; dermatitis, temporary loss of sight and hearing; "and a variety of birth defects in children born to exposed mothers". Exhibit 5. Because the substance is biocumulative, the level of PCB concentration increases as it moves up the food chain.

18. Some alternatives for the steam plant oil disposal include on-site incineration, bacterial decontamination and retrofitting the Lake Union Plant so that the boilers could destroy the PCBs. City Light is also considering shipping the subject oil to another facility by ground, or removing the oil by water for incineration on an EPA approved vessel. Appellant Exhibit 5; City Light Exhibit 12.

19. With regard to possible effects of disposal, spillage of the contaminated oil would present problems for the receiving ground or water environment. Burning the oil could produce air emissions of by-products that are more toxic and carcinogenic than PCB. Marine life could be affected if boiler heat (from burning the oil) were transferred to the Lake Union aquatic environment. Depending on the disposal method selected, noise and traffic impacts, e.g., on Fairview Avenue, might result. Specific to bacterial contamination, the resulting discharge could present new issues of proper disposal.

Conclusions

1. City Light's Declaration of Significance (DS) is an environmental determination made pursuant to Chapter 25.05, Seattle Municipal Code. According to Seattle Municipal Code Section 25.05.680, the lead agency's environmental determination "shall be accorded substantial weight." The section continues that the burden of establishing a contrary position "shall be upon the appealing party".

2. Appellant's burden therefore is to show that the declaration of significance was "clearly erroneous." Brown v. Tacoma 30 Wn.App. 762, 637 P.2d 1005 (1981), Hayden v. Port Townsend, 93 Wn.2d 870, 613 P.2d 1164 (1980).

3. If a proposal "may have a probable significant adverse environmental impact" a determination of significance is required. Seattle Municipal Code Section 25.05.360. A "significant" impact is presented "whenever more than a moderate effect on the quality of the environment is a reasonable probability." Norway Hill v. King County Council, 87 Wn.2d 267, 552 P.2d 674 (1976).

4. From the foregoing, it is clear that the question is not whether significant adverse environmental impacts are a reasonable certainty; rather the more precise question is whether appellant has used sufficient evidence to show that the City Light decision to issue the DS was "clearly erroneous." The Hearing Examiner concludes that the burden of proof was not met and the DS is therefore affirmed.

5. Several factors militate against appellant's challenge. Appellant's Exhibit 5 describes the birth defect, chloracne, dermatitis, and other health effects traceable to PCB exposure. Congress has banned PCB manufacture as an environmental contaminant. The EPA administrator has by regulation declared that the manufacture, processing and distribution in commerce of PCB's or PCB items with levels of fifty ppm or more presents an "unreasonable risk of injury to health within the United States." The contaminated oil at issue in this case has an average PCB concentration level of 75 ppm.

6. Further, the volume (811,000 gallons) of PCB contaminated oil is not insubstantial. Transfer of this amount of contaminated oil "may have a probable significant environmental impact" on the ground or water environment in the event of spillage. It is not required that a mathematical probability of spillage be determined. Disposal of the contaminated oil by burning may produce emissions that are more toxic than the PCB itself, and may cause heat disruption of the aquamarine life of Lake Union. There is also a distinct possibility of traffic, noise and other adverse impacts. The DS dictates an EIS review of alternate disposal procedures and respective impacts. In light of the record, issuance of the DS was not "clearly erroneous."

7. The Hearing Examiner acknowledges appellant's evidence which suggests some public overreaction to the PCB "scare". Exhibit 3, "PCB's: Is the Cure Worth the Cost?". Appellant also shared at least one suggested method of removing the PCB from the oil. However, these presentations fall far short of the mark required for overturning a DS.

8. Finally, appellant has correctly assessed that a contrary decision by the Hearing Examiner would have been of little or no effect since the EIS purchase order and Draft EIS issuance both predated the hearing on the DS challenge. Noel v. Cole, 98 Wn.2d 375, 655 P.2d 245 (1982) suggests that a governmental action in disregard of the SEPA provisions is ultra vires and void. The Hearing Examiner authority is more limited. Seattle Municipal Code Section 25.05.680 provides the Hearing Examiner with authority to affirm, reverse, or remand the subject administrative decisions or "grant other appropriate relief in the circumstances."

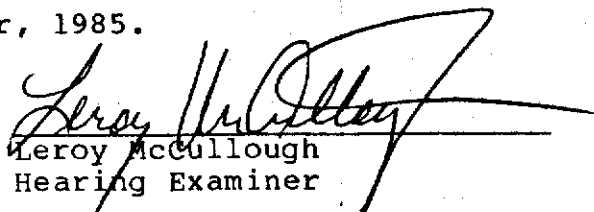
9. The Hearing Examiner is inclined to include within the category of "other appropriate" relief some action, such as City Light reimbursement of appellant's appeal fee. This would be supported by the circumstances of this case. City Light knew of the pending nature of the Hearing Examiner's hearing. Although a January, 1986, EPA election deadline is approaching, City Light offered no evidence suggesting EPA would or would not have approved an extension of time pending resolution of the appeal.

10. However, the "other appropriate relief" Section of the Ordinance is read to apply strictly to the action at issue, i.e., the declaration of significance. The record has not shown that the DS was improperly issued as it relates to probable significant adverse environmental impacts. The DS is therefore affirmed.

Decision

The determination of significance is AFFIRMED.

Entered this 22nd day of October, 1985.


Leroy McCullough
Hearing Examiner

Concerning Further Review

Judicial review under SEPA shall without exception be of the decision on the underlying governmental action together with its accompanying environmental determinations. RCW 43.21C.075(6)(c). SEPA issues may be added to the request for review of the final action within 30 days after the date of the underlying substantive decision if a notice of intent to seek judicial review of SEPA issues is filed with the Director of the Department of Construction and Land Use, 408 Municipal Building, Seattle, Washington 98104, within fourteen days of the date of this decision. Seattle Municipal Code Section 25.05.680(3).