The Environmental Coordination Procedures Act of 1973, or ECPA! ECPA! Rah, Rah, Rah!!

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THE ENVIRONMENTAL COORDINATION PROCEDURES ACT OF 1973, OR 
ECPA! ECPA! RAH, RAH, RAH!!

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The Washington Legislature in 1973 created procedures, optional with a project developer, for centralized, coordinated processing of the permit applications which state and local government now require for a developer's use of air, water and land. The Act is entitled the Environmental Coordination Procedures Act of 1973 (ECPA),¹ which does not become operative until January 1, 1974.² Since its procedures are optional with a project's developer, there is no absolute certainty at the date this article is released for publication³ that ECPA's coordination will ever be utilized.

The cheers we mean, but the occasion is like that when the home team's quarterback has run 90 yards and tripped on his shoe laces just short of the goal line on the next to the last play in a game with the opponents three points ahead. The cheers are for the performance completed, but even more for the next play which must succeed if the 90-yard run is to be more than exercise. We do not now propose firing the coach because he didn't check the shoe laces.

Cheers are deserved for a spectacular achievement by which environmentalists and development-oriented opponents supported enactment of ECPA.⁴ Cheers are needed if the possibilities of ECPA are to be achieved.

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² "This 1973 act shall take effect on January 1, 1974, except that the department [of Ecology], state agencies and local governments are authorized to take such steps as are necessary prior to that date to insure that this 1973 act is properly implemented on its effective date." ECPA § 18, WASH. REV. CODE § 90.62.906.
³ Except for addition of citations, this article was released for publication on October 8, 1973, and speaks as of that date.
⁴ A Seattle Post-Intelligencer story on May 18, 1973, was headlined: "1973 Legislature Commended by Environmental Lobbyists." The Legislature is praised for not
ECPA won support of opposed groups because both recognized a common enemy. Both were deeply threatened by bureaucracy and red tape to the point of accepting coordination. The developer today is confronted by a bewildering array of laws whenever he proposes a project which may affect air, water, and land resources of the state. Most such laws have a potential to protect people and their environment, but their complexity and multiplicity bewilder environmentalists who seek to bring developers to book. The year 1973 appears to be the date when both antagonists got tired of rushing off in search of the arena for the day's jousting.

ECPA's grand design is to provide for centralized and coordinated processing of all the permit applications which a developer may require for a project. It exposes the entire project to a public hearing at which all cognizant state agencies will be represented, before action is taken on any state permit application. It includes consolidated administrative and judicial review. It leaves each state agency issuing permits with the same substantive powers it now has, but promises expedited decisions with the Department of Ecology (Ecology) as expeditor.

enacting a Highway Department bill to exempt that Department from the requirement of environmental impact statements under the State Environmental Policy Act. ECPA is praised as an Act which "sets up a system for clearance of permits for developments." Id. at A9, cols. 2-8.

The Washington Environmental Council's undated Legislative Wrapup published at the end of the First Extraordinary Session of 1973 emphasizes that a major part of the 1973 environmental successes were in the fact that "we didn’t lose." Two "very important bills" enacted were tax exemption for nature conservancy land and "an environmental coordination act." The latter will "provide not only for more efficient handling of the permit-granting process but also establishes a hearings procedure and a chance for members of the public to appeal the outcome of the hearings if they disagree." Washington Environmental Council, Legislative Wrapup (1973). This is not accurate with respect to appeals, unless the reference is to a possibility that ECPA will give the public greater knowledge of the occasion for an appeal. Under ECPA, review is in fact narrower than under proceedings not involving ECPA. See Part II-D infra.

5. ECPA § 2(7), WASH. REV. CODE § 90.62.020(7), defines "project" as follows:

[A] ny new activity or any expansion of or addition to an existing activity, fixed in location, for which permits are required from the Department of Ecology and one or more other state agencies prior to construction or operation, including but not limited to industrial and commercial operations and developments.

See Part II-C infra for discussion of a further provision which removes from this definition proprietary interests of the state, principally those administered by the Department of Natural Resources and the Commissioner of Public Lands.

6. See Appendix A infra, a letter from Mr. Charles B. Roe, Jr., Senior Assistant Attorney General for the Department of Ecology, to Professor Charles E. Corker, which contains a nonexclusive list of agency permits which Mr. Roe believes will be covered by ECPA.
The question now is, will it work? At this moment, the mechanism for ECPA’s launching is still under construction. Ecology and the Washington Attorney General’s staff are engaged in the formidable task of devising regulations, forms and procedures that will determine how the attempt to make it work will proceed. ECPA already has survived a prenatal crisis. The Legislature directed Ecology to advise both Houses by June 30, 1973, how much ECPA will cost before a planned “mini-session” of the Legislature met in September; Ecology responded with a figure of $794,533 for a biennium. The Legislature appropriated $500,000 instead, and Ecology is trying to make do.

The significance of the historic detente between environmentalists and developers is not clear. Dr. Pangloss surely would conclude that both these groups have, at long last, awakened to an important and deeply fundamental truth. Defending the environment and development are not objectives in a zero-sum game in which one side can win only what the other side loses. With Dr. Pangloss, we believe the game is not zero-sum, but we are not totally optimistic that neither side has been overreached, nor that ECPA as enacted will not disappoint almost everyone. Changes must be made.

ECPA has flaws which should be apparent whether one wears a white hat, a black hat or no hat at all. Fortunately, these flaws are readily correctable by the Legislature. Some may be mitigated by regulations. The flaws we explore in Part II, following a summary in Part I of how ECPA operates. The important contribution we hope to have made is in Part III. While it appears that the Legislature may not have fully perceived it, ECPA offers the possibility of a mutually beneficial coordination with the State Environmental Policy Act of 1971 (SEPA). Realization of that possibility is a necessity if SEPA and

7. ECPA § 20 (uncodified). Appendix B infra, excerpt from Ecology’s report to the Legislature, shows that $794,533 will be required in the 1974–75 biennium and details how Ecology proposed to spend this money.
    Requiring a report of costs before ECPA is launched is wise. Washington’s Water Rights Registration Act, Wash. Rev. Code ch. 90.14 (Supp. 1972), was originally enacted in 1967, but its registration provisions were formally declared inoperative by duly promulgated regulation after the Director of Water Resources ascertained that $225,000 needed to administer registration was unavailable, or better spent on other departmental programs. See Corker & Roe, Washington’s New Water Rights Law—Improvements Needed, 44 Wash. L. Rev. 84, 87-100 (1968). One biennium was lost in getting the registration program under way by a modified version charging water right claimants $2 for registration. See Wash. Rev. Code § 90.14.061 (Supp. 1972).
ECPA are to avoid becoming statutory relics of a passing environmentalist fad.

I. ECPA'S PLAN OF OPERATION—TWO PROBLEMS AND A SINGLE SOLUTION

At the outset, ECPA identifies two problems. First, the developer is faced with a myriad of laws, hard to identify, and costly to satisfy, in launching his project.\(^\text{10}\) Second, the defenders of the environment have an equally hard time identifying the laws with which a developer can be forced to comply, and making sure that the public’s interest is adequately protected in what is usually a cluster of low visibility governmental decisions.\(^\text{11}\)

Unlike Washington’s Thermal Power Plant Siting Act,\(^\text{12}\) which created an Evaluation Council with power to recommend a final decision to the Governor,\(^\text{13}\) ECPA leaves all agency powers with the agency which now has them. The ECPA concept is imaginative, its execution

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\(^{10}\) It is the sense of the legislature that the heavy burdens placed upon persons proposing to undertake certain types of projects in this state through requirements to obtain numerous permits and related documents from various state and local agencies are undesirable and should be alleviated. ECPA § 1(I), WASH. REV. CODE § 90.62.010(1).

\(^{11}\) The Legislature further finds that present methods for obtaining public views in relation to applications to state and local agencies pertaining to these projects are cumbersome and place undue hardships on members of the public thereby thwarting the public’s ability to present such views. Id. § 1(2), WASH. REV. CODE § 90.62.010(2).

\(^{12}\) WASH. REV. CODE ch. 80.50 (Supp. 1972).

\(^{13}\) Id. § 80.50.030 lists 15 state agencies to be represented on the “thermal power plant site evaluation council.” Certification of a site by the Governor pursuant to recommendation of this council “shall bind the state or any of its departments, agencies, divisions, bureaus, commissions or boards as to the approval of the site and the construction and operation of the proposed thermal power plant and any associated transmission lines.” Id. § 80.50.120(1). The Governor is apparently limited to a choice to “approve or reject the application for certification” and his choice is “final as to that application.” Id. § 80.50.100.

The Thermal Power Plant Siting Act, like ECPA, captured environmental enthusiasm, but we are not sure why. If, after the state has been bound by the Governor’s certification, the state learns of previously unsuspected hazards from power plants, or that power can now be cheaply transmitted without devoting thousands of acres to surface transmission lines, the state will nevertheless be irrevocably “bound”—unless the Legislature is somehow then able to unwind the whole affair. Federal preemption of Chapter 80.50—only a possible threat to environmentalist advocates in 1970—may be a welcome happening before 1980. For more sympathetic views of the Thermal Power Plant Siting Act, see Symposium, The Location of Electricity Generating Facilities, 47 WASH. L. REV. 1 (1970).

ECPA § 3, WASH. REV. CODE § 90.62.030, makes ECPA inapplicable to thermal power siting matters controlled by WASH. REV. CODE ch. 80.50.
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complicated. We can best describe ECPA's operation by the following hypothetical case.

General Widgets, Inc., (GW) proposes to build a widget processing plant. It needs a zoning permit from local government, numerous permits from state agencies and a few permits from the United States. GW need not follow the procedures which ECPA offers; it may apply for all needed permits under present law and present procedures. GW may, however, choose to follow coordinated procedures of ECPA, and if GW does so, this is what happens. Appendix C is a diagram which may assist both in following the detailed description of ECPA which follows in this Part I, and the proposed modification in Part III.

STEP 1. Certification by Local Government

Having decided to utilize the coordinated procedures of ECPA, GW must first secure a certification from local government that its project "is in compliance with all zoning ordinances, and associated comprehensive plans," or that the certifying local government has no such ordinances or plans with which GW must comply. ECPA directs local governments to rule on GW's applications for this certification "expeditiously." We expect that Ecology will give some content to what "expeditiously" means in its forthcoming regulations.

14. Although ECPA does not inventory the state laws it seeks to coordinate, the Act does direct Ecology to make the inventory, and that operation is still in progress. Appendix A is a letter and enclosures from Mr. Charles B. Roe, Jr., Senior Assistant Attorney General for the Department of Ecology. Mr. Roe, a major draftsman of ECPA, lists representative statutes subject to coordination.

In addition, however, ECPA proposes to do something about complications of both local and federal laws. Ecology is to establish "permit requirements information centers" in Olympia and "in all of its regional offices." ECPA § 12(1), WASH. REV. CODE § 90.62.120(1).

15. ECPA § 1(2)(a), WASH. REV. CODE § 90.62.010(2)(a), lists as its first purpose to provide "an optional procedure" to assist those who must obtain state permits for a project to use the state's air, land, or water resources. This precludes any possibility that "may" means "shall" or "must" in ECPA § 4(1), WASH. REV. CODE § 90.62.040(1), which says that "Any person proposing a project may submit a master application to the department [of Ecology] requesting the issuance of all permits necessary prior to the construction and operation of the project in the state of Washington."


17. Id. § 10(1), WASH. REV. CODE § 90.62.100(1).

18. Id.

19. "The department [of Ecology] shall adopt such rules as are appropriate to carry out the provisions of this chapter." Id. § 11(1), WASH. REV. CODE § 90.62.110(1).
Consequences of this local government certification are two. First, the certifying local government is forbidden to change its zoning ordinances to affect the proposed project until all further ECPA proceedings including appeals have been completed.20 Second, no environmental impact statement is required on the occasion of the local government's certification.21 This is contrary to three recent decisions of the Washington Supreme Court;22 the law will still require an impact statement in all appropriate cases if the applicant does not proceed under ECPA.23

STEP 2. Completion of the Master Application

GW must submit to Ecology, on a form to be furnished by Ecology, a master application accompanied by the certifications of local government.

The local government does not share this rulemaking mandate. "State agencies and local governments shall cooperate fully in the preparation implementation [sic] of rules authorized under this section and in otherwise carrying out the provisions of this chapter." Id. § 11(2), WASH. REV. CODE § 90.62.110(2). Ruling on application for certification must take place "expeditiously to insure the purposes of this chapter are accomplished fully." Id. § 10(1), WASH. REV. CODE § 90.62.100(1). Ecology is the only coordinator and expediter. Rules should include specification of remedies and sanctions for failure to act "expeditiously." Should a failure of local government be corrected by Ecology, by the developer, or by an organizational defender of the environment? If a municipality certifies compliance erroneously, will Ecology proceed as ECPA directs despite a pending judicial challenge to the certification?

20. "Upon certification, the local government may not change such zoning ordinances so as to affect the proposed project until the procedures of this chapter, including any board or court reviews are completed." ECPA § 10(1), WASH. REV. CODE § 90.62.100(1).

21. "The provisions of the state environmental policy act relating to the preparation of detailed impact statements shall not be applicable to the action approving or denying certifications [by local governments] authorized in this section." Id. (emphasis added). The reference is to SEPA § 3(c), WASH. REV. CODE § 43.21C.030(c), a direction to all branches of state and local government to include in "every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on . . . (i) the environmental impact of the proposed action . . . " (emphasis added). The law makes no provision for environmental impact statements which are not "detailed."


23. The four decisions in the preceding footnote are arguably wrong, because they overlooked the policy implications of ECPA § 10. Our conclusion, however, is to the contrary. In Part II-B and Part III infra we state our view that both consequences of ECPA § 10 are unfortunate, that either § 10 must be modified or SEPA should be repealed as a bad job.
government described in STEP 1. This master application must contain "precise information as to the location of the project" and a description of "the nature of the project including . . . any uses of, interferences with, natural resources contemplated." Assessment of how formidable GW's STEP 2 task may be is impossible until the form and regulations have been devised. If ECPA is to succeed, however, the master application must be carefully prepared. Only a "properly completed master application" authorizes Ecology to take STEP 3.

STEP 3. Immediate Written Notification by Ecology to all State Agencies With "possible interest"

Upon receipt of a properly completed master application (STEP 2), accompanied by local government certification that the project complies with zoning laws and master plans, or certification that no such laws exist (STEP 1), Ecology must "immediately notify" all state agencies which have a possible interest in the project that an application has been received. A copy of the master application must accompany this notice. If the master application serves its purpose, we envisage a document in some cases weighing several pounds. Many copies often will be required for distribution to state agencies under STEP 3.

STEP 4. State Agency Response to Master Application

The agencies notified by Ecology that GW has submitted a master

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25. The Legislature directs Ecology to adopt rules for "Master application procedures under section 4(1) and (2) of this 1973 act." Id. § 11(1)(a), WASH. REV. CODE § 90.62.110(1)(a).
26. Id. § 4(2), WASH. REV. CODE § 90.62.040(2).
27. Id.
28. Regulations may cut the duplicating costs: (1) The master application form may invite attachments and appendices, which are not part of the form for this purpose, but which may be supplied to a sister agency of Ecology which thinks they are important; (2) a sister agency may delegate an Ecology employee as the sister agency's representative to inspect and copy only relevant portions of the master application. Further, if the information "in readily understandable form" which Ecology is to prepare for public information under ECPA § 12 (see note 14 supra) serves its purpose, Ecology may develop some expertise in narrowing its selection of the agencies with a "possible interest" which must be notified and sent copies of the master application. "[P]ossible interest" arises only when an agency has "a permit program under [its] jurisdiction." ECPA § 4(2), WASH. REV. CODE § 90.62.040(2). Ecology should be able to understand the ambit of those programs.
application (STEP 3) must advise Ecology within whatever time Ecology permits—but “not exceeding fifteen days from receipt”—whether the agency has an interest.\(^2\) If the notified agency says it has no interest, or if it says nothing, it is precluded thereafter from enforcing its regulatory law against GW, unless the fault is attributable to lack of information or misinformation in GW’s master application.\(^3\) If a notified agency says that it has an interest, it may also advise Ecology that it regards a public hearing to be of no value, a position that becomes important only if Ecology and all interested sister agencies concur.\(^4\)

If an agency is in doubt—or if it is unable to study the master application within the maximum 15 days permitted—it should express its interest. The agency thereby stays in the ball game; it may withdraw from the proceeding at any later time with no apparent adverse consequence.\(^5\)

STEP 5.  *Ecology’s Assembly and Transmittal of Application Forms to Project Applicant*

After all interested state agencies have responded, or have been precluded by lapse of time from ever responding (STEP 4), Ecology is to assemble and send to GW an application for every individual permit needed.\(^6\) In contrast to the carefully specified maximum of 15

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\(2\). ECPA § 4(2), WASH. REV. CODE § 90.62.040(2).

\(3\). The bar to requiring a permit subsequently shall not be applicable if the master application provided the notified agency contained false, misleading, or deceptive information, or other information, or lack thereof, which would reasonably lead an agency to misjudge its interest in a master application.

*Id.* We are highly unenthusiastic about punishing delay or error made by a state agency by precluding the agency forever from enforcing a regulatory program. This is a punishment which fits neither the crime nor the criminal, since it is visited on the public for whose benefit regulatory and environmental laws are enacted.

\(4\). See STEP 6 infra.

\(5\). See note 41 infra.

\(6\). A state agency responding affirmatively . . . may withdraw from further participation . . . by written notification to the director [of the Department of Ecology]. If it subsequently appears to such state agency that it has no permit programs under its jurisdiction applicable to the project.

ECPA § 7, WASH. REV. CODE § 90.62.070. Does this provision support an applicant’s argument that he too may withdraw without prejudice? See Part II-D infra for one important reason an applicant may wish to do so. This is a fruitful subject, we suggest, for regulations.

\(7\). ECPA § 6(9), WASH. REV. CODE § 90.62.060(8), provides that a state agency may request or receive additional information “from an applicant and others” before
days given sister agencies to respond to notice from Ecology of receipt of a master application, the Act says nothing about how soon Ecology must mail the applicant the required forms. ECPA leaves it to Ecology's regulations to specify what happens if GW is late in returning completed applications.

STEP 6. Public Hearing Called by Ecology

A reasonable time after completed application forms have been received from GW by Ecology, and transmitted by Ecology to each state agency which has indicated an interest in the project, Ecology must publish at applicant's expense a newspaper notice three times at intervals of one week, advertising a public hearing to take place at a specified time not later than 20 days after publication of the third notice. The notice must describe the project, and it must advise the public that GW's master application and all permit applications are available for inspection at three places: in the project's county, at Ecology's Olympia office (which Ecology does not have) and at

or after the public hearing, which we describe as STEP 7 infra. Suppose a sister agency fails to respond affirmatively to Ecology that it has an interest, but requests information from the applicant. Does a literal reading of the Act forever preclude the agency from enforcing its permit requirement? Doubtless another subject for regulations.

35. ECPA § 4(3), WASH. REV. CODE § 90.62.040(3).
36. Id.
37. Suppose that on receipt of application forms for completion, General Widgets discovers that some permits are too difficult to complete accurately at this stage because of possible alternative courses of action or extensive studies which must precede the permits. An example would be a permit for groundwater, which may require geohydrologic data not needed until completion of the plant several years in the future. Also, there may exist a possibility that an available alternative to groundwater may in the interim prove cheaper or more satisfactory. Can GW now dismiss, or simply forget about the ECPA proceeding, and pursue individual applications as needed just as if no application had ever been filed? See note 33 supra.
38. Publication must be in a newspaper of general circulation in each county where the project would be constructed or operated. "The notice shall describe the nature of the master application including, with reasonable specificity, the project proposed, its location, the various permits applied for, and the state agency having jurisdiction over each such permit." ECPA § 5(1), WASH. REV. CODE § 90.62.050(1). The quoted sentence contains a solecism. The master application does not "include" the permits applied for, or the agencies having jurisdiction, because the master applicant does not know this at the time he prepares the application. This is probably harmless.
39. See note 125 infra, second to last paragraph.
Ecology's appropriate regional office, together with such other locations as Ecology may designate.\textsuperscript{40} A unanimously expressed view by Ecology and all responding state agencies that the hearing would be of no value permits an alternative. Instead of a hearing, the public may submit information in writing within 30 days.\textsuperscript{41}

STEP 7. Public Hearing

Except with respect to the place (county in which all or a major part of the project is located)\textsuperscript{42} and time the hearing begins,\textsuperscript{43} ECPA says surprisingly little about the public hearing. Its purpose is "obtaining information for the assistance of state agencies" which are represented.\textsuperscript{44} The chairman is the Director of the Department of Ecology, or a hearing officer appointed by him.\textsuperscript{45} Each interested agency is to be represented by its executive officer, or his designee, and the portion of the hearing related to the particular agency's permit shall be conducted by that representative. The hearing may be continued "from time to time and place to place." It shall be "recorded in any manner suitable for transcription as determined by the department," but what, if anything, shall be done with the record ECPA leaves to inference or future regulations.\textsuperscript{46}

\textsuperscript{40} ECPA § 5(1), WASH. REV. CODE § 90.62.050(1). See note 125 infra. Identifying that office does not appear possible in all cases from WASH. AD. CODE § 173-02-040(2) (Supp. 10A, 1972), quoted in note 125 infra.
\textsuperscript{41} ECPA § 5(2), WASH. REV. CODE § 90.62.050(2), says that no public hearing is required after a unanimous agency response that a public hearing "would not be of value taking into consideration the overall public interest" and a "careful evaluation [by Ecology], taking into consideration all interests involved, including the opportunities for members of the public to present views." We would suppose that preparation for a public hearing if it is to be meaningful would usually take more time, not less, than is required for presentation of "relevant views and supporting materials in writing." We fear that the 30 days for the written presentation, 20 for the oral, bespeaks an expectation by the Legislature that hearings will serve to let off steam, rather than to inform anyone.
\textsuperscript{42} Id. § 6(1), WASH. REV. CODE § 90.62.060(1).
\textsuperscript{43} See STEP 6 supra.
\textsuperscript{44} ECPA § 6(3), WASH. REV. CODE § 90.62.060(3).
\textsuperscript{45} Id. § 6(2), WASH. REV. CODE §90.62.060(2). "Chairman" and masculine pronouns appear in ECPA and should be read generically to comprehend both sexes, a common sense proposition which would have simplified the Legislature's task in Ch. 154, [1973] Wash. Laws. 1st Ex. Sess. See Dybwad, Implementing Washington's ERA: Problems With Wholesale Legislative Revision, 49 WASH. L. REV. (1974).
\textsuperscript{46} ECPA § 6(2), WASH. REV. CODE § 90.62.060(2).
The significant provisions about the hearing are stated in the negative. No provisions of the Washington Administrative Procedure Act (APA)\textsuperscript{47} apply to the public hearing. Further, the hearing "shall not be considered a trial or adversary proceeding."\textsuperscript{48}

Upon completion of the public hearing the chairman after consulting agency representatives shall determine "the date" by which all state agencies must forward "final decisions" on applications for permits to Ecology.\textsuperscript{49} The chairman may later extend that date "for reasonable cause."\textsuperscript{50}

STEP 8. Agency Decisions

"Final decisions" on permit applications are made by each agency administering an applicable permit law unless an agency has given a negative response or has failed to respond to notice of Ecology's receipt of a master application (STEP 4). After each agency transmits its substantive decisions to Ecology, Ecology is to incorporate all decisions "into one document without modification,"\textsuperscript{51} and transmit the document to the applicant. "Each state agency having jurisdiction to approve or deny an application for a permit shall have continuing power as vested in it prior to enactment of this 1973 act to make such determinations."\textsuperscript{52}

Judicial interpretation of SEPA has made clear that each agency decision, if the decision is a major action significantly affecting the environment, be preceded by an environmental impact statement.\textsuperscript{53}

\begin{footnotesize}
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\item \textsuperscript{47} WASH. REV. CODE ch. 34.04 (1963).
\item \textsuperscript{48} ECPA § 6(3), WASH. REV. CODE § 90.62.060(3).
\item \textsuperscript{49} Id. § 6(4), WASH. REV. CODE § 90.62.060(4).
\item \textsuperscript{50} Id. ECPA § 6(5), WASH. REV. CODE § 90.62.060(5), contains parallel provisions applicable when written "views and supporting material" are invited instead of a public hearing.
\item \textsuperscript{51} Id. § 6(6), WASH. REV. CODE § 90.62.060(6).
\item \textsuperscript{52} Id. § 4(7), WASH. REV. CODE § 90.62.040(7). This provision creates awkwardness when, in 1974 or later, a permit statute is modified. The draftsman of future amendments to each permit statute will have to specify whether it is intended \textit{pro tanto} to modify ECPA § 4(7). ECPA § 4(7) \textit{should} provide: "The jurisdiction and powers of each agency to approve or deny an application for a permit are not affected by this chapter except as this chapter expressly provides."
\item \textsuperscript{53} See Part III \textit{infra}, which contains a description of SEPA and how the Washington court has construed that Act.
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ECPA, however, makes no mention of how the impact statement is to integrate into its procedures.

ECPA apparently affects the making of "final decisions" in only two ways: (1) The time for agency decisions is established by the chairman of the public hearing on completion of the hearing, after consultation with agency representatives appointed to the hearing. The time may be extended for "reasonable cause." ECPA § 4(4), WASH. REV. CODE § 90.62.040(4). ECPA § 4(5), WASH. REV. CODE § 90.62.040(5), applies parallel provisions where the public hearing is replaced by written submissions.

(2) Each "final decision" shall "set forth the basis for the conclusion reached together with a final order denying the application for a permit or granting it, subject to such conditions of approval as the deciding agency may have power to impose." ECPA § 6(4) provides that a "final decision" shall "set forth the basis for the conclusion reached." Juxtaposition of this provision with ECPA § 6(3), describing the public hearing, supports a possible inference that the "basis for the conclusion reached" should be related to information developed at the public hearing, but the inference is weak. ECPA § 6(5) curiously omits any requirement to "set forth the basis for the conclusion reached" when a public hearing is displaced by an invitation for written submissions. See WASH. REV. CODE §§ 90.62.060(4), (3), (5).

STEPS 9 and 10. Administrative and Judicial Review

Any person aggrieved by final decisions of the state agencies may obtain review by request filed with the Pollution Control Hearings Board within 30 days after Ecology has created its "one document" and transmitted it to the applicant (STEP 8). If review is sought of an action granting or denying a substantial development permit under the Shoreline Management Act, request for review must also be filed with the Shorelines Hearings Board. In the latter event, review is by both boards. The two boards are authorized to adopt rules and regulations to implement ECPA's direction that there shall be "a single staged hearing." ECPA § 8(1), WASH. REV. CODE § 90.62.080(1).

55. ECPA § 6(4) provides that a "final decision" shall "set forth the basis for the conclusion reached." Juxtaposition of this provision with ECPA § 6(3), describing the public hearing, supports a possible inference that the "basis for the conclusion reached" should be related to information developed at the public hearing, but the inference is weak. ECPA § 6(5) curiously omits any requirement to "set forth the basis for the conclusion reached" when a public hearing is displaced by an invitation for written submissions. See WASH. REV. CODE §§ 90.62.060(4), (3), (5).
57. ECPA § 8(1), WASH. REV. CODE § 90.62.080(1).
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alia, it is "unsupported by material and substantial evidence in view of the entire record as submitted; or . . . arbitrary and capricious." 58 Thus, administrative review under ECPA is confined to the restrictive standards for judicial review as set out by the APA, and neither Board has power to review the facts de novo because R.C.W. § 34.04.130(5) limits review to the record below, except in cases of procedural irregularity.

II. LEGISLATIVE CORRECTIONS NEEDED

The concepts of ECPA are good. By "concepts" we mean the opportunity for a developer to find out what the law requires, the opportunity for the public to be heard at an early stage59 after the various agencies and their requirements have been identified, and a single review proceeding thereafter. Unfortunately, ECPA contains serious flaws which defeat its purposes. In this Part we shall list the egregious flaws. Fortunately, all are readily correctable by legislation consistent with the above concepts.

A. Neither Coordination nor Public Hearing Should be Left to the Developer's Whims

ECPA states its first legislative purpose is to "provide for an optional procedure" to assist applicants for permits. 60 That, however, is not ECPA's only purpose, and the realization of the other purposes should not be left to the choice of the developer.

Conceivably, most developers will choose to invoke ECPA because it offers expedited procedures which place upon Ecology the onus of contacting and coordinating all interested state agencies. In addition, developers should know that avoiding ECPA does not necessarily

59. David V. Schuy, Extension Economist, Cooperative Extension Service, Washington State University, Pullman, Washington, effectively criticized an early draft of this paper which proposed that ECPA be amended to defer the public hearing until after any impact statement is available to the public. He emphasizes, from experience with public participation, that public involvement at an early state is important in identifying issues and alternatives. His comment was the genesis of our proposal in Part III-C infra that the public hearing take place in two phases, one before and one following availability of the impact statement.
60. See note 15 supra.
avoid a public hearing. This is because the power of a state agency to hold a hearing, if a hearing appears useful, is probably sufficient without ECPA. Ultimately, if state agencies become enthusiastic about ECPA, the developer may perceive that his applications are likely to be left on a back burner if he does not choose to follow the procedures provided by ECPA.

Clearly not all projects are appropriate occasions for the intricate ECPA procedures, but developer's choice is a poor way to select those projects where the ECPA scheme of coordination and public participation is appropriate. ECPA procedures should be mandatory in all cases, except that Ecology should have discretion to make a preliminary decision in some cases that the ECPA pattern need not be followed.

B. County and City Zoning Laws Should be Coordinated With State Agency Decisions and not Stultified

ECPA compels local governments "expeditiously" to issue a certificate that the project is in compliance with zoning laws and associated comprehensive plans, or that none exists; thereafter the local government may not change its applicable laws until ECPA procedures have run their course, through judicial review. This "expeditious" decision necessarily occurs before a full and complete consideration of environmental issues relating to the project can be conducted by local officials, because ECPA permits the developer to bypass at the local level the impact statement requirements of SEPA. Section 10(1) of ECPA provides:

The provisions of the state environmental policy act relating to the preparation of detailed impact statements shall not be applicable to the action approving or denying certifications [by local governments] authorized in this section.

61. In Stempel v. Department of Water Resources, 82 Wn. 2d 109, 508 P.2d 166, (1973), the Washington supreme court noted that the predecessor of the Department of Ecology held a public hearing, the authority for which the court did not identify. The Washington Ecological Commission, see WASH. REV. CODE §§ 43.21A.170-210 (Supp. 1972), has provided an umbrella for Ecology to hold lots of hearings. Where two or more state officers or employees gather with the public in the name of the environment, it probably is a public hearing if someone says it is a public hearing.

62. ECPA § 10(1), WASH. REV. CODE § 90.62.100(1).

63. Id.
Because the role of local government concludes with issuance of the certificate and no impact statement need be prepared at that time, local government will be forced out of the action before the local public can be informed fully by an ECPA hearing or an impact statement that widget processing plants smell bad, pollute both air and water, and harm the health of the community.

The recommended solution is to permit local government to participate like a state agency in the ECPA hearing, then to make its zoning decisions, and finally to participate in any coordinated administrative and judicial review. This is the ECPA solution with respect to air pollution and shoreline management, and it should be the solution to zoning decisions whenever local government chooses. In addition, the Legislature should delete the last sentence of Section 10(1), quoted above. Two recent decisions by the Washington Supreme Court result in a conclusion that SEPA requires an impact statement for zoning decisions which have significant environmental effect. These cases seem to bring SEPA, as judicially construed, into conflict with ECPA Section 10(1), which clearly exempts zoning decisions from the impact statement requirement. No case at all can be made for offering a bypass of SEPA as a carrot to a developer who chooses ECPA; this destroys the integrity of both Acts. Nor can a case be made for placing certain zoning decisions outside the environmental mandates of SEPA, on the sole ground that the decisions were made pursuant to an application under ECPA. For these reasons, the exemption should be deleted.


Haas v. Kirkland, 78 Wn. 2d 929, 481 P.2d 9 (1971), is a refusal to apply the "vested right" rule to a fire protection ordinance and may point toward a narrowing or extinction of the "vested right" view. Health and safety, the constitutional basis for zoning ordinances, are overriding aspects of the police power and not easy to define or limit.

65. For the limited purposes of this chapter only 'state agency' shall also mean (a) any local or regional air pollution control authority established under chapter 70.94 RCW and (b) any local government when said government is acting in its capacity as a decision maker on an application for a permit pursuant to RCW 90.58.140 [Shoreline Management].

ECPA § 2(8), WASH. REV. CODE § 90.62.020(8).

C. ECPA Should not Exclude "proprietary interests in publicly owned property"

ECPA applies to projects for which a "permit" is required, and it defines "permit" in broadest terms. Then it takes back much of the definition when it says: "Nothing in this chapter shall relate to . . . the granting of proprietary interests in publicly owned property such as sales, leases, use permits and licenses."\(^6\) The effect, and apparently the purpose, of that exclusion is to exempt from ECPA most of the programs and activities of the Department of Natural Resources and of its head official, the Commissioner of Public Lands.\(^6\) The Commissioner is an elected official, ex officio administrator of the Department, and a constitutional officer\(^6\) with perhaps greater prestige than the Director of the Department of Ecology, who is politically appointed. The Commissioner has important authority, exercised through "permits," over the tide, shore and other lands of the state. His Department is not environmentally oriented, nor congenial to public participation in its decision-making processes.\(^7\)

Moreover, if the Legislature has determined that the Department of Natural Resources should remain beyond coordination and beyond public participation, except on its own terms, it should have the forti-
tude to say so—expressly. The controlling principle should be that government as owner, employer or neighbor should be a good owner, employer or neighbor. Whether government so chooses or not, it is a model for its citizens. It should be a good model, rather than a bad one.

D. Environmental Permit Decisions Should Have the Same Standard of Review Under ECPA as in Cases Where ECPA does not Apply

Administrative review by the Pollution Control Hearings Board and Shorelines Hearings Board under ECPA is controlled by Section 13 of the APA, which, prior to ECPA, applied only to judicial review of contested cases. Under the scope of review allowed by Section 13, a permit decision will be sustained unless it is unsupported by material and substantial evidence, arbitrary and capricious, or violative of any other condition imposed by that Section. If, however, a developer decides not to proceed under ECPA and subsequently appeals an adverse agency decision to one of these same two Boards, he will be confronted with a totally different standard of administrative review; in a non-ECPA review proceeding, each Board is essentially authorized to review the case de novo and is not constrained by the narrow standard of review imposed by ECPA through Section 13 of the APA. ECPA's limitation of administrative review has several bad consequences:

71. Mr. Justice Frankfurter may have been the last jurisprudential luminary to understand the distinction between dominium and imperium, ownership and jurisdiction. See United States v. California, 332 U.S. 19, 43-44 (1947) (Frankfurter, J., dissenting). The distinction could have been useful, if understood, but Justice Frankfurter failed to make it so, and no one else is likely to succeed.  
72. See text accompanying note 58 supra.  
73. In all appeals involving a formal hearing... the [Pollution Control Hearings] board, and each member thereof, shall be subject to all duties imposed upon, and shall have all the powers granted to, an agency by those provisions of [the Administrative Procedure Act] relating to contested cases. WASH. REV. CODE § 43.21B.160 (Supp. 1972). The Shoreline Management Act contains a parallel provision, codified in WASH. REV. CODE § 90.58.180(3) (Supp. 1972): "The review proceedings authorized in . . . this section are subject to the provisions of [the Administrative Procedure Act] pertaining to procedures in contested cases."

Agencies are given broad authority under the APA to adjudicate contested cases in much the same manner that trial courts hear civil disputes. See WASH. REV. CODE § 34.04.100 (1963). The Pollution Control Hearings Board and the Shorelines Hearings Board presumably have like authority under the provisions quoted above when the Boards review permit decisions of other agencies.
(1) Both Boards are specialized agencies with specialized administrative expertise.\textsuperscript{74} To limit the scope of administrative review, where ECPA has been invoked, defeats the legislative purpose of utilizing expertise—a commendable purpose with nearly a century of administrative law behind it.

(2) Even if there were good reason to limit administrative review, there is no justification to do so only in those cases where a developer has invoked ECPA. Unless the Legislature corrects this mistake, the Pollution Control Hearings Board may find on the same calendar two identical decisions for review. In one, it might reverse because its scope of review is prescribed by the APA unmodified by ECPA. In the other it would affirm, because its review is limited to the standard which Section 13 of the APA makes applicable to review of agency action by a superior court. Such a result could not be explained except by resort to the homely wisdom of Mr. Bumble.\textsuperscript{75}

(3) The competing standards of review—ECPA and non-ECPA—invite forum shopping by the developer. If the developer thinks the agency will be favorable, but that the reviewing board will not, the developer will choose ECPA. If he thinks the converse is likely, he will avoid ECPA. ECPA will place a high premium on the ability to assess and manipulate the "personal imponderables."

(4) Administrators, reviewing boards and courts are wont to do the best they can with the laws the Legislature provides. In this instance, they will exert every pressure to minimize inconsistent results which depend on the path by which a matter comes to the reviewing board. This will distort the important and useful distinctions between judicial and administrative review.

\textsuperscript{74} The [pollution control] hearings board shall consist of three members qualified by experience or training in pertinent matters pertaining to the environment, and at least one member of the hearings board shall have admitted to practice law in this state and engaged in the legal profession at the time of his appointment.

\texttt{WASH. REV. CODE} § 43.21B.020.

A shorelines hearings board sitting as a quasi judicial body is hereby established which shall be made up of six members: Three members shall be members of the pollution control hearings board; two members, one appointed by the association of Washington cities and one appointed by the association of county commissioners, both to serve at the pleasure of the associations; and the state land commissioner or his designee.

\texttt{Id.} § 90.58.170.

\textsuperscript{75} "The law is a ass." C. DICKENS, \textit{Oliver Twist} ch. 51, in \textit{I THE WORKS OF CHARLES DICKENS} (1890).
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The provision criticized here is perhaps another political compromise. Its result is to accord greater finality to decisions by Ecology and by Ecology's sister agencies when ECPA is invoked than otherwise. Even when values of compromise are recognized, however, the price of this compromise is much too large.

E. ECPA Should Provide Coordination of Programs as well as Agencies

The first purpose of ECPA is to assist those who "must obtain a number of permits, from the department of ecology and one or more state or local agencies."76 ECPA allows, but does not require, Ecology to establish a coordinated permit application processing procedure which may be used "at the request of an applicant, in relation to two or more permit programs administered solely by the department of ecology."77 ECPA does not even authorize coordination if Ecology is not one of the agencies administering a permit program.

Apparently the reason that coordination subject to ECPA is permitted, but not required, when no state agency other than Ecology is concerned, is that Ecology, as sponsor of ECPA, envisioned it as a convenient means to coordinate its own programs. Apparently the reason that no coordination is allowed if Ecology is not involved at all is that ECPA is as far as Ecology had the cheek to ask the Legislature to go in letting Ecology cook in the kitchens of its sister agencies.

Neither reason is adequate justification for not making coordination applicable to all environmental programs, regardless of the agency administering them; coordination should depend only on whether it furthers the interest of the public as distinguished from the interest of various segments of the state bureaucracy. Agencies of state government come and go, programs wax and wane, reorganizations make big ones out of little ones, little ones out of big ones, and again regroup.78 The considerations which should be emphasized in this coordination process are need for the programs administered and their efficiency. Making ECPA depend on the name of the agency adminis-

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76. ECPA § 1(2)(a), WASH. REV. CODE § 90.62.010(2)(a).
77. Id. § 11(3), WASH. REV. CODE 90.62.110(3).
78. WASH. REV. CODE ch. 90.03 (1963) is the Water Code of 1917, with innumerable amendments. As handily reprinted by the Department of Ecology with revisions
tering a program at a given moment makes it hard to keep those considerations paramount.

Opportunistic exclusions from ECPA, moreover, are unlikely to reduce interagency tensions. Suppose, for example, that the only program that Ecology administers for which GW needs a permit is an appropriation of groundwater. Probably GW will not need groundwater, but a master application reveals the possibility of need. In every sense, groundwater in this case poses a fringe and dispensable issue, but its inclusion by GW in a master application opens the door to ECPA. Clearly, ECPA as drawn invites manipulative decisions by developers, by state agencies, and by the Legislature in considering agency reorganizations. This is clearly regrettable.

III. THE OPPORTUNITY WHICH ECPA OFFERS:
MUTUALLY BENEFICIAL COORDINATION WITH STATE ENVIRONMENTAL POLICY ACT

After some intensive study of ECPA we have concluded that in addition to the flaws described in the preceding section, ECPA's most serious failure is its failure to coordinate between its procedures and those of SEPA. ECPA's only express reference to SEPA is the sentence in Section 10(1) which provides that no detailed environmental impact statement is required when a local government certifies that a project is in compliance with all zoning laws and comprehensive plans. That sentence must be deleted, for reasons earlier stated,79 if ECPA and SEPA are to function. The problem referred to here, however, is an apparent total failure to coordinate ECPA and SEPA.80 Since the Legislature clearly did not intend to repeal SEPA when it enacted ECPA, it is apparent that the Legislature "intended" coordination with SEPA. We here propose a regulatory scheme which would transform that intent into reality.

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79. See Part II-B supra.
80. Coordination between ECPA and SEPA was proposed by ECPA's major draftsman, Mr. Charles B. Roe, Jr., Senior Assistant Attorney General for the
A. The State Environmental Policy Act of 1971

Patterned closely after the National Environmental Policy Act of 1969 (NEPA), SEPA is the Washington Legislature's sweeping response to recognition that population increase, in combination with accelerating per capita appetites for goods, services and energy, threaten the quality of life in a uniquely magnificent state. SEPA broadly declares that it is the "continuing responsibility" of the state and "all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:" \(^{82}\)

(a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(b) Assure for all people of Washington safe, healthful, productive, and esthetically and culturally pleasing surroundings;
(c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and untimely consequences;
(d) Preserve important historic, cultural, and natural aspects of our national heritage;
(e) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;
(f) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(g) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

The detailed environmental impact statement is SEPA's major device to discharge this awesome task. R.C.W. § 43.21C.030 directs that "all branches of government of this state, including state agencies, municipal and public corporations, and counties" shall include an impact statement "in every recommendation or report on proposals for legislation and other major actions significantly affecting the

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\(^{82}\) WASH. REV. CODE § 43.21C.020.
quality of the environment.”83 “Major actions” and “significantly affecting” are not self-defining terms. The Washington courts and Ecology, however, have thus far taken the Legislature at its word; any other course would do violence to language which is as broad as could be drafted. The same Section of SEPA directs that “policies, regulations and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth . . . .”84 All branches of state government must utilize “a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the design arts.” The responsible official (not precisely identifiable from the SEPA text) must consult with “any public agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”85

As enacted in 1971, SEPA lacked two essentials. First, the responsibilities it placed upon government have not been, and cannot be, achieved without coordinated administrative implementation by which state and local government can carry out the legislative will. Judicial enforcement cannot go beyond halting projects until a proper impact statement has been prepared. Second, while SEPA directs preparation of an impact statement in specified situations, SEPA leaves the substantive effect of the statement unclear. The Act directs that an impact statement be prepared but fails to tell the preparer what to do with it or who to give the final statement to. Further consideration of the present status of these two essentials is necessary before an intelligent approach can be made to the problem of whether and how to factor SEPA into the ECPA procedure.

Plans for coordinated administrative implementation, the first es-

83. Id. § 43.21C.030(2) (emphasis added). The statute requires the responsible official to produce a detailed statement on:

- (i) the environmental impact of the proposed action;
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
- (iii) alternatives to the proposed action;
- (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity; and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

84. Id. § 43.21C.030(1).
85. Id. § 43.21C.030(2)(d).
sentential, can easily be described—there are almost none. Unlike NEPA, which established a Council on Environmental Quality to guide federal agencies, and unlike California's Environmental Quality Act (EQA), which is accompanied by definitive guidelines patterned after the federal model, Washington's SEPA leaves individual governmental officials and entities to struggle without coordination or resources to obey SEPA's sweeping command. Ecology has distributed unofficial guidelines, but it has not attempted to give them any official status, perhaps because of doubt about statutory authority to do so.

86. Ecology has express statutory authority, in only two very limited contexts, to implement and coordinate SEPA: (1) Ch. 179, [1973] Wash. Laws, 1st Ex. Sess., effective on July 1, 1973, under an emergency clause, permits Ecology by rule to exempt building permits and "acts of governmental agencies concerning an individual single family residence" from the detailed impact statement of SEPA. (2) A coordinated impact statement requirement applicable to new highways and new right-of-way acquisitions requires a report from the Department of Highways, transmitted to Ecology for review by the Director. WASH. REV. CODE §§ 47.04.110-130. A public hearing follows rather than precedes the impact report.

87. The duties of the Council, as delineated in 42 U.S.C. § 4344, are essentially threefold: The Council acts as an environmental advisor to the President, conducts independent studies of its own to analyze and define changes and trends in the environment, and rides herd on the federal agencies by reviewing and appraising agency programs established to implement NEPA. The first two duties are manifested in a yearly Environmental Quality Report, required by 42 U.S.C. § 4341, to be transmitted by the President to Congress; the Report is primarily the work product of the Council in its advisory capacity to the President. The third duty has resulted in promulgation of Federal Guidelines for the Implementation of NEPA, see 36 Fed. Reg. 7724 et seq. (1971), which comprise the standard under which individual agencies structure their regulations for compliance with NEPA. See 42 U.S.C. § 4333. The Federal Guidelines, along with those promulgated by individual federal agencies, provide a useful model for implementation of Washington's Act.


Under California's three-tier system (the Act, the State Guidelines and local regulations) individual state agencies fashion their own programs to implement EQA under the uniform hand of the Guidelines and the Act, much as federal agencies function under the purview of the Council on Environmental Quality and NEPA.


The Guidelines were widely distributed in February and March, 1972, for review and comment but have never appeared in the Washington Administrative Code.

91. Cf. CAL. PUB. RES. CODE § 21083 which expressly delegates authority to the California Office of Planning and Research to prepare and develop proposed guidelines for the implementation of EQA by state agencies. The Washington Legislature should supply this omission.
Resolution of questions about the second essential, the substantive effect of SEPA, is more difficult, but recent Washington appellate decisions construing SEPA recognize that the Act demands of a governmental body much more than mere mechanical preparation of an impact statement. In *Eastlake Community Council v. Roanoke Associates*, decided after ECPA's enactment, the Washington Supreme Court held that renewal of a building permit for a highrise condominium on the shore of Seattle's Lake Union was a major action, which, when coupled with the conceded significant environmental impact of the project, required an impact statement before the project could continue.\(^9\)

The renewal of the building permit was a "major action" because it involved a *discretionary* nonduplicative stage of the building department's approval proceedings relative to an ongoing major project.

The developer argued that no impact statement was required in this case because the Building Department was bound and limited in its considerations to the Seattle Building Code, and thus the renewal was a nondiscretionary, ministerial action falling outside the standard for "major action" quoted above. The court held, however, that such a claim was not meritorious because SEPA has introduced discretionary environmental factors into what would otherwise be ministerial governmental decisions: \(^9\)

SEPA requires an integration of environmental factors into the normal governmental decision-making processes, so that the 'presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.'

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\(^9\) 82 Wn. 2d 475, 513 P.2d 36 (1973).

\(^9\) Id. at 490, 513 P.2d at 46 (emphasis added).

\(^9\) Id. at 492, 513 P.2d at 47 (quoting WASH. REV. CODE § 43.21C.030 (2)(b)).

"SEPA mandates governmental bodies to consider the total environmental and ecological factors to the fullest in deciding major matters." 82 Wn. 2d at 490, 513 P.2d at 46.

A recent Washington court of appeals case, decided 20 days prior to *Roanoke*, lends support to this proposition. In *Juanita Bay Valley Community Ass'n v. Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140, 1149 (1973), the court said:

The change in the substantive law brought about by SEPA introduces an element of discretion into the making of decisions that were formerly ministerial, such that even if we assume, arguendo, that the issuance of a grading permit was prior to SEPA a ministerial act, SEPA makes it legislative and discretionary.
The import of the Roanoke court's "broad and vigorous construction" of SEPA is clear: SEPA does not merely impose procedural requirements but is intended to have a real effect on substantive governmental decisions. Mere satisfaction of standards in present codes and regulations will not suffice when SEPA applies; where the decision constitutes a major action significantly affecting the quality of the environment, environmental factors must be considered as well. The Washington court believed that the Legislature meant what it said in SEPA.

SEPA clearly applies to state and local government actions of the type which ECPA is to coordinate. In Roanoke the Washington court said:

95. 82 Wn. 2d at 490, 513 P.2d at 46.
96. Because both SEPA and the California Act are patterned after NEPA, the Washington court in Roanoke utilized judicial interpretation of EQA and NEPA as persuasive authority for its decision. The trend among federal courts has been to give NEPA substantive, not just procedural, effect. See Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289, 298 (8th Cir. 1972):
The unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill government archives.
Following the federal example, the California supreme court has given a similar interpretation to EQA. See Friends of Mammoth, 8 Cal. 3d at 254–55, 502 P.2d at 1035, 104 Cal. Rptr. at 765.
97. In so concluding, the Washington court drew support from a case decided four months earlier which construed SEPA in the context of a claim by the Department of Water Resources (now part of the Department of Ecology) that environmental factors need not be considered when acting upon a water appropriation application. In Stempel v. Dep't of Water Resources, 82 Wn. 2d 109, 118, 508 P.2d 166, 171 (1973), the court held that SEPA made "[e]nvironmental protection... a mandate to every state and local agency and department. Consideration of environmental values is advanced under SEPA."
One commentator has pointed out articulately the practical difficulties inherent in environmental balancing by agency decision-makers. See Murphy, The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace?, 72 COLUM. L. REV. 963, 973–81 (1972) [hereinafter cited as Murphy]. This commentator sees a need for more definitive legislative standards before NEPA can become a workable tool for the federal agencies. Cf. Crampton & Berg, On Leading a Horse to Water: NEPA and the Federal Bureaucracy, 71 MICH. L. REV. 511, 520, 527 (1973); Friedman, The National Environmental Policy Act of 1969—The Brave New World of Environmental Legislation, 6 NAT. RES. LAW. 44, 56–65 (1973). "Similarly, the whole concept of preparing an impact statement is to 'ensure that the balancing analysis is carried out and given full effect' [citing Calvert Cliffs]." Id. at 65.
98. 82 Wn. 2d at 489, 513 P.2d at 45.
Government agencies essentially affect the environment in two ways. First, they may...grant permits or licenses to private projects affecting the environment [citing Stempel v. Department of Water Resources99 and Friends of Mammoth v. Board of Supervisors100]. Second, the governmental agencies may initiate and develop projects of their own...Under either agency function, [agency] activities are the 'action' covered by SEPA though in the first example the actual project is undertaken by a non-governmental entity.

Loveless vs. Yantis101 later confirmed this construction of SEPA by requiring an impact statement from a board of county commissioners prior to granting a preliminary plat for a condominium project. Federal interpretations of NEPA,102 and California interpretations of EQA,103 are in accord. Judicial application of SEPA to agency licensing of private developers removes the last logical hurdle between SEPA and ECPA. Thus, the burden falls rightfully on ECPA, as an administrative framework for expediting permits, to give practical substance to SEPA in this context.

B. The Problem—Lack of Coordination Between SEPA and ECPA

The problem posed by the Legislature's apparent failure to coordinate ECPA with SEPA is twofold: (1) Without agency input and supervision, the private developer is left free to produce an impact statement which may meet the procedural letter of SEPA but avoid the...

100. 8 Cal. 3d 1, 500 P.2d 1360, 104 Cal. Rptr. 16, as modified, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).
102. See, e.g., Calvert Cliffs' Coordinating Comm. v. AEC, supra note 96 (NEPA applies to AEC licensing of nuclear electrical power producing facilities); Citizens for Clean Air v. Corps of Engineers, 349 F. Supp. 696 (S.D.N.Y. 1972) (NEPA applies to applications by private parties to construct facilities or discharge wastes into navigable waters); Natural Resources Council v. Morton, 337 F. Supp. 170 (D.D.C. 1972) (NEPA applies to sale of oil lease on continental shelf by Interior Department).
Both the President and the Council on Environmental Quality seem to have construed licensing as falling within NEPA. See Exec. Order No. 11,514, 3 C.F.R. 104 (1970) and the Federal Guidelines § 5(a) (ii), 36 Fed. Reg. at 7724. See generally Murphy, supra note 97, at 966-67.
103. See Friends of Mammoth v. Bd. of Supervisors, supra note 100. The legislative and administrative response to that case are comprehensively discussed in Seneker, The Legislative Response to Friends of Mammoth—Developers Chase the Will-O'-The-Wisp, 48 Cal. B.J. 127 (1973) and Ackerman, Impact Statements and Low Cost Housing, 46 S. Cal. L. Rev. 754, 777-86 (1973).
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spirit of the Act by presenting only the developer's side of the argument. (2) As presently constituted, ECPA totally ignores the impact statement as a vehicle for bringing environmental issues before the public and the decision-makers in comprehensive and comprehensible form. Instead, the issues are supposedly aired at a public hearing which occurs before the public has had an ample opportunity to identify, much less digest, the environmental implications of the project, and before the agencies have had an opportunity to bring their expertise to bear on the problem. The purpose of this section is to point out the consequences of these two deficiencies.

Without coordination between ECPA and SEPA, the chances for an objective impact statement prepared by a developer proceeding under ECPA are slim. The studies and the writing which precede the final report constitute an expensive, time-consuming business, and much of the time consumed must be that of experts, not press release writers. As a practical matter, impact statements are usually prepared by the well-financed developer because he alone possesses the necessary resources. He usually obtains the sought-after permit because his impact statement meets the mechanical requirements of SEPA. Mr. Justice Douglas, dissenting in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, identified this problem threatening NEPA and SEPA when he quoted one of the major congressional sponsors of NEPA:

I am fearful that we are breeding a race of impact statement writers who put all the right words down but don't really get environmental concerns involved in the decision-making process . . . . The impact statement should be a discipline [for inserting environmental factors into the judgmental process] and also a process by which the public can be informed and brought into the decision-making process.

If the developer supplies the "right words," they are likely to be the ones most favorable to his cause, which is project completion with a minimum of quibbling over environmental amenities. The decision-maker is thus left with a project justification statement. SEPA

104. 412 U.S. 669 (1973). In *SCRAP*, a divided Supreme Court held on narrow grounds of statutory construction that NEPA did not repeal by implication the Interstate Commerce Commission's exclusive power to suspend rates.

105. 412 U.S. at 713 n.10 (Douglas, J., dissenting), quoting Representative Dingell.

106. See, e.g., the criticisms contained in the Trial Court's Oral Decision in Mensalvas v. Spellman, Civil No. 755-567 (King County Superior Court, Sept. 15,
affords an opportunity for judicial intervention when a procedural step—including the "right words"—has been missed. However, once a body of law has been created from cases like *Stempel, Roanoke* and *Loveless*, procedural miscues by developers are likely to become infrequent, and successful judicial challenges under SEPA will also become rare.\(^{107}\) After less than three years, SEPA is approaching the end of its useful course unless the public resources available for the administration of its purposes and policies are made effective. This requires a coordinated administrative scheme that will not only provide some uniformity to SEPA's implementation, but will also insert a reasonable semblance of objectivity into the impact statement.

The second aspect of the problem created by lack of coordination between ECPA and SEPA arises from the timing of the public hearing. STEP 7 of the ECPA scheme, as outlined in Part I *supra*, is a public hearing "conducted for the purpose of obtaining information for the assistance of state agencies . . ." This "information" can only come from an intelligent discussion and debate at the hearing about the environmental issues raised by the project. Another objective of the hearing is to provide a forum where the public can present its views on "proposed uses of natural resource and related environmental matters" prior to the final decisions under ECPA. ECPA cannot achieve either of these two goals for the following reasons. No mechanism is provided for identifying and investigating the environmental issues prior to the hearing, because the hearing occurs before the agencies have had full time or opportunity to bring their expertise and experience to bear on what may be a complex and highly technical problem. One consequence of this failure will be to nullify the hearing's function as a forum to generate meaningful information for

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\(^{107}\) The present prominence of successful judicial actions by environmentalists under NEPA may be illusory. The primary use of NEPA has been as a delaying tactic to scuttle the projects of proponents who failed to go through the procedural motions specified by the Act. As impact statement writing becomes more of a fine art, however, the usefulness of NEPA and its state counterparts as obstructional weapons of militant environmentalists will decline. See Comment, *The National Environmental Policy Act of 1969: Analysis and Judicial Interpretation*, 25 *Baylor L. Rev.* 71, 90-91 (1973).
the permit decisions. Lacking an ordered presentation of the environmental issues, the hearing will produce at best a haphazard and tentative identification of problems, subject to later revision by the agencies. A second consequence will be to deprive the public of a viable voice in ECPA. Without expert assistance, which few public interest groups are able to afford and which ECPA fails to provide, the public is left to fend for itself in the hearing against the considerable resources of the developer. As a consequence, the ECPA forum becomes an illusory one for the public, and government is deprived of meaningful counterarguments to those of the developer.

C. How Coordination of ECPA and SEPA Should Work

We propose to alleviate the foregoing problem by using the impact statement required by SEPA as the vehicle to accomplish the necessary integration of the two Acts. The core of our solution is bifurcation of the ECPA public hearing so that a draft impact statement is made available for study before the second phase of the hearing. Rather than leaving the impact statement solely to the developer, the modified procedure would provide some agency supervision over its preparation. The developer would be able to benefit from the availability of agency expertise assembled at the first phase of the hearing. The result will be a more objective and comprehensive impact statement, which will be available to governmental bodies well in advance of their final decisions, so that SEPA's mandate to consider environmental impacts can be honored. Conversely, the impact statement will achieve an objective of ECPA by giving direction to the participants at the ECPA public hearing, making the hearing more than an unattended ceremony or a shouting match. Hence, this emphatic conclusion—ECPA and SEPA must be read in pari materia.

This solution would operate in the following manner: Soon after Ecology has advertised the availability of the developer's applications, phase one of the public hearing should be convened. The hearing agenda at phase one should include three items, although the second and third will not always be reached if the answer to the first item is no: First, is an impact statement to be prepared?108 Second, if so, how

108. No more than one impact statement should be prepared for each master application acted upon. The advantages of a single impact statement are obvious.
can the thoroughness and objectivity of the prospective statement be optimized? Third, what opportunities exist at this phase of the hearing for public participation in preparation of the impact statement? The courts have made clear that a decision not to prepare an impact statement is judicially reviewable. Therefore, the ECPA hearing should recess, rather than terminate, until it is clear that no judicial review will be sought of a decision that no impact statement be prepared. Phase two is a second part of the hearing reconvened after a draft impact statement has been made available for study. The first item on the phase two agenda should be the adequacy of the impact statement, and the second item is interchange among the participants for the purpose of supplying useful information to the participating agencies and providing a forum for public participation in agency decision-making.

This bifurcated procedure will enhance ECPA's usefulness by making a draft statement available at the public hearing. At phase one

Several agencies may discern a significant environmental effect resulting from their individual decisions on permits, but a single, coordinated document obviates the necessity for preparing multiple, often duplicative statements. Furthermore, the cumulative effect of granting all permits requested under the master application can be more accurately assessed by a coordinated statement. One of the primary purposes of SEPA is to avoid the adverse impact which takes place when various aspects of a project are myopically authorized by different agencies in a piecemeal fashion without regard to the cumulative effect of the total development. See Juanita Bay, 9 Wn. App. at 72, 510 P.2d at 1149, and cited federal authority construing NEPA. See also Federal Guidelines § 5(b), 36 Fed. Reg. at 7724.

Roanoke raised the bothersome possibility of multiple impact statements for a multi-stage project, 82 Wn. 2d at 489, 513 P.2d at 45-46, but a single statement would be permissible under ECPA because all state permit decisions can be considered contemporaneously.

109. Although SEPA does not require a public hearing, use of the ECPA hearing to implement SEPA is consistent with federal administrative precedents. Administrators of NEPA and California's EQA have recognized that the public role in bringing environmental values before the decision-makers is an important one. Federal Guidelines § 10(e), 36 Fed. Reg. at 7726, directs that:

These procedures [to be established by individual agencies] shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action . . . .


110. If the decision is not to prepare an impact statement, then the reasons for that decision should be set forth in a written negative declaration which is filed with the Governor and made available for public scrutiny. Cf. California Guidelines § 15033, CAL. AD. CODE at 293. As Stempel, Roanoke and Loveless have shown, a decision not to prepare a SEPA impact statement is judicially reviewable.
all the cognizant agencies have been identified and each is represented. Ideally, phase one would aim for an objective impact statement by assigning responsibility for conducting the necessary studies and writing parts of the draft impact statement to participating agencies on the basis of statutory authority and expertise of each. Practically, present budgetary and manpower constraints prevent burdening state and local government with sole responsibility for preparation of all impact statements arising from private developer applications under ECPA. The compromise solution is to leave the financial burden where it presently rests—with the developer—while achieving statement objectivity by giving cognizant agencies the power to supervise its preparation. Phase one can be utilized by the agencies to inform the developer that certain alternatives must be considered, or that certain environmental effects must be investigated, which the developer might otherwise choose to ignore or gloss over. Developers may be able to benefit at this point from agency expertise, since availability of past agency studies could negate the necessity for duplicative actions carried out at the developer’s expense. Although it stops short of requiring neutral agencies to prepare all ECPA impact statements, this solution would enhance the objectivity, and hopefully the quality, of such statements while remaining within the bounds of fiscal reality.

The readers who will benefit from early preparation of an impact statement are: (1) The public, which has been represented and has probably identified some of its concerns in phase one; (2) the public agencies, which are to make decisions with respect to permits needed by the applicant; and (3) the Legislature, which must ultimately act to fill in the statutory gaps where existing law is lacking or inadequate to safeguard the environment. Phase one will match up environmental impacts with agency expertise, resources and statutory authority. By exercising discretion during this step, Ecology, the coordinating
agency, will play a role analogous to NEPA's Council on Environmental Quality.\footnote{113. See note 87 supra. Among other duties, the CEQ is empowered to determine jurisdictional questions among the agencies. See Federal Guidelines § 5(b), 36 Fed. Reg. at 7725. Both the Federal and California Guidelines contain useful keys for determination of which agencies have authority and expertise in what areas. See Federal Guidelines app. II, 36 Fed. Reg. at 7727; California Guidelines app. B., 14 CAL. AD. CODE at 319.} If no agency can be identified with jurisdiction over a specific environmental impact, then the problem is inadequacy of the laws, and this is a matter to be addressed to the Legislature by the public, by an agency (if its regulations or resources are merely inadequate) or the chairman of the hearing (if no law exists).\footnote{114. ECPA § 6(2), WASH. REV. CODE § 90.62.060(2), prescribes that the Director of the Department of Ecology, or his designee, shall chair the public hearing. The Director may submit recommendations for new legislation to the Governor after obtaining the advice of the Ecological Commission under authority of legislation creating the Department of Ecology and the Ecological Commission. See WASH. REV. CODE §§ 43.21C.190(5), .200 (Supp. 1972).} Similarly, if conflict among represented agencies cannot be resolved, the problem is also one for the Legislature.

Every impact statement prepared under this procedure should include not only an assessment of the environmental impact of a proposed action and the alternatives to that action, but also an identification of the responsible agencies, the relevant laws which they administer, and their administrative regulations related to the problem. If decision-makers and laws are not identified the useful future for public participation in ECPA and SEPA is nil. Public participation is meaningless when it consists of castigating the Director of Widget Licensing for doing or failing to do something about which the laws give him no choice.

Under the procedure proposed here, the draft impact statement provides a reservoir of information for meaningful public participation at phase two of the hearing,\footnote{115. Comprehensive presentation of views by the public at a hearing requires at a minimum an understanding of the issues involved and alternatives available. Without information presented by the impact statement, laymen will be normally unequipped} and what better forum for such participation than a public meeting with representatives of each agency empowered to make decisions? Deficiencies in the draft statement can be identified by cognizant agencies at phase two and corrected by the developer. After circulation among the agencies for review and comment, the final version will be compiled, thus insuring that the impact statement, complete with public input and prepared
by the developer under at least some neutral agency supervision, will
be available for use by agencies when they are called upon by Ecology
to render final decisions.

Although both legislative history and internal evidence in ECPA
support a conclusion to the contrary, we are persuaded that a
reading of ECPA and SEPA *in pari materia* not only authorizes, but
compels, the bifurcated proceeding outlined above. ECPA is precise
about the time when the hearing is to begin but does not say when it
should terminate; the chairman may continue the meeting "from time
to time." This might be regarded as tacit authorization of a bifur-
cated hearing, but our conclusion rests on a much firmer foundation
than this. The public hearing designed by ECPA to elicit response to
the proposed project is an exercise in futility if the public is unin-
formed because it has no access to a draft impact statement. It
would be even worse if the date set by Ecology for final agency deci-
sions preceded the date of availability of the impact statement, thus
frustrating the purpose of SEPA to bring environmental values before
decision-makers. In either case, the public hearing or impact state-
ment becomes a costly and useless exercise. The hearing therefore
should be recessed, not terminated, until it is clear that neither agency
decision nor later judicial action will compel preparation of an impact
statement.

We have attempted only to outline coordination; the reader's un-
derstanding of this coordination will be aided by Appendix C infra, a
to assimilate the mass of technical considerations and trade-offs raised by the master
application, and unable to transform what they do know into viable arguments in the
public interest. See generally Ruckelshaus, *The Citizen and the Environmental Process*,
47 IND. L.J. 636, 637 (1972); Gellhorn, *Public Participation in Administrative Proceed-
ings*, 81 YALE L.J. 359, 388-403 (1972); Bolle, *Public Participation and Environmental

Technical data will be rendered comprehensible to the public through the impact
statement. The importance of making expertise available and comprehensible to the
public cannot be overemphasized if the public voice is to be meaningful at all in the
environmental arena. See Gellhorn, *supra*, at 393-94; Lucas & Moore, *The Utah
Controversy: A Case Study of Public Participation in Pollution Control*, 13 NAT.
RES. J. 36, 57-60, 72-75 (1973); Cramton, *Citizen Suits in the Environmental Field—

116. *E.g.*, ECPA § 10(1) expressly makes SEPA's requirement of an impact
statement inapplicable to the step by local government granting or denying certification
that local zoning ordinances and plans have been complied with.

117. *See* ECPA § 6(2), WASH. REV. CODE § 90.62.060(2).

118. *See* note 115 *supra*.

119. *See* notes 92-97 and accompanying text *supra*.
schematic diagram which compares the present and proposed ECPA formats. Only one legislative change—authorizing local governments to participate at a public hearing and to render their decisions after hearing, and not before—is clearly necessary. Even that amendment is not necessary if ECPA is to coordinate only state agencies.

Experience may reveal other pressing problems and the need for other legislative revisions. A number of problems are related to ECPA's requirement that all agency decisions be made and returned to Ecology by the same date. A project applicant who needs 16 permits, each based on a separate costly investigation and each essential to the project, will, if he pays for the investigations, prefer to get the answer to the most doubtful application first. If the answer is no, he will likewise prefer to seek review before paying for 15 other investigations which will be useless unless and until that first no becomes a yes.

Economy and effectiveness are enhanced by a sequencing of what should be studied, what should be reported, and what should be decided, both in preparation of impact statements and the permit decisions to which the statements relate. Such sequencing could be a major facet of coordination among agency representatives at phase one of the hearing. Sequencing, however, takes more time than if everything moves toward decision at once. Each case is likely to be different. If the investigation of a doubtful application will take six months, while the other 15 investigations are costly but will take only three days, coordination should delay the 15 others until the longer investigation has been completed, and until an affirmative decision on the six-month matter is final. This will be hard to accomplish and still comply with ECPA's mandate for a single staged administrative review. Before an actual case has been examined, however, we would opine that the coordination described is not impossible. Agreement by the applicant would, of course, help.

120. As discussed in Section II-B supra, the present procedure stultifies needlessly local zoning laws and wrongfully deletes actions taken under these laws from the requirements of SEPA. Elevating local government into the ECPA framework would allow the local voice to be heard in the impact statement and public hearing, while satisfying the judicial rule stated in that section.

121. See ECPA §§ 6(4), (6), WASH. REV. CODE §§ 90.62.060(4), (6).

122. See ECPA § 8, WASH. REV. CODE § 90.62.080.

123. For example, a noncritical permit involving years of hydrologic investigation
Environmental Coordination Procedures

represented only by those who attend the hearing—effectively stipulate? Probably not, but there may be an accommodation.

A critical problem with ECPA and SEPA—a lone or together—is cost. Dollar cost is only the most easily measured element of cost. Should ECPA regulations require compulsory attendance of all representatives of all agencies for several days of a hearing on an air pollution aspect of a project to which only one agency representative can make a contribution? Or should attendance be voluntary? How should the alternative costs be calculated, and can calculations include the cost of doing without services of agency representatives at other tasks? We cannot provide an answer, but we are convinced that Ecology's regulations and its 1975 report should expressly address all such problems. Otherwise, the Legislature cannot discover how and whether ECPA really works.

We have proposed to bridge the gap between ECPA and SEPA using the two primary assets which ECPA offers, interagency coordination and public participation. Failure to do so will stifle the potential which each Act possesses to safeguard the public's environmental interest.

might be removed from ECPA's coordination if the applicant agrees. If critical, the long investigation might precede action on the other permits if the applicant waives time requirements in ECPA.

124. The Wall Street Journal reported that costs of impact statements range from $500 for a shopping mall to $9,000,000 for the Alaska pipeline. Wall Street Journal, Sept. 27, 1973, at 1, col. 1. A Washington Department of Ecology official estimates for us that the Addy impact statement in tentative draft cost from $18,000 to $20,000, and that the final draft issued in October cost $15,000 to $16,000. Telephone interview with Dennis Lundblad, Supervisor, Environmental Review Section, Department of Ecology. Mr. Lundblad heads a section with a total of eight professional and clerical personnel, charged with making and reviewing impact statements for the Department.

These costs do not cover costs to the project applicant and to those who oppose the application or seek modification. Nor do they reach the critical question, whether the impact statements significantly improved the projects, or alternatives to projects, to which they related. Indeed, the more pertinent question even harder to answer, even where the statement appears to have produced no result, is the influence of the impact statement requirement on project planning and on projects abandoned before the impact statement stage is reached.

ECPA provides that it does not affect agency charge to applicants. ECPA § 9(3), Wash. Rev. Code § 90.62.090(3). In 1973, this was perhaps necessary, but in any case it was, in 1973, wise. When Ecology reports to the Legislature as directed on January 1, 1975, data should be available not only on Ecology's ECPA costs but those of other state agencies. Regulations should now provide for submission of such data to Ecology, including data about applicants' costs. The cost study should include SEPA costs, because SEPA and ECPA rightfully constitute a single mechanism. This will require, of course, a common basis of cost accounting in the regulation.
IV. PROGNOSIS

ECPA's success or failure depends only in part on overcoming the problems we have described. Equally important are the resources, the personnel and the quality of its administration, not only in Ecology but in Ecology's sister agencies. As important but harder to estimate are responses of developers who are free to choose or to ignore ECPA, of the public who are free to participate in or to ignore public hearings, of the officials of local and of federal government whom ECPA invites to join in coordinating environmental laws.

The biggest question is whether Ecology will succeed in executing the directive to "provide information to the public, in readily understandable form, pertaining to the requirements of federal, state and local governments for permits which must be acquired before initiating various types of activities and projects proposed in the state with special emphasis being given to those permits which apply to the use of land, air, and water resources." This is a large undertaking, in

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125. ECPA § 12(1), Wash. Rev. Code § 90.62.120(1). County offices staffed by clerical employees, only a part-time employee in most counties, are to provide assistance and forms to the public. Appendix B, which is Ecology's report of ECPA's costs to the Legislature, estimates this cost at $285,000 per year, more than twice the costs at Ecology headquarters. At headquarters, ECPA is to be staffed by "Environmentalists" of various grades. Department of Personnel Class Specifications for these employees are excerpted in note 132 infra. An "Environmentalist" is an engineer with environmental experience and some legal expertise.

Although the junior author has an engineering background, the professional and legal bias of both authors will be apparent in our cautiously ventured opinion that the reported allocation of resources is heavily overweighted in clerical personnel who will dispense assistance to the public, underweighted in the legal talent which will be required by Ecology if the assistance to the public is to do more good than harm. Mail and telephone—which will have to be heavily employed in any case—should make fewer field employees necessary. The budget allocation proposed by Ecology makes no provision for the professional legal advice which must be available to the public if the ECPA scheme is to work. Filtered to the public through a clerical employee in the field, legal advice is more likely to mislead than to assist. Large developers can be expected to have their own counsel; small developers and the public invite trouble by accepting verbal assurance from clerical field personnel. Publications to inform the public must be prepared with utmost care, because they become administrative interpretations and possibly the basis of estoppel against the state.

Although the Department of Ecology receives mail through an Olympia address, it maintains no Olympia office. Its headquarters is in or near Lacey, on the campus of St. Martin's College. Wash. Ad. Code § 173-02-040(2) (Supp. 10A, 1972) identifies three regional offices: "a southwest regional office located at Olympia [reported in fact to be in Tumwater, not Olympia], a northwest regional office located at Redmond and an eastern regional office located at Spokane."

Wash. Ad. Code § 173-02-070 (Supp. 10A, 1972) invites submissions of applications and requests to either the Olympia address of the headquarters "or to any
which Ecology has not been spectacularly successful even with the programs which it now administers. For Ecology to make clear requirements of all other state agencies, local governments and the United States—as well as its own programs—is a task of unprecedented proportions.

Unfortunately, Ecology's staffing proposals leave little room for optimism. On June 28, 1973, the Department gave the Legislature its estimate that ECPA will cost $794,533 for a biennium and a breakdown of how it proposed to spend that sum. More than half would go to clerical employees to maintain the public information operation, including an office in each county in the state. Professional personnel are all to be "environmentalists," a new employee classification created in 1972 for engineers. The highest classification is Environmentalist V, but the highest Environmentalist administering ECPA would be Environmentalist IV.

The Legislature appropriated $500,000, less than two-thirds of the sum Ecology requested, but it provided no directions as to how this sum will be spent.

We do not suggest that Ecology is or will be overstaffed with engineers. The contrary appears to be true. We do think that legal advice originating with engineers, and filtered through clerical employees in county and regional offices, is a poor way to serve the public, the environment, or to achieve any of the stated goals of ECPA.

Ecology is now understaffed with lawyers, with the consequence that environmentalist efforts are misdirected. A manifest example is the Draft Environmental Impact Statement recently produced on a proposed magnesium plant at Addy, Washington. It has received deserved praise: "unexcelled in terms of scope, depth and clarity of presentation," and establishing "a criteria [sic] by which other impact regional office to whose area of geographical responsibility the application, submission or request refers" with three regional addresses. However, the Code does not define "geographical responsibility."

126. See Appendix B infra.
127. See note 8 supra.
128. Ecology employs approximately 36 environmentalists of all grades, the Department of Highways employs one. Telephone conversation with Ms. Cherie Frazer, Washington Department of Personnel, Sept. 26, 1973. Figures, she advised, vary substantially from time to time. Mr. William Wright of the same Department advised on the same date that Environmentalists Grades III, IV and V are currently filled only from promotional lists, i.e., engineers already employed by the state under other labels.
statements can be measured.”129 Yet, the expensive effort is likely to be wasted because little effort was made to identify or to appraise the existence or adequacy of the laws which deal with the environmental impacts. Clearly, the Addy draft statement, although expensive, was never reviewed by any lawyer prior to its release.130

Public participation is a theme of ECPA, but to be effective, public participation must be more than a slogan. To participate meaningfully, the public must be informed accurately not only about impending environmental impacts, but about the extent, nature, and adequacy of the authority of various public officials and agencies to deal with the particular project and the particular problem.

In the long run, if ECPA is to succeed, its administration should be outside the Department of Ecology, in which are located most of the activities to be coordinated. Ecology’s position as the ECPA coordinator and the major coordinatee is, at best, awkward. At worst, it is a serious conflict of institutional interests.

The coordinator and expediter of ECPA must be equipped to serve as Ecology’s conscience and hair shirt, referee of Ecology’s squabbles with the Department of Natural Resources and advisor to the Legislature. The coordinator’s staff should be small, augmented when needed by technical personnel requisitioned from operating agencies. The coordinator should have authority to fix responsibility for preparing impact statements, and to decide what to do with them once prepared. With respect to such statements, the coordinator should in every instance identify the agency with authority to do something about such impact, and if no such agency exists, to report that fact to the Legislature.

The coordinator should not be limited to “coordination.” Constant “coordination” usually indicates duplicating and overlapping governmental functions. Responsibility should be given to recommend consolidation and abolition of unnecessary agencies or functions.


130. One page of the draft statement was devoted to the recent Washington supreme court decision in Stempel, but the critical information about that decision was quoted from an Associated Press dispatch which in turn quotes the Washington court’s opinion. See Final Addy Impact Statement, supra note 129, at 200.

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An operating agency such as Ecology cannot be expected to undertake or to sustain such a role. To do so would embroil itself with other agencies, bring charges of empire building, and invite retaliation from agencies which might survive Ecology’s recommendation to abolish. Coordination, to succeed, should be carried on by an agency without operative programs of its own and whose sole measure of performance is the results it produces in other agencies. If ECPA is ultimately to succeed, it will outgrow Ecology, or Ecology will absorb far larger functions than it now has.

APPENDIX A

Letter of September 21, 1973, from Mr. Charles B. Roe, Jr., Senior Assistant Attorney General, to Professor Charles E. Corker.

Re: Environmental Coordination Procedures Act

Dear Professor Corker:

This is written in response to your inquiries pertaining to the Environmental Coordination Procedures Act of 1973 (ECPA) which was recently enacted by the legislature.

As you know, I was involved in the development as well as the passage of the bill. The primary objectives of the bill were to:

1. Reduce the amount of effort required of a person or entity in obtaining rulings on applications on permits pertaining to natural resources usage or protection which are required to be approved before a “project” is begun in the State of Washington.

2. Provide an opportunity for the “public” to present its views on a project at one time and at one place.

3. Put state government agencies as well as certain local government units in a position to provide more considered decisions based on better information than allowed under other procedures.

The legislature’s passage of the ECPA is a significant step in the right direction. The step could have been substantially longer, however. Through my glasses, the bill’s shortcomings relate to four major areas:
1. The reduction of the scope of "permits" to which the bill applies by the addition during the bill's travels through the legislature of the emphasized portion of section 2(4) of chapter 185, Laws of 1973, shown as follows:

"Permit" means any license, permit, certificate, certification, approval, compliance schedule, or other similar document pertaining to any regulatory or management program related to the protection, conservation, or use of, or interference with, the natural resources of land, air or water in the state, which is required to be obtained from a state agency prior to constructing or operating a project in the state of Washington. Permit shall also mean a substantial development permit under RCW 90.58.140. Nothing in this chapter shall relate to a permit issued by the department of labor and industries or by the utilities and transportation commission; nor to the granting of proprietary interests in publicly owned property such as sales, leases, easements, use permits and licenses.

2. The refusal of the legislature to tackle the problems arising from the threat of multiple preparation of impact statements applicable to one project under the State Environmental Policy Act of 1971. (It was suggested to the legislature, but rejected, that a lead-agency concept, such as contained in the language attached hereto, be incorporated in the bill.)

3. The bill, as enacted, placed the "trigger" for initiating the permit processing procedures of the act in a private party only. The bill, as introduced at the request of Governor Evans, placed the trigger in the Department of Ecology. The Department should have the opportunity to force the use of the bill especially when the bill's coordinated procedures would assist greatly in bringing about fully informed, well-reasoned decisions by various governmental units.

4. The length of time involved in completing coordination procedures is too long for many projects to which the statute is applicable.

It is my hope that, as time passes, the bill will be tuned up by eliminating these shortcomings.

You specifically inquired as to the scope of coverage of the bill in terms of governmental approvals. In presenting the bill to committees of the legislature, I described the coverage as arising, in approximately 80% of the situations, from permit programs administered by the Department of Ecology.
The following nonexclusive list of permits issued by various agencies appears to me to be covered by the act:

**A. Regional Air Pollution Control Authorities**
1. Air pollution source new construction approval—RCW 70.94.152
2. Air pollution standards variances—RCW 70.94.181

**B. Counties**
1. Substantial development permits—RCW 90.58.140
2. Forest practices permits—RCW 90.58.150

**C. Department of Ecology**
1. Surface water rights permits—RCW 90.03.290
2. Dam safety approval—RCW 90.03.350
3. Reservoir permits—RCW 90.03.370
4. Approval of change of place or purpose of use—RCW 90.03.380
5. Approval of change of point of diversion—RCW 90.03.380
6. Ground water permits—RCW 90.44.050
7. Secondary permits—RCW 90.03.370
8. Air pollution source new construction approval—RCW 70.94.152
9. Air pollution standards variances—RCW 70.94.181
10. Burning permits—RCW 70.94.650
11. Flood control zone permits—RCW 86.16.080
12. Waste discharge permits—RCW 90.48.180
13. NPDES waste discharge permits—section 4, chapter 155, Laws of 1973
14. Sewerage facilities approval—RCW 90.48.110
15. Oil discharge permit—RCW 90.48.343
16. Weather modification permit—RCW 43.37.110

**D. Department of Fisheries**
Hydraulic permit—RCW 75.20.100

**E. Department of Game**
Hydraulic permit—RCW 75.20.100

**F. Department of Highways**
Approvals to inundate public highways—RCW 90.28.010

**G. Department of Natural Resources**
1. Burning permit—RCW 76.04.150-.170
2. Dumping permit—RCW 76.04.242
3. Operating permit—RCW 76.04.275
4. Right of way clearing—RCW 76.04.310
5. Surface mine reclamation permits—RCW 78.44.080
6. Timber cutting permits chapter 76.08 RCW

(The "permit" exemptions I referred to as shortcoming 1. appear to apply to the statutory powers of the Department of Natural Resources contained in Titles 76 and 79 RCW relating to land under that enactment's jurisdiction. These powers include the authority to sell and/or lease state-owned uplands, tidelands, shorelands and beds of navigable waters, lease harbor areas, enter into contracts involving various types of timber sales, exchange lands, and grant easements. The specific statutory listing of these powers is very long.)

H. Oil and Gas Conservation Commission

Drilling permit—RCW 78.52.120

I would anticipate that by mid-October 1973, the Department of Ecology will have developed a draft of a regulation as part of the process of satisfying the requirements of ECPA under section 11 of chapter 185, Laws of 1973. Included in this regulation will be a more definitive list of the permit programs covered by ECPA.

Hopefully this information will be of assistance to you.

Very truly yours,
Charles B. Roe, Jr.
Senior Assistant Attorney General

Enclosure with Roe letter

Section 12. State Environmental Policy Act [proposed but never incorporated]:

The department shall, as to any project which appears to constitute a major action significantly affecting the quality of the environment for which a detailed statement is required to be prepared by RCW 43.21C.030, designate one state agency to prepare the detailed statement for the project. Such statement shall accompany each permit application processed hereunder for any project through the review process of the state agency acting on the permit and any such agency may append such comments of its own to the preparing agency's statement as it may deem appropriate. No designation shall be made as herein authorized if a detailed statement was prepared by local gov-
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ermment in conjunction with the issuance of a certification pursuant to section 8 which appears to the department to satisfy the aforementioned requirements of RCW 43.21C.030. No hearing authorized under section 5(1) shall be completed prior to completion of a detailed statement.
### APPENDIX B

**ECPA BUDGET AND PERSONNEL ALLOTMENTS**

**DEPARTMENT OF ECOLOGY OPERATING BUDGET**

AND GRANT ASSISTANCE FOR COUNTIES

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<tr>
<th></th>
<th>1974</th>
<th>1975</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>285,000</td>
<td>285,000</td>
</tr>
</tbody>
</table>

**Annual Program Totals**

<table>
<thead>
<tr>
<th></th>
<th>1974</th>
<th>1975</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>395,379</td>
<td>399,154</td>
</tr>
</tbody>
</table>

**Biennial Total**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$794,533</td>
</tr>
</tbody>
</table>

---

131. The $285,000 per year—more than half the total sum appropriated and more than one-third of the total requested—is for clerical employees in each county to make information available to the public. The information, however, does not exist in accurate form useful to the public, and Environmentalists Grades I through IV are unlikely to possess qualifications to produce it.
### PROGRAM PERSONNEL

<table>
<thead>
<tr>
<th>Main Office</th>
<th>1974</th>
<th>1975</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmentalist IV(^{132})</td>
<td>$15,840</td>
<td>$16,800</td>
</tr>
<tr>
<td>Environmentalist III</td>
<td>12,240</td>
<td>13,200</td>
</tr>
<tr>
<td>Clerk Typist II</td>
<td>6,900</td>
<td>7,080</td>
</tr>
<tr>
<td>Environmental Technician II</td>
<td>7,740</td>
<td>8,160</td>
</tr>
<tr>
<td>Accounting Assistant II</td>
<td>7,308</td>
<td>7,644</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Regional Offices</th>
<th>1974</th>
<th>1975</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 Environmentalists II</td>
<td>21,600</td>
<td>22,560</td>
</tr>
<tr>
<td>Environmentalist I</td>
<td>9,360</td>
<td>9,840</td>
</tr>
</tbody>
</table>

\[ \$80,988 \quad \$85,284 \]

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\(^{132}\) **WASHINGTON STATE DEP'T OF PERSONNEL, SPECIFICATIONS FOR CLASS OF ENVIRONMENTALIST IV (1972),** sets forth the basic requirements for the supervisory position of Environmentalist IV:

**Definition:** Supervises a section with statewide function of the environmental/ecology program with major emphasis on environmental control or resource management or supervises a defined geographical area in carrying out multiple program responsibilities in the regional office or assists the Environmentalist V/Division Supervisor of the department, functioning as the "assistant manager" in program development, planning, and implementation.

**Minimum Qualifications**

1. A Bachelor's degree involving major study in environmental or physical science, one of the natural sciences, engineering, or other closely allied field (emphasis added).

AND

2. Four years of experience in environmental analysis or control. A Master's degree in one of the above fields may be substituted for one year of experience. Additional qualifying experience may be substituted, year for year, for education.

The minimum qualifications for an Environmentalist III, who "[p]lans and conducts the work under the general direction of a Division Supervisor/Environmentalist IV/V and performs independently in office, laboratory or field . . . ." are identical to those for Environmentalist IV, with the exception that only three, rather than four, years of experience are required. See **WASHINGTON STATE DEP'T OF PERSONNEL, SPECIFICATIONS FOR CLASS OF ENVIRONMENTALIST III (1972).**

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Corresponding step under present ECPA format. See Part I.

1. Master Application filed with Ecology.
2. Request for statements of interest from sister agencies [and local government].
3. Responses received by Ecology. Individual applications sent to developer.
5. Ecology sends applications to appropriate agencies [and local government].
7. Should impact statement be prepared?
   - NO
   - YES
     - Negative Declaration filed.
     - Draft impact statement completed
     - Notice given for Phase Two of Public Hearing
     - Phase Two of Public Hearing
     - Final draft of impact statement completed.
     - Agencies [and local government] make final decisions on applications.
     - Final decisions returned to Ecology
     - Administrative Review
     - Superior Court

ECPA procedures are shown in solid lines. Dotted lines and bracketed words illustrate consolidating ECPA procedures with SEPA, described in Part III.