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THE WASHINGTON ENVIRONMENTAL POLICY ACT

William H. Rodgers, Jr.*

As the Washington State Environmental Policy Act of 1971 (SEPA)\(^1\) approaches its fourteenth birthday, the time is ripe for an assessment of its recent history and foreseeable future. Several SEPA milestones have come and gone in the last several months, and a period of stability is in order. Reported Washington decisions citing SEPA now number close to one hundred; more than fifty of these are decisions of the Washington Supreme Court.\(^2\) The books are closed on the two-year efforts of the Washington Commission on Environmental Policy (the SEPA Commission), whose work culminated in a report to the 1983 Legislature.\(^3\) There was a legislative response, albeit one more noteworthy for what it did not do than for what it did;\(^4\) the 1983 Amendments to SEPA are decidedly a job of fine tuning rather than crude wrecking. As directed by the 1983 Amendments, the Department of Ecology has finished work on the SEPA Rules.\(^5\) Known popularly as the Green Book,\(^6\) these rules will serve as the principal reference on SEPA for thousands of public officials across the state in the decade ahead.


2. A computer search in October of 1984 yields 98 citations, 51 of which are Supreme Court decisions.


4. 1983 Wash. Laws, ch. 117. Among the provisions not adopted in the 1983 Amendments, despite being urged in various forms, was a repudiation of the "fundamental and inalienable" rights language creating private causes of action, see infra note 13, the vesting in the Department of Ecology of an authority to create legally binding categorical exemptions, the elimination of an obligation to consider socioeconomic effects, and the imposition of substantial bond requirements as a prerequisite to suit, among others. The basic purposes of the 1983 Amendments were to simplify the rules, reduce paperwork, and improve predictability. See SECTION-BY-SECTION SUMMARY OF S.S.B. 3006, AS REPORTED OUT OF THE SENATE PARKS AND ECOLOGY COMMITTEE (undated). Useful discussions of the recent changes can be found in the papers by Snell, Major Changes Under the New SEPA Rules—1984, and Lean, Major Issues Under SEPA—How They Were Treated in Amendments to the Act and Rules, in Washington State B.A., THE SECOND ENVIRONMENTAL AND LAND USE LAW SECTION MID YEAR MEETINGS & SEMINARS 3-3, 3-29 (1984).


6. Designed to replace, suitably, the Red Book.
The best starting point for a short sketch of the reach of SEPA is to acknowledge its kinship with the National Environmental Policy Act of 1970 (NEPA).\(^7\) To this day, the SEPA language repeats verbatim major parts of NEPA, with obvious consequences for cross-jurisdictional interpretation and the use of precedents.\(^8\) NEPA, and the SEPA’s following, are designed to improve agency decisionmaking and to protect the environment.\(^9\) NEPA,\(^10\) and the SEPA’s following,\(^11\) contain a variety of research, disclosure, and study obligations that are not well-publicized and that function independently of the much-touted duty to prepare impact statements. NEPA, and the SEPA’s following, feature an impact statement requirement that “combines the legislative objectives of full disclosure, consultation, and reasoned decisionmaking prescribed as the cutting edge of administrative reform.”\(^12\)

Among close relatives, differences are more pronounced. The most striking departure from NEPA in the Washington SEPA is, without a doubt, the legislative insistence “that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”\(^13\) While this provision to date has been more symbolic than substantive, the situation may change as the courts extend a new respect to a policy expression that has demonstrated its staying power and cast off its reputation as a passing fancy. Other differences between NEPA and SEPA are clearly discernible, and will be presented in the

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\(^7\) 42 U.S.C. §§ 4331–70 (1982); see W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 697–809 (1977) [hereinafter cited as ENVIRONMENTAL LAW].


\(^9\) See ENVIRONMENTAL LAW, supra note 7, § 7.10, at 801. See id. § 7.11 for a general discussion of the thirty or so SEPA’s.


\(^12\) ENVIRONMENTAL LAW, supra note 7, at 725, quoted with approval in Sierra Club v. Adams, 578 F.2d 389, 392–93 (D.C. Cir. 1978).

\(^13\) WASH. REV. CODE § 43.21C.020(3) (1983); see Leschi Improvement Council v. Washington State Highway Comm’n, 84 Wn. 2d 271, 279–80, 525 P.2d 774, 781 (1974) (“The choice of this language in SEPA indicates in the strongest possible terms the basic importance of environmental concerns to the people of this state. It is a far stronger policy statement than that found in the National Environmental Policy Act . . . .’’); ASARCO, Inc. v. Air Quality Coalition, 92 Wn. 2d 685, 700, 601 P.2d 501, 512 (1979) (en banc).
course of a discussion organized around the issues of: (1) threshold applicability of the Environmental Impact Statement (EIS) requirements; (2) statement adequacy or content; (3) SEPA substance; and (4) responsibility for statement preparation.

I. WHETHER AN EIS IS REQUIRED

A. Major Actions With Significant Environmental Effects

Not surprisingly, the threshold question of applicability is the most thoroughly litigated single issue under the Washington Environmental Policy Act. In pertinent terms, the Act links preparation of an EIS to legislation or other "major actions significantly affecting the quality of the environment." The threshold is set low by the Supreme Court's generic instructions that an action "significantly" affects the environment "whenever more than a moderate effect on the quality of the environment is a reasonable probability." Other criteria emerging in the case law include whether the proposal would work substantial changes to the existing background of land uses, or whether it would produce cumulative harm or other indicia of significant quantitative effects. The point, of course, is to cull out the actions that would benefit from the additional study and deliberation associated with preparation of the EIS.

Courts have found a "major" action with "significant" effects where the proposal would transform radically a fifty-two-acre wooded glen into a residential suburban neighborhood, authorize the destruction of a significant stand of first-growth timber, encroach upon fourteen acres of land on a small lake encompassing a bald eagle habitat, endorse a thirteen story condominium on the stately residential slopes of Queen Anne

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14. WASH. REV. CODE § 43.21C.030(c) (1983); id. § 43.21C.031 (an EIS "shall be prepared on proposals for legislation and other major actions having a probable, significant adverse environmental impact"); SEPA Rules, WASH. ADMIN. REG. No. 84-05-020 (1984) (to be codified at WASH. ADMIN. CODE § 197-11-330) (effective April 4, 1984).
17. Norway Hill Preservation and Protection Ass'n v. King County Council, 87 Wn. 2d 267, 552 P.2d 674 (1976) (en banc).
Hill, clear the way for a private commercial overnight campground on 252 acres abutting the pristine waters of Hood Canal, approve the discharge of thousands of tons of pollutants onto the community even in face of the claims that this was the way it has always been, rezone a 141-acre lot in the North Creek Valley of Bothell to make way for a regional shopping center, approve the location of a major marina in a biologically sensitive area of the San Juan Islands, or endorse a housing development that would hit hard on rare bird life as well as an area listed in the National Register of Historic Sites on Whidbey Island. Often in these cases it is possible to detect significant opposition, unique and irreplaceable cultural or biological resources, or prospects for cumulative effects or snowballing development. In different ways, these considerations offer a rough cultural or community vote (as distinguished from a political vote) underscoring the significance attending reallocation of these natural resources.

By contrast, proposals or actions not needing EIS’s take on the hue of the routine and unexceptional. An affirmance of a negative declaration is the likely outcome in cases of typical construction projects in urban areas. The same is true of a rezoning (from single-family dwelling to planned residential development) of an eighty-nine acre tract in Tacoma overlooking the Tacoma Narrows that amounts to a paper shuffle working no practical change in usage. A similar example of this paper-shuffle principle is *Marino Properties v. Port of Seattle*, which holds that a mere change in ownership without expected changes in use of the property does not trigger the EIS requirements. Another group of cases, better viewed as timing cases, find no “major action” attending a variety of

29. ENVIRONMENTAL LAW, supra note 7 § 7.7 (discussing when an EIS must be prepared).
preliminary planning moves that cannot produce observable impact without later decisions that can be attended by full EIS compliance.\textsuperscript{30}

Other variables are at work in these threshold judgments of whether there is "major" action afoot with "significant" environmental effects. The Washington courts acknowledge the possibility that nondiscretionary or ministerial decisions need not pause for the assembly of environmental data that cannot be heeded\textsuperscript{31} but they are routinely skeptical of arguments that the agency is afforded no room for choice by its statutory mandate.\textsuperscript{32}

So, too, it is said that an action is not "major" unless it is "nonduplicative,"\textsuperscript{33} by which is meant that it has not been addressed by the functional equivalent of an EIS earlier within the regulatory regime. But NEPA's functional equivalency exception, most closely associated with the work of the federal Environmental Protection Agency,\textsuperscript{34} is virtually without representation in Washington law.

To be sure also, officials with different geographical and jurisdictional domains may have different opinions on the features of "major" action with "significant" effects. These invisible criteria no doubt may explain some of the choices. With this much said, a simple recitation may have explanatory value. In addition to those cases mentioned above, an EIS has been required for:

* construction of a permanent breakwater, piers, and floats to develop a boat marina on 12.5 acres of Burke Bay and 10 acres of heavily wooded uplands;\textsuperscript{35}

* construction of 0.625 miles of highway in the City of Mountlake Terrace;\textsuperscript{36}

* issuance of a grading permit authorizing excavation of up to 100,000 cubic yards of material;\textsuperscript{37}


\textsuperscript{31} This is the implication of Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wn. 2d 475, 488, 513 P.2d 36, 45 (1973) (en banc), discussed in Loveless v. Yantis, 82 Wn. 2d 754, 764, 513 P.2d 1023, 1029 (1973) (en banc), and ASARCO, Inc. v. Air Quality Coalition, 92 Wn. 2d 685, 601 P.2d 301, 512 (1979) (en banc).

\textsuperscript{32} See infra note 169 (on SEPA's role in expanding statutory mandates).

\textsuperscript{33} Loveless v. Yantis, 82 Wn. 2d 754, 764–65, 513 P.2d 1023, 1029 (1973) (en banc).

\textsuperscript{34} See ENVIRONMENTAL LAW, supra note 7 § 7.6, at 765–66.

\textsuperscript{35} Merkel v. Port of Brownsville, 8 Wn. App. 844, 846–48, 509 P.2d 390, 392–93 (1973) (SEPA conceded to be applicable).

\textsuperscript{36} Cheney v. City of Mountlake Terrace, 87 Wn. 2d 338, 552 P.2d 184 (1976) (en banc).

\textsuperscript{37} See Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wn. App. 59, 72–73, 510 P.2d 1140, 1149 (1973) (remanding, however, for another look at whether an EIS is required).
**approval of the conversion of 40 acres of agricultural land into lots for mobile homes on soils unsuited to septic tanks;**

**adoption of an interim zoning ordinance;**

**authorization of the construction of a 128-unit, 5-story condominium apartment building (the Roanoke Reef Project) on Lake Union in Seattle;**

**issuance of a water appropriation permit authorizing the withdrawal of .7 cubic feet per second of water from Loon Lake to serve the domestic needs of 123 lots;**

**issuance of a substantial development permit under the Shoreline Management Act allowing harvest of subtidal clams by a mechanical harvester;**

**establishment of a business park zone to enable construction of an electronics manufacturing facility;**

**issuance of a permit to build a pier;**

**approval of a proposal to develop 26 acres of agricultural and forest land near the Town of Poulsbo;**

**stripmining of sand and gravel on a tract in South King County;**

**county and city zoning action allowing construction of a shopping center;**

**an annexation clearing the way for construction of a shopping mall and office complex.**

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38. See Newaukum Hill Protective Ass'n v. Lewis County, 19 Wn. App. 162, 168, 574 P.2d 1195, 1199 (1978);

We have the definite and firm conviction that it was a mistake to excuse an EIS . . . [which should] give detailed consideration to the alternative possibilities of a community sewer system, larger lots, or indeed delaying development of this heavy concentration of population until the entire area can be embraced in a municipal sewer system.

39. Byers v. Board of Clallam County Comm'rs, 84 Wn. 2d 796, 801-02, 529 P.2d 823, 828 (1974) (en banc) (emphasizing that the term "major action" is not synonymous with the word "project"; rejecting pleas of difficulty as a reason for noncompliance).


42. Kitsap County v. Department of Natural Resources, 99 Wn. 2d 386, 388, 392, 662 P.2d 381, 382, 384 (1983) (en banc) (disallowing as untimely a challenge to the adequacy of an EIS not raised in administrative proceedings).


44. See Clampitt v. Thurston County, 98 Wn. 2d 638, 658 P.2d 641 (1983) (en banc) (a dispute that mushrooms into a donnybrook over a reporter's privilege not to disclose confidential sources).


46. Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc., 96 Wn. 2d 558, 561-62, 637 P.2d 647, 649-50 (1981) (en banc) (minimum cost of SEPA statement of $35,000 one of the reasons for abandoning the project; court applies doctrine of commercial frustration because parties did not anticipate the vigorous environmental opposition that would follow in the wake of SEPA).


incorporation of a Riverfront Development Plan into a city’s comprehensive plan for developing the downtown area;\textsuperscript{49} 
* approval of a housing project creating a threat to groundwater in apparent violation of Washington Administration Code (WAC) requirements addressing minimum lot sizes on certain types of soils;\textsuperscript{50} 
* a project approval contemplating placement of a commercial facility (a miniwarehouse and U-Haul dealership) in an essentially rural residential area;\textsuperscript{51} 
* an initiative amending a city zoning ordinance to prevent the construction of multiple family dwellings in over half the City of Bremerton;\textsuperscript{52} 
* approval of a preliminary plat for a new subdivision opposed by some of the neighbors;\textsuperscript{53} 
* issuance of a substantial development permit authorizing a land-fill affecting ninety-three acres in the Snohomish River estuary, and including construction of docks, a railroad spur, and a steel fabrication facility.\textsuperscript{54} 

By contrast, no EIS is required for: 
* issuance of a conditional use permit by the Grays Harbor County Board of Adjustment to the prospective builder of a mobile home park;\textsuperscript{55} 
* approval of a boating destination site consisting of two mooring buoys, five campsites, a group of fire rings, four picnic sites, two vault toilets, a well, signs, fencing, screening and improvement of an existing access road;\textsuperscript{56} 
* changing of location of a highway interchange and approval of a six-year road plan;\textsuperscript{57} 
* a thirty-four unit condominium located within the City of Tacoma;\textsuperscript{58} 

\textsuperscript{49} See Lassila v. City of Wenatchee, 89 Wn. 2d 804, 816–17, 576 P.2d 54, 60–61 (1978) (en banc) (this was a “recommendation or report on proposals for legislation” and probably also “major action”). 
\textsuperscript{52} See Lince v. City of Bremerton, 25 Wn. App. 309, 607 P.2d 329 (1980) (affirming the trial court on the ground that the zoning ordinance could not be amended by initiative). 
\textsuperscript{57} See Harris v. Hornbaker, 98 Wn. 2d 650, 662–63, 658 P.2d 1219, 1224–25 (1983) (en banc) (Department of Transportation, the lead agency, must decide whether a supplemental EIS is required). 
\textsuperscript{58} Brown v. City of Tacoma, 30 Wn. App. 762, 637 P.2d 1005 (1981) (although the court affirms a declaration of nonsignificance the applicant was required to hire an engineering firm to analyze noise, shadow effect, and view blockage).
a city’s creation of a separate fund to be used for planning and construction of riverfront development;\textsuperscript{59}  
* the acquisition of real property with no plan of development;\textsuperscript{60}  
* the execution of design and engineering contracts;\textsuperscript{61}  
* rezone of 6.3 acres in the course of redevelopment of the Wenatchee central business district;\textsuperscript{62}  
* the building of a supermarket in an industrial and commercial area of the City of Port Townsend;\textsuperscript{63}  
* bond issuance by the Seattle Port Authority to reacquire piers from the Navy without proposing to change intensity of uses challenged by a commercially interested party.\textsuperscript{64}

B. Review of Negative and Positive Declarations

A declaration of nonsignificance [hereinafter DNS] is reviewable judicially under the "clearly erroneous" test,\textsuperscript{65} which means that the court may search the entire record and reverse if convinced that a mistake has been made. This decidedly nondeferential standard is justified in various ways: the judgment on applicability is akin to a legal determination where the court should have the last word,\textsuperscript{66} the agency’s expertise is nonenvironmental and therefore not a cause for restraint but a reason for scrutiny,\textsuperscript{67} or the courts should be reluctant to let go of SEPA’s bold policies

\textsuperscript{59} Lassila v. City of Wenatchee, 89 Wn. 2d 804, 814, 576 P.2d 54. 60 (1978) (en bane) (attempted environmental evaluation at funding stage would be purely speculative).

\textsuperscript{60} Id. at 815, 576 P.2d at 60.

\textsuperscript{61} Id. at 815–16, 576 P.2d at 60 ("While such decisional aids may have some political impact, they have no impact on the environment.").

\textsuperscript{62} Id. at 817–18, 576 P.2d at 61–62.

\textsuperscript{63} Hayden v. City of Port Townsend, 93 Wn. 2d 870, 879–81, 613 P.2d 1164, 1169–70 (1980) (en bane).

\textsuperscript{64} Marino Property Co. v. Port of Seattle, 88 Wn. 2d 822, 831, 567 P.2d 1125, 1130 (1977) (en bane).

\textsuperscript{65} See, e.g., Hayden v. City of Port Townsend, 93 Wn. 2d 870, 880, 613 P.2d 1164, 1170 (1980) (en bane); Sisley v. San Juan County, 89 Wn. 2d 78, 84, 569 P.2d 712, 716 (1977) (en bane); Norway Hill Preservation and Protection Ass’n v. King County Council, 87 Wn. 2d 267, 274, 552 P.2d 674, 678 (1976) (en bane); Short v. Clallum County, 22 Wn. App. 825, 830, 593 P.2d 821, 824 (1979); Richland Homeowners Preservation Ass’n v. Young, 18 Wn. App. 405, 408–09, 568 P.2d 818, 820 (1977) (both clearly erroneous and arbitrary and capricious standards are available); Johnston v. Grays Harbor County Bd. of Adjustment, 14 Wn. App. 378, 541 P.2d 1232 (1975) (closely examining procedures attending a declaration of nonsignificance [hereinafter DNS]; complaining parties, however, do not have a right to be mailed copies of documents in advance of a hearing and have no right to cross-examine the author).

\textsuperscript{66} See Norway Hill Preservation and Protection Ass’n v. King County Council, 87 Wn. 2d 267, 273, 552 P.2d 674, 678 (1976) (en bane) (a DNS is "more than a simple finding of fact because the correctness of a no significant impact determination is integrally linked to the act’s mandated public policy of environmental consideration").

\textsuperscript{67} See Short v. Clallum County, 22 Wn. App. 825, 830, 593 P.2d 821, 824 (1979) (reviewing positive declaration by the Board of County Commissioners) (arbitrary and capricious test).
that are pulled down by any negative declaration. This close scrutiny is firmly in the tradition of the federal hard look doctrine that attends a wide variety of regulatory endeavors with environmental effects. This skeptical oversight is sustained-no doubt by theoretical and empirical convictions that agencies doing what is best for themselves may not be doing what is best for the environment and its public constituency.

Losers presented with negative declarations are offered a variety of process rights, although several of these are ill-defined. It is clear that the agency is obliged to defend its choice, and that choice must be based on a review of the environmental checklist, an actual consideration of environmental effects, and the searching out of additional information where it would cast light on the proposal at hand. Hearings, especially formal ones, are not required to substantiate the adequacy of a negative declaration although the agency that makes provision for public hearings of some sort has made a good investment in demonstrating both the good faith and reliability of its judgments. A number of courts have approved negative declarations that were not reduced to writing, despite the

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68. See Hayden v. City of Port Townsend, 93 Wn. 2d 870, 880, 613 P.2d 1164, 1169 (1980) (en banc) ("to reach a valid negative threshold determination, environmental factors must have been evaluated to such an extent as to constitute prima facie compliance with SEPA procedural requirements") (dicta) (following Sisley v. San Juan County, 89 Wn. 2d 78, 569 P.2d 712 (1977)); see also Eastlake Community Council v. Roanoke Assoc., 82 Wn. 2d 475, 489-93, 513 P.2d 36, 45-47 (1973) (en banc), supra note 66.

69. See ENVIRONMENTAL LAW, supra note 7 §§ 1.5, 3.2A (1984 Supp.).


73. See id. § 197-11-330 (spelling out the threshold determination process). Compare id. § 197-11-340(b) (specifying the notice that must accompany issuance of a DNS) with § 197-11-535 (specifying circumstances under which a public hearing must be held in connection with preparation of an EIS).


76. Compare Hayden v. City of Port Townsend, 93 Wn. 2d 870, 881, 613 P.2d 1164, 1170 (1980) (en banc) and San Juan County v. Department of Natural Resources, 28 Wn. App. 796, 801, 626 P.2d 995, 997-98 (1981) (sustaining negative declaration based on environmental checklist prepared by applicant over objections that it was unacceptably conclusory) with In re Petition of Port of Grays Harbor, 30 Wn. App. 855, 865, 638 P.2d 633, 639 (1982) (dicta) (a mere declaration of nonsignificance probably will not suffice absent a written record showing that environmental factors actually were considered). A written record, even a letter, is a helpful aid to the decisionmaker who
obvious risk that dispensing with this minimum formality encourages superficial review and ex post facto justification.

Ultimately, the courts must be convinced that the judgment of no significant environmental effects was genuinely undertaken, fairly explained, and intuitively correct. The solicitation of information from other agencies and even a pro forma hearing will not suffice to sustain a negative declaration if it produces a record "filled with many assertions, numerous unanswered questions and a paucity of information." Especially is this so where the decisionmaker's reasoning is missing so that neither the public nor the reviewing court can understand the rationale of the action. Negative declarations are not sustained where the threshold decision was clearly not made, where there is a plausible showing of environmental and economic damage, where there is evidence the program was artificially contrived to avoid SEPA compliance, where there are apparent violations of WAC requirements dealing with minimum lot sizes on certain types of soil, and where the planning official's opinion on nonsignificance is contradicted by a host of expert and agency opinions. By the same token, an affirmance of a DNS will be forthcoming where there is a convincing showing the environmental factors were considered and nothing to suggest the judgment was wrong.

For a variety of reasons (not excluding the expense and effort involved in EIS preparation) litigation in Washington tends to focus more on the threshold decision to forego an EIS than on the adequacy of the document once prepared. Tactically, this puts challengers in an enviable position because it requires them to show only that the judgment of nonsignificance is implausible. The better litigated cases come to the courts of appeals on records containing numerous unanswered questions about
possible effects raised by agencies, experts, and the public at large. The predicted result of a sharp judicial scrutiny is a high casualty rate for agency DNS's.

Judicial review of positive declarations of environmental significance (which presage EIS preparation) has been undertaken in a few cases. The standard of review is narrow, in accordance with the arbitrary and capricious test, as might be expected since the consequence of error favors the diverse interests protected by SEPA at the expense of the developer who suffers the added costs and delay. Nonetheless, the neutral features of hard look process rights, which serve to protect environmentalists and builders alike, have not gone unnoticed in Washington law. This means that some scrutiny will be given to the decision to require a statement. The most striking instance of judicial second-guessing of a positive declaration occurred in a context where the EIS obligation looked very much like a tool to punish a trickster who won approval to build a warehouse by the simple expedient of calling it a barn.

C. Mitigated Declaration of Nonsignificance

The Green Book endorses the notion that a developer can get out from under the EIS obligation by simply mitigating the bad effects that recommended the EIS in the first place. Case law endorses this escape route.


89. ENVIRONMENTAL LAW, supra note 7 §§ 1.5, 3.2A (1984 Supp.).


although it has not escaped notice either that last-minute, ad hoc mitigation is a reliable indicator of major action with significant effects. The issue of a mitigated DNS is hotly debated, and for reasons easy to intuit. On the one hand, if mitigation can diminish the consequences, then there is no reason in theory why the anticipated effects cannot be drawn down below the statutory boiling point at which an EIS is required. On the other hand, what this process approves is a kind of backroom bargaining outside of the normal glare of EIS procedures. A mitigated DNS lacks the enforceability, outside scrutiny, and investigation that would attend the process were the mitigation commitments to flow from EIS preparation. The mitigated DNS procedure effectively raises the threshold for EIS preparation by allowing pre-project bargaining to avoid the consequences most feared. One obvious derivative consequence is to intensify the pressures for process fairness by potential losers at the threshold decisionmaking stage. In the early days of NEPA the Second Circuit approved this process extension by suggesting that a public hearing was appropriate prior to the decision to write an impact statement. As Judge Friendly put it in dissent, “[T]he agency would do better to prepare an impact statement in the first instance.” The relationship between threshold and pre-decision process rights appears to be directly correlated: the higher the threshold, the heavier the process obligation to sustain the choice to forego an EIS. Mitigated DNS’s will remain under sharp scrutiny.

D. Categorical Exemptions

At the federal level, the NEPA exemptions claimed by the federal agencies are scattered throughout the Code of Federal Regulations in the implementing regulations of the individual agencies. In Washington, the categorical exemptions are collected in the Green Book. There is no comprehensive rationale behind these exemptions. They extend to

94. See Cabinet Mountains Wilderness/Scotchman’s Peak Grizzly Bears v. Peterson, 685 F.2d 678 (D.C. Cir. 1982).
96. Hanly v. Kleindienst (Hanly II), 471 F.2d 823 (2d Cir. 1972), cert. denied, 416 U.S. 936 (1976). Compare supra note 74 (no hearing now required in connection with preparation of DNS). It is gospel among attorneys for developers that solicitation of the staff should occur early and often, as part of a campaign to win support for the project. This phenomenon offers empirical support to the efforts of opponents to get a procedural foot in the door at the early stages.
97. 471 F.2d at 839.
activities with minimal effects (e.g., minor new construction),\textsuperscript{99} emergencies where compliance with SEPA would be difficult,\textsuperscript{100} nondiscretionary activities where evaluation couldn’t make a difference,\textsuperscript{101} regulatory choices prompting analyses functionally approximating the SEPA review (issuance of waste discharge permits or approval of solid waste management plans),\textsuperscript{102} and surprise interpretations especially annoying to an aggrieved constituency (school closures).\textsuperscript{103} One is tempted to invoke sheer interest group politics as the most satisfactory explanation for the generous and sometimes implausible exemptions extended to a number of agencies.\textsuperscript{104}

Without resorting to a discussion of the credibility of exempting, for example, an approval for in-stream gravel removal by the Department of Fisheries, it deserves mention that categorical exemptions are categorical misnomers. While the legislation insists that the SEPA rules are to be honored,\textsuperscript{105} it declares also that the exemptions “shall be limited to those types [of actions] which are not major actions significantly affecting the quality of the environment.”\textsuperscript{106} This means, quite clearly, that the courts are obliged to assess independently whether a claimed exemption requires an EIS, and there are good reasons to expect this review to be vigorous.\textsuperscript{107} The record, after all, is likely to consist of little more than evidence that the agency has taken refuge behind this or that exemption in the face of a plausible showing of environmental damage by objecting

\textsuperscript{99}Id. § 197-11-800(1)(a).
\textsuperscript{100}Id. § 197-11-880.
\textsuperscript{101}Id. § 197-11-840(3) (issuance of hunting or fishing licenses). Compare Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wn. 2d 475, 482, 488, 513 P.2d 36, 41-42, 44-45 (1973) (administration of a zoning ordinance).
\textsuperscript{102}SEPA Rules, WASH. ADMIN. REG. No. 84-05-020 (1984) (to be codified at WASH. ADMIN. CODE § 197-11-855(1), (2)).
\textsuperscript{103}Id. § 197-11-800(7). A school closure exemption is approved by WASH. REV. CODE § 43.21C.038 (1983).
\textsuperscript{104}See, e.g., SEPA Rules, WASH. ADMIN. REG. No. 84-05-020 (1984) (to be codified at WASH. ADMIN. CODE § 197-11-800(25)(a)) (all class I, II, and III forest practices) (mandated by statute in WASH. REV. CODE § 43.21C.037 (1983)); SEPA Rules, WASH. ADMIN. REG. No. 84-05-020 (1984) (to be codified at WASH. ADMIN. CODE § 197-11-800(25)(i)) (periodic use of chemicals to maintain public park and recreation land); id. § 197-11-830(5) (Department of Natural Resources; permits for geothermal test drilling); id. § 197-11-835(2), (3) (Department of Fisheries; hydraulic project approvals); id. § 197-11-840 (1), (6) (Department of Game; establishment of hunting, trapping, or fishing seasons; hydraulic project approvals); id. § 197-11-800(9) (approval of variances under the Clean Air Act); id. § 197-11-800(5) (purchase or acquisition of any right to real property).
\textsuperscript{105}WASH. REV. CODE § 43.21C.095 (1983) (rules are to be accorded "substantial deference").
\textsuperscript{106}WASH. REV. CODE § 43.21C.110(1)(a) (1983).
The categorical exemption procedure protects the agencies from paperwork they wish to avoid, but also lulls them into a demurrer strategy vulnerable to judicial second-guessing. This is not to say that the Green Book categories are disregarded in SEPA cases. The courts often invoke the exemptions, usually in support of a conclusion that the action attacked was not a major action requiring EIS preparation. The exemptions nonetheless remain an accurate mirror of agency practice but only a rough outline of what the courts consider major action.

A close examination of the Green Book confirms a decided reluctance of the Department of Ecology to conform its categorical exemptions to judicial holdings on "major" actions. Indeed, the exemptions are so numerous and explicit that they disclose an administrative determination to "overrule" judicial decisions considered disagreeable. This tendency is aggravated by an explicit procedure inviting agencies to petition the Department of Ecology for changes in exemptions to accommodate agency plans. Handing out dispensations in the mistaken belief that DOE has the last word has its dangers. The efficiency benefits and paperwork avoidance attending the categorical exemption procedure are utterly

108. Id. at 158-59.


dependent upon DOE making accurate calls in ruling out categories of actions as of no environmental moment. The courts stand ready to tell DOE who is the dog and who is the tail. The wider the gap between judicial and administrative versions of SEPA compliance, the more unsettling this intervention is likely to be.

E. Procedural Hazards

Attacks on declarations of nonsignificance as well as on the adequacy of the statements that are prepared are vulnerable to three serious procedural barriers. The first is standing, which has been invoked in SEPA contexts to foreclose an attack by an economically interested property owner against the planned expansion of a hospital, a citizen challenge to an annexation making way for the construction of a log export facility, and a school policy activist's challenge to the adequacy of the EIS attending the decision to close five elementary schools. Putting to one side the correctness of these holdings (the latter two at least are in doubt), the important point is that SEPA, if anything, expands rather than contracts the roster of those in position to attack harmful environmental actions. The legislation is designed to protect rights in a variety of resources that could be called loosely a public commons. Citizen standing to protect this common resource heritage would appear to be a necessary corollary.

Somewhat more perplexing is the question of the specificity with which SEPA objections must be advanced in order to preserve opportunities for

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112. Concerned Olympia Residents For the Environment v. City of Olympia, 33 Wn. App. 677, 657 P.2d 790 (1983) (rejecting claims of "economic injury" from loss of profit from sale of property to a competing hospital; the plaintiff owned two acres approximately due west of the hospital planning the expansion).


115. See the comments of Justice Dore, joined by Justices Utter, Rosellini, and Williams, dissenting in Nisqually Delta Ass'n v. City of Du Pont, 95 Wn. 2d 563, 572, 627 P.2d 956, 961 (1981) (en banc): Our State Environmental Policy Act of 1971 (SEPA) acts as an overlay on existing statutory provisions, including boundary changes [citing Bellevue, supra note 48]. SEPA expresses our state's policy that "each person has a fundamental and inalienable right to a healthful environment," WASH. REV. CODE § 43.21C.020(3), and the state policies are to be administered and interpreted "to the fullest extent possible." WASH. REV. CODE § 43.21C.030 (1983). This lends further support for a liberal reading of the term "area affected" [that would allow citizens to contest proposed boundary changes in their community].
later attack. This is a familiar problem in environmental law.\textsuperscript{116} Champions of procedural regularity invoke visions of the stockpiling of objections and appellate sneak attacks to sink projects years after the fact on grounds entirely unanticipated. Disciples of forgiveness, on the other hand, perceive the problem to be whether a struggling citizen confronting the bureaucracy with good faith objections must be thrown out of court for failure to pass some lawyers’ literacy test. Judges are well able to choose between these competing models. A good example is \textit{Gardner v. Pierce County Board of Commissioners,\textsuperscript{117}} where the Court made clear that objections must be advanced only with reasonable specificity, not a chapter and verse recitation of the WAC.

By far the most severe procedural risk in SEPA cases is that review will be foreclosed by a variety of objections (timeliness, laches, failure to exhaust) that the losers have bypassed opportunities to contest directly a declaration of nonsignificance or a statement’s adequacy. These “failure to exhaust” claims become ever more common as the time lapse between statement and action is measured in years rather than months or weeks. Courts require a version of orderly SEPA review although with some hesitation. They enforce the statutory time limits for SEPA reviews\textsuperscript{118} while insisting that notice be genuinely conveyed.\textsuperscript{119} They apply exhaustion defenses\textsuperscript{120} while observing that it is unnecessary to resort to illusory

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\item[\textsuperscript{116}] The Clean Air Act is perhaps the best example. See ENVIRONMENTAL LAW, \textit{supra} note 7 § 3.2A (Supp. 1984).
\item[\textsuperscript{117}] 27 Wn. App. 241, 243-45, 617 P.2d 743, 745-46 (1980) (also rejecting defense of failure to exhaust administrative remedies); \textit{compare} Kitsap County v. Department of Natural Resources, 99 Wn. 2d 386, 391, 662 P.2d 381, 384 (1983) (en banc) (unanimous decision).

The SEPA guidelines were structured in such a way as to require consulted agencies to participate in the SEPA process at a time when their participation is meaningful and contributes to the environmental assessment at the earliest possible opportunity. Where the objection to an EIS is saved until the parties receive an unfavorable decision, the purposes of SEPA are frustrated.

\item[\textsuperscript{118}] Citizens Interested in the Transfusion of Yesteryear v. Board of Regents of the Univ of Wash., 86 Wn. 2d 323, 544 P.2d 740 (1976); Oden Investment Co. v. City of Seattle, 28 Wn. App 161, 622 P.2d 882 (1981); Hulo v. City of Redmond, 14 Wn. App. 568, 544 P.2d 34 (1975). Currently, SEPA reviews confront a thirty day appeal provision, WASH. REV. CODE § 43.21C.075(5)(a) (1983), although this raises the bizarre possibility that the SEPA and non-SEPA portions of a lawsuit may be filed at different times. SEPA Rules, WASH. ADMIN. REG. No. 84-05-020 (1984) (to be codified at WASH. ADMIN. CODE § 197-11-680(4)(b)); \textit{see} Lean, \textit{supra} note 4, at 3-1, 3-51 to 3-52.

\item[\textsuperscript{120}] Spokane County Fire Protection Dist. No. 9 v. Spokane County Boundary Review Bd., 97 Wn. 2d 922, 928-29, 652 P.2d 1356, 1359-60 (1982) (en banc) (unanimous decision) (rejecting SEPA attack on an annexation approval because the city’s negative threshold determination was not appealed to the city manager). The considerable attention paid to “scoping” or issues definition in the Green Book, SEPA Rules, WASH. ADMIN. REG. No. 84-05-020 (1984) (to be codified at WASH. ADMIN. CODE §§ 197-11-408, -410, -793), strongly suggests that those who decline earlier invitations only to jump into the fray thereafter with a new agenda will confront exhaustion barriers.
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remedies. And they have run up the laches flag with the warning that it should be used sparingly to head off a genuine if disorganized public opposition.

The tensions inherent in this debate over proper channels are posed nicely by a number of Washington cases forbidding "collateral" attacks on SEPA judgments in the course of condemnation proceedings. \(^{124}\) King County v. Burhen, \(^{125}\) for example, rejected a challenge to a negative assessment contesting the effects of roadbuilding on a stream by a property owner targeted in the condemnation proceeding to obtain an easement to widen the road. In cases of this sort, project sponsors invoke the usual arguments of repose and the unarguable advantage of presenting environmental objections when they can be considered, corrected, and acted upon. Losers, on the other hand, can be expected to object when they are being marched to the firing line even though they held back when their fate was but dimly perceived. People don't pick fights with impact statements; they pick fights with projects, and especially projects that are about to happen. It is true, moreover, that the projects described in impact statements often resemble only remotely the project that is implemented. Routes are changed, mitigation forgotten, new losers nominated, and old plans shelved.

To what extent should these bypass defenses be enforced in SEPA cases? The model of SEPA analysis is to capture the essence of the proposal and its environmental effects in the EIS or in the record of the DNS and to resolve objections then. It is necessary to pick a fight with the EIS to record your complaints about the project. Withhold objections to a


\(^{122}\) Hayden v. City of Port Townsend, 93 Wn. 2d 870, 875–76, 613 P.2d 1164, 1167–68 (1980) (en banc) (11 month delay between rezone approval authorizing construction of a shopping center and filing of the legal action); Marino Property Co. v. Port of Seattle, 88 Wn. 2d 822, 831, 567 P.2d 1125, 1130 (1977) (en banc) ("Appellants have slept on their rights for over four years while commercial operations at the Port were being increased."). Compare Byers v. Board of Clallam County Comm'rs, 84 Wn. 2d 796, 798, 529 P.2d 823, 826 (1974) (en banc) (rejecting laches claim despite a lapse of twenty months between filing of the writ of certiorari and the date of the hearing).

\(^{123}\) See Hayden v. City of Port Townsend, 93 Wn. 2d at 871, 613 P.2d at 1164 ("In the face of serious defects in a rezone action, to estop a community from challenging that action solely because a developer moved with dispatch while challengers were getting organized, raising funds, selecting an attorney and the like, causes us some hesitation.").

\(^{124}\) State v. Brannan, 85 Wn. 2d 64, 530 P.2d 322 (1975) (en banc); In re Petition of Port of Grays Harbor, 30 Wn. App. 855, 638 P.2d 633 (1982) (even while conceding inadequacies in the declaration of nonsignificance attending the amendment of the Port's Comprehensive Scheme). Compare supra note 109 (collecting case law on the exemption for condemnation actions).

\(^{125}\) 29 Wn. App. 497, 628 P.2d 1341 (1981); see also Save a Neighborhood Environment (SANE) v. City of Seattle, 101 Wn. 2d 280, 676 P.2d 1006 (1984) (en banc) (applying regulation making clear that lead agency threshold determinations shall not be repeated by other agencies for "substantially the same proposal").
known project and you have lost the fight. To the extent mismatches appear between the project described and that implemented, however, the case for foreclosure disappears. A significant change may represent an independent "major" action starting anew the process of threshold analysis.\textsuperscript{126} Violations of commitments in an earlier EIS are likely to be substantive SEPA violations with the "governmental action" for appeal purposes being dated not from the time of the original EIS but from the time of the departure from the commitments contained in that document.\textsuperscript{127} Another possibility is the use of nuisance law where a court might be inclined to look to commitments in an EIS or DNS for an enforceable standard of behavior,\textsuperscript{128} even though the occasion for direct challenge to the EIS is long since past.

II. STATEMENT ADEQUACY OR CONTENT: WHAT IS REQUIRED IN AN EIS?

A rule of thumb in Washington law is that a statement, any statement, is more likely to withstand judicial review than a declaration of nonsignificance. A number of circumstances suggest that state courts may be satisfied with less elaborate analyses and supporting detail than one is accustomed to finding in federal EIS's. A shortage of resources may justify a scaling down of formalities. The projects proposed (often land use or simple construction endeavors) may simply lack the inherent complexities of, say, the breeder reactor program. Also, local decisionmaking may be served less by scorched-earth formalities and more by straight talk. Substance over form is a distinct byword of the Washington SEPA. A few distinctive aspects of statement adequacy nonetheless deserve mention.

A. Socioeconomic Effects

The first and still the leading decision holding an EIS inadequate is \textit{Barrie v. Kitsap County},\textsuperscript{129} which disapproved a county EIS clearing the

\textsuperscript{126} Some untimely SEPA complaints can be reviewed by calling upon the agency to prepare a supplemental EIS. \textit{See} SEPA Rules, WASH. ADMIN. REG. No. 84-05-020 (1984) (to be codified at WASH. ADMIN. CODE § 197-11-620); \textit{cf.} WASH. ADMIN. CODE § 197-11-340(3) (prescribing circumstances for withdrawing a DNS). Any declaration of nonsignificance would be reviewable in the ordinary course as would any supplemental EIS. For an undemanding view of the obligation to supplement an EIS, \textit{see} Barrie \textit{v. Kitsap County Boundary Review Bd.} (Barrie III), 97 Wn. 2d 232, 235-36, 643 P.2d 433, 435-36 (1982) (en banc).

\textsuperscript{127} \textit{See} WASH. REV. CODE § 43.21C.075 (1983).

\textsuperscript{128} \textit{See} \textit{ENVIRONMENTAL LAW}, \textit{supra} note 7 § 2.10 (Supp. 1984) (discussing various sources of standards in nuisance cases).

\textsuperscript{129} 93 Wn. 2d 843, 855-60, 613 P.2d 1148, 1155-58 (1980) (pointing out that EIS adequacy is a question of law subject to de novo judicial review); \textit{cf.} Downtown Traffic Planning Comm. \textit{v.}
way for a regional shopping center for its limited discussion of alternative sites and of the socioeconomic impact of the project (including prominently the possible deterioration and demise of Bremerton’s central business district). There are reasons to anticipate SEPA extension to considerations more comfortably labelled as economic or social: urban development projects rarely admit to a sharp bifurcation between physical environmental effects and impacts on people; and many agencies, especially the smaller ones, can be expected only to give one good look at a project, lacking as they do the wherewithal to assess independently five or six principal features of a proposal, including its economic and environmental overtones.

Constituencies exist to eliminate entirely from SEPA the obligation to consider and discuss socioeconomic effects, presumably on the ground that inquiries of this sort yield more chaff than wheat. Neither the legislation nor the WAC goes this far although the Green Book takes the precaution of banishing socioeconomic effects from the vocabulary. One potentially useful distinction allows the agency to include nonenvironmental analyses in the EIS but does not oblige the project sponsor to provide them. Here is a rough line holding the sponsor responsible for producing information on its immediate project spillovers, physical and social, but assigning to the community other types of study it wishes to conduct.

There remains a strong role for the courts in adjudging the extent to which socioeconomic consequences must be discussed. Nuisance law confirms repeatedly the good sense of assessing the impact of a project on a neighborhood, including the people who live and work there, and there is every reason to believe that the SEPA is not intended to dwarf the softer considerations of place and preference in favor of the hard data on, say, length of the sewer line. At the same time, the dominant point of

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130. SEPA COMMISSION REPORT, supra note 3, proposing a rule stating unequivocally that “[a]nalysis of purely socioeconomic effects of proposals or alternatives is not required in environmental impact statements”.

131. SEPA Rules, WASH. ADMIN. REG. No. 84-05-020 (1984) (to be codified at WASH. ADMIN. CODE 197-11-448(2)). Subsection (3) lists examples of information, including methods of financing and social policy analysis “that are not required to be discussed in an EIS.” The Green Book also introduces distinctions between the “natural” environment and “built” environment. See SEPA Rules, WASH. ADMIN. REG. No. 84-05-020 (1984) (to be codified at WASH. ADMIN. CODE § 197-11-444). For an elaboration on why the term “socioeconomic” does not appear in the legislation, see supra note 3, at 14–15.

132. See SEPA Rules, WASH. ADMIN. REG. No. 84-05-020 (1984) (to be codified at WASH. ADMIN. CODE § 197-11-100(3)).

133. ENVIRONMENTAL LAW, supra note 7 §§ 2.7, 2.8 (Supp. 1984).

134. See WASH. REV. CODE § 43.21C.030(b) (1983) (making clear that decisionmaking must
SEPA is to discuss the effects of a proposal on the physical world, including the people who live there, not on the accounting consequences of adding the new coal-fired unit. Courts are perfectly able to distinguish the socioeconomic consequences that count, such as the destruction of downtown Bremerton, from those that do not.

B. Remote or Cumulative Effects: The Sun-Will-Shine-Tomorrow Syndrome

The question of how much detail is enough inevitably surfaces in SEPA litigation, and opens up another series of indeterminate choices. The attention of the SEPA Commission,135 and the adoption of the scoping procedures,136 confirm a desire to encourage statements that are short, to the point, and focused in their discussion of effects and alternatives. The 1983 Amendments make clear that the WAC rules should assure that statements are "simple, uniform, and as short as practicable; statements are required to analyze only reasonable alternatives and probable adverse environmental impacts which are significant, and may analyze beneficial impacts."137

If long-winded, discursive, or speculative EIS's are a problem, it is hardly one that has been encouraged by judges. Under one or another version of a remoteness principle, courts have declined to require an EIS on a public road project to discuss a contemplated condominium on private land,138 an EIS on an annexation proposal to discuss a shopping center that might not be built,139 and an EIS on a rezoning to address all kinds of details on the roads and sewers expected to accompany the housing development.140 A collection of rationales justifying a truncated analysis emerge in one case involving a proposal to develop beachfront property as a hotel.141 The EIS did not have to address the prospects of trespasses

\footnotesize{ insure "that presently unquantified environmental amenities and values will be given appropriate consideration in decisionmaking along with economic and technical considerations")

135. SEPA COMMISSION REPORT. supra note 3 at 2–3.
137. WASH. REV. CODE § 43.21C.110(d) (1983).
138. Cheney v. City of Mountlake Terrace. 87 Wn. 2d 338, 343–44, 552 P.2d 184, 188 (1976) (en banc) (the private development is not "part of a totally integrated plan for development with the immediate project . . . . [T]here is simply no factual connection between the alleged condominium project and construction of this urban arterial.").
by hotel users upon resident properties (these effects were remote and speculative), the environmental consequences of construction of a bulkhead along the beachfront (a substantial development permit would be required later), or the provisions of a comprehensive land use plan (an omission "unfortunate but not fatal").

Informed prediction, of course, is the essence of the EIS obligation to address "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." This is true despite data shortages obscuring the details if not the trends. One good example is the Barrie case, requiring discussion of the dimly perceived albeit very real prospect of a regional shopping center spelling doom for a downtown business district. Another example is the well known Polygon decision, which uses a cumulative effects analysis to condemn an unsightly condominium planned for location on Queen Ann Hill. The obligation to discuss cumulative effects, which undoubtedly exists under SEPA, is a good illustration of how some statements are obliged to go beyond case specifics to become predictive and venturesome.

The 1983 Amendments insist that an EIS is required to analyze "only those probable adverse environmental impacts which are significant." While this language disowns Herman Kahn's far-out futurism as a proper subject of EIS analysis, it does not relieve officials from making projections within the range of plausibility. A statement of meaningful consequences extended, for example, for ten to fifteen years poses precisely the types of questions public officials ought to be asking themselves. The result is supposed to be better decisions although any obligation to discuss future effects may do no more than provide historians with grounds to criticize past decisions.

The strongest indicator in Washington law of the detail that must accompany EIS discussion of predicted impacts is the existence of some future forum that can address these effects and do something about them. We will call this phenomenon the sun-will-shine-tomorrow syndrome, by which is meant the stringency of today's EIS disclosure obligation is correlated strongly to judicial optimism about whether the questions raised can be answered later. The Washington Supreme Court thus has

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142. 22 Wn. App. at 290, 588 P.2d at 1230.
143. WASH. REV. CODE § 43.21C.030(c)(5) (1983); see also id. § 43.21C.030(c)(iv).
146. SEPA Rules, WASH. ADMIN. REG. No. 84-05-020 (1984) (to be codified at WASH. ADMIN. CODE §§ 197-11-060(4)(c), 197-11-792(a)(c)(iii)).
147. WASH. REV. CODE § 43.21C.031 (1983).
approved a "bare bones" EIS,\textsuperscript{148} whose inadequacies are described vividly by Justice Utter,\textsuperscript{149} where the nature of the project is such that later decisionmaking sequences allow a more detailed assessment. This is true, for example, of a rezoning to be followed by individual sector plan applications,\textsuperscript{150} the preparation of a preliminary plat to be followed by issuance of a building permit,\textsuperscript{151} or a rezoning to be followed by consideration of a substantial development permit.\textsuperscript{152} The key seems to be whether the decisionmaking points coming later offer credible opportunities to say "no" and mitigate or avoid the adverse consequences.

The risk of the sun-will-shine-tomorrow strategy is a dangerous incrementalism where the obligation to decide is postponed successively while project momentum builds. There is also a prospect of an Alphonse-Gaston reaction as the earlier analysis defers to that coming later and the later analysis gives full respect to the judgments made earlier. It is one thing to be tolerant of skimpy detail because the uncertainty will recede later on, quite another to excuse a decisionmaker from admitting to the many uncertainties an affirmative decision presumptively dismisses.

C. The Leaky Bucket Phenomenon

Another familiar issue of statement adequacy is whether the EIS itself must capture the essential ingredients of the decision and thus maintain an identity as a key decisionmaking document. There are obvious reasons of


\textsuperscript{149} See 96 Wn. 2d at 208-09, 634 P.2d at 858:

The EIS is a "barebones" presentation of the problem. Although it correctly identifies many possible adverse consequences, it does not indicate their magnitude and, in several instances, simply suggests that their impact could be later assessed when the developers seek sector approvals. The EIS, as petitioners allege, is particularly devoid of any quantitative discussion as to cumulative and secondary effects on surrounding areas. Though it mentions that there will be a serious shortage of roads and schools, it suggests that those problems will remedy themselves as the development occurs. As a generalization, the EIS identifies the consequences, but offers no quantitative discussion of their possible magnitude or the costs of mitigating them.

Many EIS's fit this description, and the holding in \textit{Cathcart-Maltby} is unlikely to deter the practice.

\textsuperscript{150} 96 Wn. 2d at 210, 634 P.2d at 859 ("Piecemeal review is permissible if the first phase of the project is independent of the second and if the consequences of the ultimate development cannot be initially assessed."). \textit{See also} Carpenter v. Island County, 89 Wn. 2d 881, 577 P.2d 575 (1978) (en banc) (Sewer district annexation does not require an EIS but installation of facilities cannot be undertaken without reference to environmental impact).

\textsuperscript{151} 96 Wn. 2d at 210, 634 P.2d at 859. \textit{See also} \textit{ENVIROMENTAL LAW. supra} note 7 § 7.7 (on the timing of statement preparation).

expediency and practicality to expect a drift away from EIS completeness. All decisions proceed over time and are fed constantly by new empirical information, changing policy; revised plans, different people. The EIS is not supposed to be as formally complete as, say, the record on appeal so there are predictable tendencies among agencies to forget and among courts to forgive failures to include in an EIS the studies, understandings, or other project documents well known to insiders. The Green Book encourages this exercise in pragmatism by allowing an EIS to incorporate other documents by reference although it holds the line with a clear statement that an EIS should be complete in itself.

The difficulty with tolerating leakage of information from the EIS, for isolated reasons that often are convincing, is that the document becomes progressively less probative of the issues at hand. Each time something significant is left out, bit by incremental bit, the EIS becomes less a decision document and more a remote starting point. This incremental erosion process is illustrated by the decision in Toandos Peninsula Association v. Jefferson County, which held that the EIS on a proposed overnight campground development on Hood Canal was satisfactory despite failures to discuss the Shoreline Management Act, the Shoreline Master Program, and a comprehensive plan that forbade explicitly overnight campgrounds in the area contended for. While there is much in the record to indicate a careful environmental assessment was made, the EIS had little to do with the outcome. The decision hardly encourages conscientious attention to the next EIS.

Loss of probative content from impact statements takes a toll most heavily upon outsiders who benefit from the disclosures contained in the documents. Many insiders, no doubt, would be delighted if the opposition concentrated its fire on documents that progressively have less weight in the actual outcome. The importance of retaining the EIS as a

153. See SEPA Rules, WASH. ADMIN. REG. No. 84-05-020 (1984) (to be codified at WASH. ADMIN. CODE § 197-11-425(6)): Agencies shall incorporate material into an environmental impact statement by reference to cut down on bulk, if an agency can do so without impeding agency and public review of the action.

154. See SEPA Rules, WASH. ADMIN. REG. No. 84-05-020 (1984) (to be codified at WASH. ADMIN. CODE § 197-11-425(1)): Environmental impact statements shall be readable reports, which allow the reader to understand the most significant and vital information concerning the proposed action, alternatives, and impacts, without turning to other documents.

155. 32 Wn. App. 473, 483, 648 P.2d 448, 454 (1982) (“Courts will review an EIS to determine whether the project’s environmental effects are reasonably disclosed, discussed, and substantiated.”).

156. Id. at 479, 648 P.2d at 452. (The county commissioners’ approval of the issuance of building permits was subject to a detailed site plan and 71 conditions governing construction and operation of the campground.)
“self-contained instrument” long has been recognized in NEPA law,157 and the same considerations hold true for SEPA. The tactic that will be used most often to repair EIS’s that happen to spring leaks is to demand a supplemental statement.158

D. Discussion of Alternatives

SEPA law is firmly committed to one of the great indeterminacies of NEPA that the obligation to discuss alternatives is bounded by considerations of reasonableness.159 This usually means the agency should give some hard thought to ‘‘doing nothing, doing something on a less bold scale, and doing it in a way that minimizes adverse effects.’’160 Washington law is particularly striking in its insistence that the discussion of alternatives address the prospects of mitigation.161 The EIS, or even the mitigated DNS, thus probes the prospects for friction avoidance that are enforced in fact under the substantive requirements of the law.

The Green Book states, somewhat ambiguously, that reasonable alternatives ‘‘may be those over which an agency with jurisdiction has authority to control impacts either directly, or indirectly through requirement of mitigation measures.’’162 This, of course, is true as far as it goes, but it is also true that a reasonable alternative for discussion purposes is one an agency may be utterly impotent to implement. This is bedrock NEPA law,163 and the reason is that the EIS’s are designed to facilitate

157. See ENVIRONMENTAL LAW, supra note 7, at 728: 
   The requirement that the EIS be a self-contained instrument like a judicial opinion strengthens its role in rationalizing agency decisions affecting the environment. [Discussing authorities]. 
   Once the EIS becomes less than a complete environmental decision, it is in danger of becoming just another bit of information along the way. That fate would fulfill little of NEPA’s promise of full disclosure and methodological reform.

158. SEPA Rules, WASH. ADMIN. REG. No. 84-05-020 (1984) (to be codified at WASH. ADMIN. 
   CODE § 197-11-620). In recent years, the supplemental EIS has been a popular subject of NEPA 

159. See, e.g., Leschi Improvement Council v. State Highway Comm’n, 84 Wn. 2d 271, 
   473, 483-84, 648 P.2d 448, 454 (1982). See also ENVIRONMENTAL LAW, supra note 7 § 7.9, at 792-98.


161. See, e.g., City of Richland v. Franklin County Boundary Review Bd., 100 Wn. 2d 864, 
   676 P.2d 425 (1984) (en banc); Save Our Rural Environment v. Snohomish County, 99 Wn. 2d 363, 
   372, 662 P.2d 816, 821 (1983); Hayden v. City of Port Townsend, 93 Wn. 2d 870, 613 P.2d 1164 

162. SEPA Rules, WASH. ADMIN. REG. No. 84-05-020 (1984) (to be codified at WASH. ADMIN. 
   CODE § 197-11-440(5)(b)(iii)); see id. No. 84-05-020 (definition of ‘‘reasonable alternative’’).

163. The source is Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834-35, 
   837 (D.C. Cir. 1972) (Leventhal, J.).
ic平 among agencies and break down the narrow purpose mania that gives administrative government a bad name.

One of the more interesting variations of Washington law declares that "[w]hen a proposal is for a private project on a specific site, the lead agency shall be required to evaluate only the no action alternative plus other reasonable alternatives for achieving the proposal's objective on the same site." This limitation has been endorsed tentatively by the courts but without much conviction about what is at stake. The idea might be that site acquisition is so important to most proposals that the alternative of doing it elsewhere is financially out of the question and therefore unworthy of discussion. Or perhaps the notion is that developers are entitled to a decision on a take-it or leave-it basis so that the range of alternatives must be defined by the scope of their ambition. It is certainly not the case that private projects never end up in the wrong place or that public officials always overlook questions about other sites. A failure to consider offsite alternatives for private projects may yet prove unreasonable in a given case.

While the federal government is now seething with interest over the worst case analysis, the option has received little attention in Washington law. One appeal of the approach is that it does put a ceiling (built on guesses, to be sure) on what can go wrong and thus parrots closely an intuitive device commonly invoked by individual and institutional decisionmakers. The worst case is usually associated with analyses attending the regulation of toxic substances or long range resource planning conducted by the federal natural resources agencies. But it can prove useful in contexts more familiarly linked to the SEPA's. A good example is Ullock v. City of Bremerton, which holds that an EIS is adequate "in a nonproject zoning action where the environmental consequences are discussed in terms of the maximum potential development of the property under the various zoning classifications allowed." Here is the use of the worst case to suggest that the outcome is within the range of the acceptable.

164. SEPA Rules, WASH. ADMIN. REG. No. 84-05-020 (1984) (to be codified at WASH. ADMIN. CODE § 197-11-440(5)(d)). The Red Book version confined consideration of alternatives to "the same site or other sites owned or controlled by the same proponent." Former WASH. ADMIN. CODE § 197-11-440(12)(c) (1983).
168. Id. at 581, 565 P.2d at 1184.
III. SEPA AS SUBSTANTIVE LAW: RESULTS AS WELL AS PROCESS

The Washington Environmental Policy Act is celebrated nationally as a rare breed of SEPA with a distinctive substantive bite. This SEPA substance has several expressions, which deserve separate consideration.

A. Charter Supplementation

The use of SEPA to import environmental considerations into otherwise restrictive legislative charters has been endorsed consistently by the Washington Supreme Court. Quite simply, this construction extends the authority of government to say "no" for environmental reasons, even to constituencies quite unaccustomed to this response. There is reason to believe, for example, that the Department of Natural Resources' "top dollar" interpretation of its land management responsibilities is in this day insufficiently attentive to SEPA.169

The pattern was set in the Supreme Court's first SEPA decision in Stempel v. Department of Water Resources, where the court rejected the claim that the "public welfare" charter of the state water code permitted consideration of only water allocation and not water pollution in evaluating a water withdrawal proposal.170 Stempel, which can be called Washington's version of Calvert Cliffs,171 took this tack over objections of the state bureaucracy, including the attorney general's office, and in the context of a well-established program with strong constituency support. Stempel is followed by Polygon Corp. v. City of Seattle,172 which holds that SEPA vests in a city superintendent of buildings authority to deny a building permit on environmental grounds. This was true even

169. This policy is oft-expressed in DNR circles. See also ENVIRONMENTAL LAW, supra note 7, at 699-700 (on the "supplementary" charter-expanding uses of NEPA). An excellent example of charter supplementation in Washington, not widely known, is the recognition that the Department of Game must admit to its moose-hunting lottery persons who intend to preserve as well as destroy the moose. See Letter from John Patterson, Wildlife Management, Department of Game, to Michael W. Gendler, Esq., July 23, 1981 (copy on file at Washington Law Review).

170. 82 Wn. 2d 109, 117, 508 P.2d 166, 171 (1973). The court made it clear that the relevant agency was therefore required "to evaluate the possible pollution reentry problems resulting from the domestic water use in the vicinity of the lake" from which the withdrawals were to be made. 82 Wn. 2d at 119, 508 P.2d at 172. Stempel is overruled legislatively in limited particulars by WASH. REV. CODE § 43.21C.035 (1983).


though the pre-SEPA authority might be characterized as ministerial, the
project was otherwise in compliance with existing zoning laws, and the
effects were largely aesthetic and those associated with normal growth
and standard construction (the thirteen story condominium would produce
view obstruction, shadow effects, increases in traffic and noise). In an-
other recent decision\textsuperscript{173} the Supreme Court has affirmed a denial of a pre-
liminary plat proposal by the Skagit County Board of Commissioners on
grounds that both local law and SEPA authorize a consideration of future
environmental impact in making the regulatory choice. The Court ap-
proved the court of appeals’ observations\textsuperscript{174} that:

- concern over noise and traffic, police and fire protection, schools, and other
problems of planned growth management are properly considered by a
board confronted with plans for a development which, in the words of an
opponent at the hearing, would turn a previously unused area into the fourth
town in Skagit County.

In addition to expanding the discretionary power of many agencies to
say “no” or to qualify their “yes” on environmental grounds, SEPA
policies have been invoked in “supplemental” fashion to contend for one
or another result favorable to the environment: expanded standing,\textsuperscript{175} re-
jection of repeal by implication arguments,\textsuperscript{176} preparation of an EIS when
in doubt,\textsuperscript{177} generous interpretation of other environmental laws.\textsuperscript{178}
The substantive policies of SEPA, including the purposes to restore the en-
vironment as well as maintain it\textsuperscript{179} and the “inalienable” rights provi-
sions,\textsuperscript{180} are thus commonly invoked in legal argument as a clincher, ver-
ifier, or tie-breaker.

\textsuperscript{173} Buchsieb/Danard, Inc. v. Skagit County, 99 Wn. 2d 577, 579–81, 663 P.2d 487, 488–89
(1983) (en banc) (distinguishing Norco Construction, Inc. v. King County, 97 Wn. 2d 680, 649 P.2d
103 (1982)).
\textsuperscript{174} 99 Wn. 2d at 579–80, 663 P.2d at 488 (quoting Buchsieb/Danard, Inc. v. Skagit County,
31 Wn. App. 489, 495, 643 P.2d 460, 464 (1982)).
\textsuperscript{175} See Nisqually Delta Ass’n v. City of Du Pont, 95 Wn. 2d 563, 571–73, 627 P.2d 956,
\textsuperscript{176} ASARCO, Inc. v. Air Quality Coalition, 92 Wn. 2d 685, 708, 601 P.2d 501, 516 (1979)
(following Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wn. 2d 475, 490, 513 P.2d
36, 46 (1973)).
\textsuperscript{177} See Norway Hill Preservation & Protection Ass’n v. King County Council, 87 Wn. 2d 267,
\textsuperscript{178} State of Washington v. City of Seattle, 94 Wn. 2d 162, 168–69, 615 P.2d 461, 464–65
(1980) (en banc) (Dolliver, J., dissenting) (invoking SEPA in support of a city’s police powers to
provide for the preservation of historic buildings); Hunt v. Anderson, 30 Wn. App. 437, 439, 635
P.2d 156, 158 (1981) (mobile home obstructing view on Lake Chelan must be removed under author-
ity of Shoreline Management Act) (quoting English Bay Enterprises, Ltd. v. Island County, 89 Wn.
2d 16, 20, 568 P.2d 783, 786 (1977)).
\textsuperscript{179} WASH. REV. CODE § 43.21C.020 (1983).
\textsuperscript{180} Id. § 43.21C.020(3), see supra text accompanying note 13; Leschi Improvement Council v.
B. Enforcing Mitigation; Project Turn-Downs

A variety of substantive policies are discoverable in SEPA, above and beyond the celebrated "fundamental and inalienable right to a healthful environment." One of the most conspicuous of these could be called a standard of maximum mitigation, which invokes the "all practicable means" language of the statute to support a stringent best efforts obligation to avoid adverse environmental effects. There is no doubt that there are duties to mitigate under SEPA, and these duties are enforceable in the ordinary course as an aspect of substantive SEPA.

It is clear that approval of a project connotes a judgment that the substantive requirements of the Act are satisfied. But the standard of judicial review is unclear. Some cases embrace an arbitrary and capricious test, replete even with language suggestive of the hands-off approach of federal NEPA law. On the other hand, there is at least one decision rejecting outright a bogus mitigation arrangement in the course of a holding that a rezoning clearing the way for a major regional shopping center inadequately protected citizen substantive environmental rights. The


181. WASH. REV. CODE § 43.21C.020 (1983); duplicative; § 43.21C.060.

182. See supra note 180.


It seems evident that if a particular governmental action were to result in severe environmental consequences and there were no other important beneficial consequences against which to balance them, the courts would be warranted in holding the action to be either ultra vires or arbitrary and capricious and violative of the substantive policies of SEPA.


SEPA is essentially a procedural statute to ensure that environmental impacts and alternatives are properly considered by the decision makers .... It was not designed to usurp local decision-making or to dictate a particular substantive result.

Citations omitted.

188. See Save A Valuable Environment (SAVE) v. City of Bothell, 89 Wn. 2d 862, 871, 576 P.2d 401, 406 (1978) (en banc) (city's agreement with developer acknowledged that "effects on the region should be mitigated; within reasonable limits"; the court was unimpressed despite acknowledgement of a restrictive standard of review).
clear inference is that the question of adjudging compliance is a legal issue for the courts immune from administrative opinions. Over the long run administrative sponsorship is unlikely to win exemptions for environmental damage perceived by the courts to be avoidable or otherwise unacceptable.¹⁸⁹

Law students meeting NEPA for the first time are baffled consistently by the revelation that this most famous of environmental laws promises process galore without judicial weapons against destructive results. A substantive right of mitigation or minimization of friction without more is similarly incomplete if it settles for best efforts even in the face of an appalling outcome. The circle is closed by recognition of a power to say “no”—to turn down a project despite every procedural and substantive precaution to reach accommodation with environmental needs. Sometimes a hard look and maximum mitigation are not quite enough.

This ultimate power to disapprove is clearly sanctioned by the Washington SEPA although project losers are protected by some uncertain process rights. One provision specifies that project conditions or denials “shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency (or appropriate legislative body, in the case of local government) as possible bases for the exercise of authority pursuant to this chapter.”¹⁹⁰ This is either a strict rulemaking requirement, in which event it will be rarely complied with, or a loose notice provision, in which event it will be routinely complied with. The reason that a strict rulemaking precondition would be largely fatal to substantive SEPA is that inventing detailed before-the-fact specifications for sui generis conflict is an unproductive enterprise, especially for busy decision-makers who are obliged to respond to problems of the moment at the


¹⁹⁰. Wash. Rev. Code § 43.21C.060 (1983) reads in pertinent part:

Any governmental action may be conditioned or denied pursuant to this chapter: Provided that such conditions or denials shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency (or appropriate legislative body, in the case of local government) as possible bases for the exercise of authority pursuant to this chapter. Such designation shall occur at the time specified by RCW § 43.21C.120 [generally Oct. 1, 1984, one hundred and eighty days after adoption of the Green Book rules]. Such action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter. These conditions shall be stated in writing by the decisionmaker. Mitigation measures shall be reasonable and capable of being accomplished. In order to deny a proposal under this chapter, an agency must find that: (1) the proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact.
expense of big picture rulemaking. If a detailed rule is the *sine qua non* of a project denial, it won’t happen.

A more likely reading of this “identified” policies provision is that while it anticipates some kind of rule adoption or policy statement by the agencies, a general incorporation of SEPA substantive law should suffice to cover the cases not yet envisaged. One reason for this interpretation is that the SEPA Commission, whose report serves as an ingredient of the legislative history of the 1983 Amendments, explicitly approves the *Polygon* decision. *Polygon* is distinctly a common law case where the aesthetic grounds for rejecting the project were found in SEPA independently of the zoning laws that were satisfied. It is difficult to perceive how a legislator voting to endorse *Polygon* can be understood simultaneously to repudiate the decision to the extent it says anything other than that the zoning laws must be complied with.

An interesting variation is to speculate about what happens in the eventuality, hardly improbable, that an agency or local government does nothing whatsoever to specify a SEPA turndown policy. One possibility is that projects can proceed but without vulnerability to substantive SEPA conditions or denials. Another possibility is that projects cannot be approved until the agency adopts a SEPA implementing policy. It is not difficult to imagine what outcome is more likely to inspire crash SEPA implementation.

The other statutory preconditions of project denials or mitigation directives (such as the findings and writing requirements) are best understood as a variety of hard look process rights protecting potential losers

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191. Reconciliation of SEPA practice with the Washington vested rights doctrine is a delicate enterprise. Washington adheres to a strict bright-line minority rule that entitles a developer “to have a proposal processed under regulations in effect at the time of building permit application regardless of subsequent changes in zoning or other regulations.” R.L. Settle, *supra* note 1 § 2.7(b), at 41. The rationale is said to be of common law origins “designed to serve policies of administrative convenience and predictability.” *Id.* at 43; see Comment, *Washington’s Zoning Vested Rights Doctrine*, 57 WASH. L. REV. 139 (1981). The entire SEPA enterprise, based upon study over time and a search for project-specific mitigation, is at odds with this vested rights model of static obligation. Suffice it to say that in the SEPA context, the Washington courts may be tempted to acknowledge a constitutional core behind the vested doctrine (that is, takings or substantive due process) and simultaneously concede the power of local governments to impose environmental obligations conceived after some magical filing date. Dignifying the claim may be an ironic way to dismiss its significance. But the proposition that there is a vested right to pollute a stream would attract few subscribers. The safest prediction would be to expect a judicial tolerance for revised EIS’s and redefined policies aimed at heading off adverse environmental impacts.

192. *SEPA Commission Report: supra* note 3, at 6. *See also* State Department of Natural Resources v. Thurston County, 92 Wn. 2d 656, 601 P.2d 494 (1979) (en banc) (county commissioners have authority under SEPA to deny a preliminary plat on environmental grounds; a proposed housing development was thought inadequate to protect a bald eagle nesting site despite a project approval by the Shorelines Hearing Board). *Cert. denied*, 449 U.S. 830 (1980).

193. *Supra* note 190.
before the agencies. Any loser certainly has a right to know what impacts he is being called to account for and the mitigation prescribed. The requirement that "action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter" suggests a wry hypothetical: can a project be turned down on the basis of a shoddy EIS? Do project sponsors who write many statements under loose delegation rules have yet more incentive to pull their punches? The point of the requirement, after all, is to make sure that mitigation is commensurate with the predictions of adverse effects. One court has made clear that no particular quantum of data is necessary to support a finding of adverse impact. As for disincentives for statement preparation, a poor statement is vulnerable on grounds of procedural inadequacy, and a statement just good enough to clear that hurdle is good enough also to sustain mitigation or rejection directives.

C. Complementary Legislation and Doctrines; Damages and Other Remedies; Reallocating Risks of Project Failure

As under NEPA, SEPA litigation in Washington commonly proceeds in conjunction with a variety of other laws seeking similar procedural and substantive aims. The most likely nominees are the appearance of fairness doctrine, which serves an important role in public decision-making, the Shoreline Management Act, zoning, and nuisance claims. SEPA interacts with these laws in reciprocal fashion, some-

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195. ENVIRONMENTAL LAW, supra note 7 § 7.12.
times borrowing limitations from them, sometimes adding gloss to them, and sometimes providing the disclosures that invite applications of these other laws.

One interaction not yet fully explored in the case law is the use of SEPA to define standards of proper behavior for purposes of nuisance suits, both against the government and private implementers. The essence of nuisance law is to emphasize ways to minimize the friction between competing resource users, and SEPA obviously prescribes research, study, and behavioral obligations with the same ends in mind. EIS prescriptions can be agreeably put to use to define the reach of reasonable behavior for nuisance purposes. Another predictable role of a substantive SEPA is to fulfill the function of the public trust doctrine, which in several states serves to protect public resource commons from consumptive use or detrimental reallocations into private hands. Washington is not known for a lively public trust doctrine although its SEPA contains familiar public trust themes. Not surprisingly, several of the Washington SEPA cases look very much like conflicts that would be disguised as public trust disputes in other jurisdictions.

The *City of Spokane* decision declines to adopt the "novel theory" that money damages are available under SEPA "particularly in a case where adequate damages are available under established theories." This "novel" eventuality may yet come to pass, as the Washington Supreme Court has long been in the forefront of innovative tort law. The discovery


201. Supra notes 175–78.


204. For a discussion of the public trust doctrine, see ENVIRONMENTAL LAW, supra note 7 § 2 16 (1977 & Supp. 1984).

205. See WASH. REV. CODE §§ 43.21C.020(1), (2)(a), (2)(d) (Agencies must use "all practicable means" to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations" and to "preserve important historic, cultural, and natural aspects of our national heritage.").


of private damage remedies in citizen suit provisions is not implausible in light of the purposes of commissioning the citizen in the clean-up effort. The boldness of the legislature in embracing the "fundamental and inalienable" rights language rejected by Congress when enacting NEPA is compatible with the derivation of strong remedies. *Parens patriae* damage remedies are routinely available to state authorities pursuing the protection of natural resources assets, and the "fundamental and inalienable" language can be viewed as extending to individuals that which used to be a closely held right of the public authorities to sue for environmental damage. For that matter, SEPA substantive rights have presumed equitable relief for a long time and damages can be perceived as simply a lesser included option.

A damages remedy under SEPA is by no means pre-ordained. The critical features of SEPA strive for protection and enhancement, goals realizable through injunctive orders. SEPA treats environmental assets as something unique not simple items of trade covered comfortably by exchanges of dollars through the liability system. The emphasis is upon stemming the losses not calculating payoffs. A private damages remedy for the loss of what are often very public assets also creates its own valuation and allocation problems: what is the extent of the loss? Is the first plaintiff entitled to collect all damages for an incident on a prior appropriation theory? How is a SEPA damage remedy system to be reconciled with the closely written provisions of, say, the water pollution laws?

Under SEPA it is clear that an injunction for noncompliance is the expected remedy. There is language in the cases insisting that the burden of compliance remains strictly upon the government agencies. In one case, the court resisted a segmentation compliance strategy by extending an injunction originally entered for noncompliance with SEPA until all permits required by the Shoreline Management Act had been obtained. The order, consistent with federal cases that protect the physical environment pending compliance, forbade the defendant Port Authority from cutting timber and clearing and grading the upland portions of the project.

SEPA project denials or long interruptions have prompted frustrated developers to lash out in a variety of directions in attempts to shift the

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208. See ENVIRONMENTAL LAW, supra note 7 § 1.13, at 84–85.
209. Id. § 7.1, at 701–02 & n.25.
210. See id. § 4.19, at 518 & n.10 (collecting cases).
212. Merkel v. Port of Brownsville, 8 Wn. App. 844, 850–51, 509 P.2d 390, 395 (1973) (posing the issue as "whether the Port may take a single project and divide it into segments for purposes of SEPA and SMA approval").
213. ENVIRONMENTAL LAW, supra note 7 § 7.10, at 801–03.
losses. Unsuccessful suits have been attempted on a conspiracy theory against the environmental group erecting the legal obstacles and on a tort claim theory against the city modifying the permit. Successful suits have been maintained on a commercial frustration theory allowing a gravel stripminer to get out from under a lease arrangement unexpectedly in environmental disrepute and on an unjust enrichment theory against the Department of Natural Resources for pushing along a timber removal project that proved to be highly vulnerable to a SEPA attack. The latter decision, in particular, will invite a variety of attempts to shift economic losses from SEPA-related project interruptions to the agency that bungled the EIS. This version of state insurance against environmental mishaps lacks intuitive appeal, at the very least, and one can anticipate that *Noel v. Cole*-vintage compensation will be restricted to cases where the SEPA violations are not patently obvious, where the agency applies considerable coercive pressure to the project sponsor to go ahead, and where there is no evidence that the developer aids, abets, and encourages the SEPA shortcuts.

IV. RESPONSIBILITY FOR WRITING THE STATEMENT

The SEPA requirement that the EIS be prepared by the "responsible official," like the identical NEPA requirement, has given rise to two types of issues. The first is a delegation question of the extent to which responsibility for statement preparation can be placed in the hands of the private sponsors of the project. Delegation of various EIS-preparation duties is widespread in Washington, and often is mandated by the implementing rules of the different agencies. The principal reasons for this widespread delegation are both pragmatic (who knows most about the proposal?) and financial (who should pay for the statement?), although there seems to be an unspoken rule that the one who pays should bear the principal honor of preparation.

218. *WASH. REV. CODE § 43.21C.030(2)(c) (1983).*
220. *See, e.g., SEPA Rules, WASH. ADMIN. REG. No. 94-05-020 (1984) (to be codified at WASH. ADMIN. CODE § 197-11-960) (the environmental checklist, which serves as the principal raw material for all threshold determinations, is to be prepared by the applicant).*
It goes without saying that the EIS process anticipates an independent agency judgment and not the parroting of partisan opinion. In Washington, an explicit procedure exists requiring the designation of the responsible official. With this person known, one would expect litigation to focus upon the extent to which this official can attest to the independency of judgments reflected in the DNS or EIS. The likely attitude of the courts is suggested by the decision in Brown v. City of Tacoma, rejecting a delegation argument with these observations:

The extensive review and consideration given the [applicant's] checklist and the modifications ordered and studies conducted belies Brown’s contentions that the Department relied upon the allegedly biased and erroneous checklist and “rubber stamped” its approval of the project on that basis.

The second major question attending statement preparation requires identification of the “lead agency” for purposes of carrying out the environmental analyses. This nomination process obviously involves sensitive issues of agency status and turf protection, as attested to by the extensive WAC rules developed on the subject. The regulations attempt to bring some order to potentially chaotic contests over the allocation of SEPA responsibilities by identifying the lead agencies for certain types of proposals and by giving the Department of Ecology authority to resolve lead agency disputes. In litigation, an Alphonse-Gaston response is clearly detectable as agencies charged with shirking their SEPA responsibilities defend on the ground that they do not have lead agency responsibilities. This is an unfortunate situation, and it bears out predictions that heavy reliance upon lead agency nominations may sacrifice compli-

\[\text{221. SEPA Rules, WASH. ADMIN. REG. NO. 84-05-020 (1984) (to be codified at WASH. ADMIN. CODE § 197-11-910); see D.E.B.T., Ltd. v. Board of Clallam County Comm’rs, 24 Wn. App. 136, 600 P.2d 628 (1979) (Board of Clallam County Commissioners is the “responsible official” and is not bound by the contrary conclusions of the Clallam County Planning Commission).}\]

\[\text{222. 30 Wn. App. 762, 637 P.2d 1005 (1981).}\]

\[\text{223. Id. at 765, 637 P.2d at 1007.}\]


\[\text{224. Id. §§ 197-11-926 to -938.}\]

\[\text{225. Id. § 197-11-946.}\]

\[\text{227. Harris v. Hombaker, 98 Wn. 2d 650, 658 P.2d 1219 (1983) (en banc) (Department of Transportation, not the Franklin County Board, was the lead agency for purposes of deciding where to locate a highway interchange); see also Save a Neighborhood Environment (SANE) v. City of Seattle, 101 Wn. 2d 200, 676 P.2d 1006 (1984) (en banc) (lead agency threshold determinations binding on other agencies for “substantially the same proposal”); City of Bellevue v. King County Boundary Review Bd., 90 Wn. 2d 707, 856 P.2d 667, 586 P.2d 570, 476-77 (1978) (en banc); Spokane County Fire Protection Dist. No. 8 v. Spokane County Boundary Review Bd., 27 Wn. App. 491, 618 P.2d 1236 (1980) (annexation clearing the way for a major subdivision was assessed by the plan commission and not the review board approving the annexation).}\]
ance at the altar of efficiency and avoidance of duplication. The ultimate remedy available to the courts is to insist that "the responsible official" for EIS purposes resides within agency A even though the Department of Ecology has declared that agency B is the lead agency. An agency that gladly opts out or one that is reluctantly squeezed out of its environmental review responsibilities may be pulled back in by this kind of interpretation.

V. CONCLUSION

Washington’s SEPA offers confirmation of legal theories suggesting that identical statutes evolve in somewhat different directions in varying cultural and political contexts. While its common ancestry with NEPA remains unmistakable, the Washington SEPA has taken on plumage that sets it apart. The Washington approach is short on process, long on substance. It is inattentive to high standards of articulation in the statements, receptive to avoid-the-paperwork and exhaust-proper-channels arguments. At the same time, it focuses upon results and is unwilling to accept procedural generosity as a fair tradeoff for a polluted stream. Slick statements are no substitutes for clean water. Washington will be best known as the state whose SEPA elevates substance over form.

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228. See ENVIRONMENTAL LAW, supra note 7 § 7.8, at 783–85. The opinion in Sisley v. San Juan County, 89 Wn. 2d 78, 85–88, 569 P.2d 712, 716–18 (1977) (en banc), is especially attentive to the obligation of agencies to decide for themselves rather than parrot other opinions.