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Recommended Citation

The State of Washington has attempted to protect its environment by enactment of a statute closely patterned after the National Environmental Policy Act of 1969 (NEPA). The State Environmental Policy Act of 1971 (SEPA), together with similar statutes in many other states, requires governmental agencies to prepare a statement


discussing in detail the environmental impact of each "major action significantly affecting the quality of the environment" in which the state or one of its subdivisions plays a role. This environmental impact statement (EIS) requirement plays a most important role in implementing SEPA's environmental mandate.

The EIS requirement is the most precise of SEPA's procedural commands. The EIS itself must be a formal, tangible document. Its contents should reflect intelligent, plenary environmental analysis on the part of responsible government officials. The EIS serves as both the showpiece of the developer and as a target for those opposing the project. It is, in final form, no less than an environmental transcript, providing a critical portion of the record for administrative decision-making and judicial review. Hence, because of its visibility and required specificity, and the importance of its role in decision-making, the EIS requirement has come to occupy center stage in SEPA's grand design, and the legal questions surrounding the need for EIS preparation have captured the attention of all concerned with SEPA.

On four occasions in 1973 Washington appellate courts construing


5. The declared policy of SEPA is:

• to use all practicable means and measures, including financial and technical assistance, in a manner calculated to:
  (1) Foster and promote the general welfare;
  (2) to create and maintain conditions under which man and nature can exist in productive harmony; and
  (3) fulfill the social, economic, and other requirements of present and future generations of Washington citizens.

WASH. REV. CODE § 43.21C.020 (Supp. 1973). The Act describes procedures by which this policy may be implemented: agencies must establish new organizational apparatus, new internal operating policies, guidelines, regulations or procedures (including procedures for determining whether an environmental impact statement is required), and new consultation processes to include environmental values in decisionmaking. Id. § 43.21C.030.

6. The requirement is:

[A]II branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

... (c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality or the environment, a detailed statement by the responsible official 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 irrevocable commitments of resources which would be involved in the proposed action should it be implemented.

Id. § 43.21C.030(3)(c).
SEPA reversed lower court or agency decisions and remanded for failure to comply with the Act's EIS requirement. In *Stempel v. Department of Water Resources*, SEPA reversed lower court or agency decisions and remanded for failure to comply with the Act's EIS requirement. In *Stempel v. Department of Water Resources*, the Washington Supreme Court found the issuance of a water use permit to a private developer to be a "major action significantly affecting the quality of the environment," and required the Department to act in accordance with the provisions of SEPA prior to permit issuance. In *Juanita Bay Valley Community Association v. City of Kirkland*, the court of appeals voided the city's issuance of a grading permit to a private developer because the city neglected initially to consider environmental factors and determine whether the grading proposal was a "major action significantly affecting the quality of the environment," requiring the preparation of an EIS. In *Eastlake Community Council v. Roanoke Associates, Inc.*, the Washington Supreme Court invalidated the City of Seattle's issuance, without preparing an EIS, of a building permit for construction of a five-story condominium apartment building on the shore of Seattle's Lake Union. Finally, in *Loveless v. Yantis*, the Washington court stated in dicta that SEPA required county commis-

7. 82 Wn. 2d 109, 508 P.2d 166 (1973).
8. Id. at 119, 508 P.2d at 172.
10. Id. at 73, 510 P.2d at 1149. The court stated forcefully that, "the detailed procedural requirements of SEPA, specifically RCW 43.21C.030, are directly imposed upon all branches of state government, including municipalities." Id. at 65, 510 P.2d at 1145 (emphasis added).
11. 82 Wn. 2d 475, 513 P.2d 36 (1973). The opinion was handed down only one month after the *Juanita Bay* decision.
12. 82 Wn. 2d at 498, 513 P.2d at 50. The opinion of the court dealing with the environmental issue may be regarded as either strong dicta or as an alternative holding. As the court stated at the outset:

   "We agree with plaintiffs that the building permit was issued in violation of the Seattle building code, that irregularity was not cured by subsequent compliance and that, as well, even if the permit issuance was valid, an environmental impact statement was required prior to the third renewal of the building permit." Id. at 478, 513 P.2d at 39 (emphasis added). This statement seems to relegate the environmental discussion to the status of mere dicta.

   However, a number of indications support a contention that the disposition of the case was at least partially grounded in environmental analysis. The *Eastlake* dissent states, for example, that "the majority holds" there has been a violation of the environmental impact statement requirements of SEPA. *Id.* at 505, 513 P.2d at 54. The dissent's forceful rebuttal of the majority's holding on the narrow procedural ground of building code violation suggests that the majority had other grounds for decision. *Id.* at 503-05, 513 P.2d at 53-54. Lastly, SEPA analysis creeps into the majority's ruling on code violation. For example, the court states, *id.* at 484-85, 513 P.2d at 43, that, "defendant started the project with full awareness that there were multiple, serious legal obstacles [to development]." (Emphasis added.) The "multiple" serious legal obstacles must refer to either SEPA or SMA issues, in addition to code violation.

14. The *Loveless* court upheld the commissioners' decision upon finding that the submitted plat violated the controlling zoning ordinances. *Id.* at 762, 513 P.2d at 1028.
sioners to prepare an EIS before issuing a preliminary approval for a planned unit development, because approval constituted a "major action significantly affecting the quality of the environment." The reasoning and results of these four Washington decisions emphasize the need for governmental agencies to analyze carefully SEPA's EIS requirement prior to approval or commencement of a project.

The requirement of EIS preparation has received a comparable degree of attention in the federal courts. Although some initial attempts were made under NEPA to determine in a one-step analysis whether an action under review constituted a "major Federal action significantly affecting the quality of the human environment," requiring the preparation of an EIS, the federal courts have now settled upon a two-step analysis:

1. Is the proposal a major Federal action? If so,
2. Will that action significantly affect the quality of the human environment? If so, an EIS must be prepared.

Washington courts construing SEPA have concurred in this analysis.

This note identifies and analyzes those factors, intrinsic to the above two-step analysis, which properly should be considered by a court construing, or a rulemaking body implementing, the EIS mandate of SEPA and other comparable legislation. (The reader may wish to refer to the Flow Chart, Appendix A, while following the analytical process suggested in this note.) This note concludes that uniform and consistent application of those factors could best be obtained by rulemaking, rather than by ad hoc judicial determination.

15. Id. at 763, 513 P.2d at 1028–29.

The Federal Council on Environmental Quality Guidelines, 38 Fed. Reg. 20,550 et seq. (1973) (hereinafter CEQ Guidelines), also seem to adopt a one-step analysis by construing the phrase, "major Federal actions significantly affecting the quality of the human environment" as a unity. Id. § 1500.6(a), 38 Fed. Reg. at 20,551.
17. See, e.g., First National Bank v. Richardson, __ F.2d ___, 5 BNA ENVIRON. REP. 1830 (7th Cir. 1973), where the court found a proposed courthouse annex and jail facility to be a major Federal action, but found that the action would not significantly affect the quality of the environment.
18. See Eastlake, 82 Wn. 2d at 489–93, 513 P.2d at 45–47.
19. Constraints of space and time preclude discussion of other important and interesting issues under SEPA, such as: who should prepare the EIS; what information the EIS should contain; what amount and type of public participation and agency review is required by the Act?
I. DEFINING "MAJOR ACTION"

When the language of the Washington court in these SEPA cases is synthesized with that of other state and federal courts, determination of whether an "action" is "major" seems to require analysis of the following criteria:20

1. The nature of the governmental "decision";
2. the character of the subject "project"; and
3. the relationship, or "nexus", between the governmental decision and the subject project.

Each of these three criteria helps define the term "major action," and thereby describes and delimits the applicable scope of SEPA's EIS requirement.

A governmental "decision" is the making of an enforceable determination; in Eastlake, the City of Seattle's grant or denial of a building permit would constitute such a governmental "decision." The term "project" means the contemplated endeavor or undertaking itself; in Eastlake, for example, the developer's plan for construction of the condominium was the "project" under consideration. The relationship, or "nexus," between decision and project may best be identified in terms of the degree of governmental "participation" present in expediting the project;21 thus, in Eastlake, the "participation" was substantial since the governmental decision on the building permit determined whether the project would be permitted to proceed.22

These three criteria—"decision," "project" and "nexus"—will now be examined. Following examination of the nature of these criteria, the desirability and utility of including each as an essential element of the "major action" test will be discussed.

A. The Nature of the Governmental "Decision"

Analysis of the nature of the governmental "decision," viewed as independent from the character of the subject "project," is an impor-

20. As will be discussed below, a "major action" should be composed of:
   (1) a "discretionary, nonduplicative governmental decision;"
   (2) a "major project;" and
   (3) a "minimal link" between decision and project.
22. E.g., in Simmans v. Grant, 6 BNAENVIRON. REP. 1224, 1229 (S.D. Tex. 1973), the court asked whether, "but for" the government action, the project would have proceeded, with resultant environmental impact.
tant aspect of SEPA's "major action" test. The "decision" criterion, however, is more often used in state "little NEPA" analysis than in NEPA analysis. For example, under California's Environmental Quality Act (CEQA), the nature of the governmental decision—which is either "discretionary" or "ministerial" under CEQA—determines whether that governmental decision should be examined for its environmental effects; only "discretionary" decisions require such analysis.

Washington courts have engrafted the California approach onto SEPA, and now consider analysis of the "discretionary" or "ministerial" nature of the governmental decision to be an independent element of the major action test under SEPA; thus in Washington, as in California, a "discretionary" decision is a prerequisite to a major action. However, this judicial surgery was not accomplished without difficulty. Definitional problems first arose in *Juanita Bay*, where the court of appeals held that even though the issuing of a building permit may have been a ministerial decision prior to SEPA, "SEPA introduces an element of discretion" into such decisions, making them susceptible to SEPA's EIS requirement. Under this analysis, the nature of the governmental decision before enactment of SEPA is irrelevant be-

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23. The federal courts construing NEPA have tended not to focus upon the nature of the governmental decision as an independent element of the "major action" test. *See* note 137 and accompanying text infra.


25. CEQA describes "discretionary" decisions as including, *inter alia*: "the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits and the approval of tentative subdivision maps . . . ." *Id.*, § 21,080(a). Determination of those decisions which are "ministerial" is left to California administrative agencies under CEQA. *Id.*, § 21,082. Pursuant to this authority, California's Office of Planning and Research has suggested that "ministerial" decisions include issuance of most building permits and business licenses, and most approvals of final subdivision maps and individual utility service connections. OPR Guidelines. 14 CAL. ADMIN. CODE § 15,073 (1973). This scheme was accomplished by amending the original CEQA. *For* a discussion of the considerations leading to CEQA's amendments, see Seneker, *The Legislative Response to Friends of Mammoth—Developers Chase the Will-O'The-Wisp*. 48 CAL. B.J. 126 (1973).

26. Presumably, if the governmental decision requires judgment or deliberation on the part of the official or agency, even as to "narrow or limited evaluative points," the decision should be identified as "discretionary" for the purposes of SEPA. *See* text accompanying note 30 infra. A nondiscretionary decision, on the other hand, would be one in which a government official or agency, once certain facts were shown, would be required by law to act in a prescribed manner, regardless of his/her own opinion or judgment. *Compare* 14 CAL. ADMIN. CODE § 15,032 (1973).

27. 9 Wn. App. at 73, 510 P.2d at 1149. The court held that, "the City failed to exercise its legislative discretion under SEPA . . . ." *Id.*
cause SEPA’s introduction of discretion will make every governmental
decision *ipso facto* discretionary.

In *Eastlake*, “major action” was defined as a “discretionary, nondup-
licative stage of the building department’s approval proceedings rela-
tive to an ongoing major project.”28 The *Eastlake* court seemed to
depart from the *Juanita Bay* analysis by indicating that a major action
would result only if the nature of the governmental decision was “dis-
cretionary and nonduplicative” apart from the impact of SEPA.29

In *Loveless*, finally, the Washington court appeared to reject the
*Juanita Bay* analysis, and to modify the *Eastlake* requirement of “dis-
cretion” by stating that while discretion must inhere in the govern-
mental decision absent SEPA, it need only exist with respect to what
the *Loveless* court called “narrow or limited evaluative points.”30 The
*Loveless* analysis of the nature of the governmental “decision” thus
occupies somewhat of a middle ground between *Juanita Bay* and *East-
lake*.

The question remains whether the governmental “discretion” must
be found to inhere in the decision absent SEPA, as *Loveless* suggests,
or whether “discretion” is introduced by SEPA itself, as suggested by
*Juanita Bay*. The proposition is an important one, because of the se-
rious consequences of exclusive adoption of either the *Loveless* or
*Juanita Bay* rules. Adoption of the *Loveless* rule would posit SEPA as
merely important legislation, whose provisions would not per se vitiate
the obligatory commands of other statutes. On the other hand, adop-
tion of the *Juanita Bay* rule would provide SEPA with a nearly consti-
tutional dimension, since provisions in all other legislation, permissive
or mandatory, would bow to SEPA’s provisions in case of conflict.31

28. 82 Wn. 2d at 490, 513 P.2d at 46. Where there are several “discretionary”
governmental decisions relating to the same project, environmental analysis must be
conducted for each decision only to the extent that such analysis does not duplicate
analysis already made for other related decisions. *Loveless*, 82 Wn. 2d at 764–65,
513 P.2d at 1029 (1973).

29. The *Eastlake* court painstakingly demonstrated that the defendant City of
Seattle had made a discretionary and nonduplicative decision under existing building
code provisions. 82 Wn.2d at 491–92, 513 P.2d at 46–47. In *Stempel*, the Washington
court implicitly recognized that the Department’s decision was discretionary under
existing legislation, since the Department was required to evaluate potential “detriment
to the public welfare” prior to decisionmaking. 82 Wn 2d at 117, 508 P.2d at 171.

30. 82 Wn. 2d at 764, 513 P.2d at 1029. Such “narrow or limited evaluative
points” need not, of course, relate to environmental factors.

31. The difficult question remaining is whether the issuance of, e.g., a building
permit is “ministerial” merely because local legislation deems it so. See generally
Concededly SEPA amends the authorizing legislation of all government agencies in Washington by attaching "particular additional duties" (such as the duty of giving "appropriate consideration" to environmental values)\textsuperscript{32} to existing discretionary decision-making processes.\textsuperscript{33} The Act does not, however, supersede other statutes sub silentio, \textsuperscript{34} by unilaterally injecting environmental "discretion" into ministerial decisions made pursuant to otherwise obligatory legislation.\textsuperscript{35}

In short, SEPA affects, but does not create, governmental decision-making. It is submitted, therefore, that "discretion" should be

for example, the court noted that under the terms of the Seattle Building Code, "'If the superintendent of buildings is satisfied' that the application and materials conform to the law and the building permit fee has been paid 'he shall issue a permit therefor to the applicant ...." 82 Wn. 2d at 482, 513 P.2d at 41 (emphasis added). Although this would appear to involve a mere "ministerial" decision, the Eastlake court did not rule on the matter, since the building permit renewal, under attack, was clearly a discretionary governmental action under the terms of the Seattle Building Code. It is of course anomalous to conclude that the initial issuance of a building permit is exempt from SEPA as a "ministerial" decision, but renewal of the same permit, for the same project, is "discretionary" and therefore subject to the Act. It is equally anomalous that a local government should be able to exclude any permit issuance process or other activity from SEPA's EIS requirement by simply passing legislation which designates those processes or activities as "ministerial". If this were attempted, the Washington courts might well employ the Loveless test to find some "narrow or limited evaluative points," making the decision "discretionary" despite a legislative finding to the contrary. This could, in time, however, distort an already overworked discretionary-ministerial dichotomy.

It is notable that the state legislation which grants municipalities the power to generally regulate building activity clearly designates the municipal function as discretionary. See WASH. REV. CODE § 35.22.280(25) (1963). Perhaps SEPA's EIS requirement should be found to apply to all governmental activities which are "discretionary" under state legislation, regardless of the mandates of local provisions.

The difficulties in resolving these issues in the courts suggest that it is particularly appropriate for the Legislature to simply designate, or to allow an administrative agency such as the Department of Ecology to designate, actions which are "discretionary" and therefore subject to SEPA's EIS requirement.

\textsuperscript{32.} See WASH. REV. CODE § 43.21C.030(b).

\textsuperscript{33.} Eastlake, 82 Wn. 2d at 497, 513 P.2d at 50.

\textsuperscript{34.} See United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973). In SCRAP, an environmental group sought to enjoin enforcement of orders of the Interstate Commerce Commission allowing railroads to collect a surcharge on freight rates, by arguing that such enforcement would violate the provisions of NEPA. The United States Supreme Court held that alleged noncompliance with NEPA did not give the power to the federal courts to invade the province of the ICC, as established by the Interstate Commerce Act. The Court went on to say that "'[t]he statutory language in fact indicates that NEPA was not intended to repeal by implication any other statute.' Id. at 694. Since SEPA's legislative history indicates no legislative intention to depart from the language and intent of NEPA, but rather indicates an intent to closely parallel the national Act, see WASH. S. JOUR. 1808-09 (1971), the SCRAP construction of NEPA would seem applicable to SEPA.

\textsuperscript{35.} See Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971).
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found to inhere in the governmental decision apart from SEPA, in accordance with the Loveless rule.

B. Character of the “Project”

Discussion of the nature of the governmental “decision” focused upon the governmental function itself, regardless of the character of the subject “project”. The analysis here focuses upon the character of the “project” as an element of major action, independent of the governmental function.

The federal courts under NEPA have often used the “character of the project” criterion to aid in determining whether an action subject to NEPA was “major”. Accordingly, they have considered the physical magnitude, cost and duration of a project as indicia of its “majorness”. The results, however, have been conflicting and confusing. Timber sales transactions of the United States Forest Service, on seemingly analogous facts, have been deemed both major and not major. Federal-aid construction of a sixteen-story apartment building was not a major project, whereas a sixty-six unit apartment project was major. While neither a “TOPICS” (street-widening) project nor construction of a 4.3 mile Forest Service roadway was major, a state highway bypass project was declared major because of its “integral connection” with nearby federal-aid highway construction. These examples indicate that, while the federal courts often look to the “character of the project” to analyze the “major action” requirement of NEPA, the results are far from consistent.

In contrast with the federal courts, which often find the “character of the project” to be a distinct element of “major action,” the California courts or agencies interpreting CEQA do not analyze the character of the physical undertaking by itself to determine whether its environmental effects should be studied; instead, they look only to

whether the related governmental decision is "discretionary" or "ministerial." 43

The Washington Supreme Court, like the federal courts, uses the "character of the project" criterion as an independent element of the "major action" test. The Eastlake court distinctly separated the governmental "decision" from the related private "project." It then went on to suggest: "When such separation [between decision and project] exists . . . the character of the project must be considered in determining whether the government action is to be deemed 'major'." 44 The Eastlake court found, apparently as a matter of law, that the condominium development under review was a "major project"; however, the court did not identify those characteristics of the condominium project which led to this conclusion. 45

It is perhaps difficult, in using the "character of the project" criterion as an independent element of the "major action" test, to distinguish the magnitude of the project for purposes of the "major action" determination in the first step of the analysis, from its environmental significance for purposes of the "significantly affecting" determination in the second step. 46 Realization that it is not the specific nature of the project so much as its cost, size and duration which justifies the label "major project" may alleviate some of the confusion. 47 Similarly, the controversiality, cumulativeness and precedent-setting capability of a proposal could be determinative factors in appropriate circum-

43. See text accompanying notes 24–25 supra.
44. 82 Wn. 2d at 490, 513 P.2d at 46.
45. Nowhere in the opinion is there mention of a stipulation that either the "project" or the "action" is major. Neither the City nor the trial court ruled on the issue. The court apparently interpreted the "clear legislative mandate that SEPA be given a broad and vigorous construction" as justifying the a priori conclusion that the Roanoke Reef plan was per se a "major project." Id.
46. See, e.g., Eastlake, id. at 491, 513 P.2d at 46, where the court stated that the project was "significant in itself." Presumably the court meant "major;" but nonetheless one wonders if the court's use of the word "significant" might not reflect some confusion as to the two-step threshold determination.

Also in Eastlake, id. at 491, 513 P.2d at 46, the court spoke of the major "impact" of government participation in the project. Since the word "impact" is usually associated with the "significantly affecting" test, its use by the court in the "major action" determination is confusing.

The difficulty has also been recognized in the NEPA context. See Simmans v. Grant, 6 BNA ENVRN. REP. 1224 (S.D. Tex. 1973).
47. See Simmans, 6 BNA ENVRN. REP. at 1234. See also Lynch, Complying With NEPA: The Tortuous Path to an Adequate Environmental Impact Statement, 14 ARiz. L. REV. 717, 726 (1972). Analysis should be made of planning time and resource and manpower expenditures of both: (1) those implementing the project, and (2) government approval at all levels.
stances. A project may be deemed major, then, because of its sheer magnitude; but that project and the action of which it is a part may not require an EIS because of insignificant environmental impact.

C. The "Nexus" Between "Decision" and "Project"

Because NEPA, SEPA and comparable state acts impose their EIS requirements only upon governmental agencies, there must be a "nexus" between the governmental "decision" and the subject "project" to bring the EIS provisions into play. Where the government is the party carrying out the project, the connection is direct—the decision is an integral part of the project and the government has a "direct proprietary interest." Where, on the other hand, the government is only approving or funding an otherwise private activity, serious questions may arise about whether the requisite "nexus" exists between the governmental decision and the private project to render the aggregate activity an "action" subject to the EIS requirements of SEPA.

In the federal courts, it appears that even a minimal governmental involvement with a project will be sufficient to satisfy the "nexus" requirement under SEPA. For example, the court in Davis v. Morton found in government approval of the lease of Indian Reservation lands sufficient connection between decision (approval) and project.

48. A project's attendant controversiality indicates its importance, or "majorness," independent of environmental effects, since any project, whether or not related to the environment, may be subject to protest and disagreement.

Cumulative government approval of building permits for a group of adjacent single family homes in a forseeably short time period should render the agglomerated nonmajor projects a "major project." Similarly, where a single building permit approval sets the stage for many more comparable approvals, a "major project" may be foreseen. The total project might be developed by numerous parties.

See also Scientists' Institute for Public Information v. AEC, 481 F.2d 1079, 1089–90 (D.C. Cir. 1973), for a discussion of the precedent-setting capability of a "major Federal action."

49. See, e.g., First National Bank v. Richardson, supra note 17.

50. Eastlake, 82 Wn. 2d at 489, 513 P.2d at 45. The Eastlake court remarked that this type of action is most common with federal agencies. Id.


52. 469 F.2d 593 (10th Cir. 1973). In Billings v. Camp, 4 BNA ENVIRON. REP. 1744 (D.D.C. 1972), the court required an EIS to be filed prior to a decision by the Comptroller of the Currency to approve an application to construct a branch banking facility (even though, presumably, actual construction would be subject to local zoning and building code regulations).

But see Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973) (government's action on request for loan to finance partially construction of a machinery plant was insufficiently related to demolition of homes, prior to construction, to warrant application of NEPA).
(negotiation of lease) to make the approval an "action" within the meaning of NEPA. However, government involvement will not be found by the federal courts where there is no federal financing, planning or design involved, and the project is not "under the auspices of a federal agency." Federal government involvement must be actual, not anticipated, and the determination of when that occurs is a factual one.

State courts construing little NEPA's have not strayed far from the federal analysis of decision-project relationships. The California Supreme Court in *Friends of Mammoth v. Board of Supervisors of Mono County* stated unequivocally that CEQA's EIR requirement applied to government approval of private projects so long as the governmental decision had some "minimal link" with that project through the funding, permit or regulatory process. Legislation and court decisions in other states have expressly or impliedly recognized the applicability of environmental policy mandates to government approval, permit and licensing processes.

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53. Rucker v. Willis, 484 F.2d 158, 163 (4th Cir. 1973). The multiple decisions in Ely v. Velde afford an excellent example of the difficulties inherent in making a decision as to the sufficiency of the connection between "decision" and "project." In *Ely*, the State of Virginia applied for federal funding for construction of a prison reception and medical center. The trial court found, 321 F. Supp. 1088, 1092-93 (E.D. Va. 1971), that NEPA's EIS requirement applied to such a funding scheme. On appeal, the Fourth Circuit, 451 F.2d 1130 (4th Cir. 1971), agreed that NEPA was applicable, *id.* at 1137 n.22; moreover, it found that compliance with the EIS requirement was necessary despite the presence of other seemingly conflicting and "non-discretionary" legislation. *Id.* at 1137-38. Virginia then decided to complete the project without federal funding, thus circumventing the EIS requirement. This scheme was allowed by the district court, provided that no federal funding, direct or indirect, was involved. 356 F. Supp. 726, 729 (E.D. Va. 1973). Throughout this litigation the character of the project and the nature of the governmental funding decision remained the same; but the relationship between the governmental decision and the project, without federal funding, was insufficient to invoke NEPA. *But see* Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013, 1027 (5th Cir. 1971).


55. *Id.* at 263, 104 Cal. Rptr. 761, 502 P.2d 1049 (1972).


57. *Id.* at 263, 104 Cal. Rptr. at 771, 502 P.2d at 1059.

Although SEPA, like NEPA, does not expressly address itself to government approval of private projects, Washington courts and litigants alike have accepted that such approvals usually establish the "minimal link" between decision and project necessary to support a finding of "major action" within the meaning of SEPA. The ease with which this understanding was reached in Washington may be explained by the fact that state—and more particularly local—permit and regulatory decisions often have a much closer "nexus" to the private project than do analogous federal decisions.

The "minimal link" test requires only that the governmental decision relate to the private project in terms of:

1. funding assistance (contract, loan, grant, subsidy and the like);
2. permitting a use (sale or lease of government property, permit issuance, licensing, entitlements for use generally);
3. regulating a use (pollution control, utilities regulation, etc.).

This test will be readily satisfied by most government funding, permit and regulatory activities in Washington.

permit for location of utility transmission lines and facilities); North Carolina's Environmental Policy Act of 1971, N.C. GEN. STAT. § 113A-8 (Supp. 1973) (authorizes "all cities, counties, and towns . . . to require any special purpose unit of government and private developer of a major development project to submit detailed environmental impact statements. . . ."); Vermont's Land Use and Development Act, as amended, VT. STAT. ANN. tit. 10, §§ 6001 et seq. (Supp. 1973) (establishes detailed conditions and criteria—most notably, conformance with a "capability and development plan"—to be considered prior to approval of a private development). Court decisions include: In Re Spring Valley Development, 300 A.2d 736 (Me. 1973) (subdivision permit); Hamilton v. Diamond, 70 Misc. 2d 899, 335 N.Y.S.2d 103 (N.Y.App. 1972) (seawall construction permit); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (permit for draining, dredging and filling of wetlands); Irish v. Green, 4 BNA ENVIRON. REP. 1402 (Mich. App. 1972).

59. Stempel, 82 Wn. 2d at 119, 508 P.2d at 172; Eastlake, 82 Wn. 2d at 489, 513 P.2d at 45; Loveless, 82 Wn. 2d at 763, 513 P.2d at 1028–29. Only in Juanita Bay was there disagreement on this point. The Juanita Bay court relied upon Mammoth and various federal decisions to apply the "express mandate" of SEPA to the issuance of a municipal grading permit. 9 Wn. App. at 71–72, 510 P.2d at 1148–49.

See also KING COUNTY CODE § 20.44.040 (3) (1973), which states that "actions" include granting of permits, franchises, leases and other entitlements for use.

60. E.g., in Juanita Bay, the permit issuing authority (City of Kirkland) examined detailed ordinance provisions which specified the conditions under which a grading permit could issue, 9 Wn. App. at 71, 510 P.2d at 1148; whereas in Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973), the concern of the federal Corps of Engineers in approving a pier construction permit was limited to problems of navigability.

61. See CAL. PUB. RES. CODE § 21,063.
D. Which Criteria Should be Used in Applying the "Major Action" Test?

Without question the "discretionary governmental decision" criterion and the "nexus" criterion are both essential components of the test for "major action." The need for finding a "discretionary" governmental decision as a criterion of the "major action" test is eminently reasonable, for only if discretion exists to grant or deny the authorization in question can environmental considerations be acted upon. The "minimal link" test of the Mammoth court seems an appropriate means of insuring that sufficient "nexus" exists between governmental decision and private project to justify imposition of SEPA's requirements. Since privately initiated projects can be as "major" as governmentally initiated projects, and certainly are more numerous, it is proper that they be equally susceptible to SEPA's EIS requirement; the comprehensive environmental planning contemplated by SEPA otherwise would be rendered impossible of attainment.

Although the tests for "discretion" and "nexus" delimit to some extent the "actions" requiring a "significantly affecting" inquiry under SEPA, the practical effect of the limitations imposed by these two criteria is negligible. Most important governmental decisions will be found "discretionary" because of the presence of some "narrow or limited" issues left to administrative judgment, and "nexus" will most always be satisfied by the "minimal link" test. Thus if only the criteria of "nexus" and "discretion" comprise the test, "major action" for practical purposes means "any action." The question remains, then, whether the "character of the project" should be employed as a third criterion by which effectively to delimit the group of "major actions" requiring the "significantly affecting" inquiry.

It is essential to ask whether analysis of the quantitative character of the subject project as an ingredient of the "major action" test fa-

62. Discussed in Section I-A supra.
63. Discussed in Section I-C supra.
64. See text accompanying note 61 supra.
65. See Mammoth, 8 Cal. 3d at 263-64, 104 Cal. Rptr. at 771-72, 502 P.2d at 1059-60.
66. WASH. REV. CODE § 43.21C.020(2).
67. See text accompanying note 31 supra.
68. Discussed in Section I-B supra.
69. Quantitative analysis of environmental impacts must be distinguished from quantitative analysis of project characteristics themselves. See text following note 110 infra for a discussion of the former.
cilitates clear thinking, or whether such an approach only introduces such confusion that the characteristics of the "project" should more appropriately be considered solely under the "significantly affecting" test. Should the phrase "major action" define some limited group of large, important "actions," as an ordinary interpretation of the word "major" would suggest, or is "major" mere surplusage, bringing virtually all "actions" within SEPA's comprehensive mandate? This question is important, because its resolution determines whether Washington courts and agencies will conduct the "significantly affecting" inquiry for a limited, or a substantially unlimited, group of governmental "actions."

Where only limited financial resources are available to governmental agencies for implementing SEPA, it appears preferable on balance to analyze the "character of the project" under the "major action" test rather than under the "significantly affecting" test. The former approach would render only a limited group of governmental "actions" subject to SEPA's demanding "significantly affecting" test, permitting concerned governmental agencies to concentrate their efforts only upon major projects which prima facie portend environmental significance. In using the "character of the project" criterion as an element of the "major action" test, governmental agencies would initially determine applicability of SEPA's EIS requirement by analyzing the seriousness or consequence of a project in the abstract (using measures such as cost, size, duration, controversiality, cumulativeness and precedent-setting capability), without concern for environmental effects. Such an approach would in most instances avoid the problem attendant upon the requirement to analyze nearly all "actions" under the "significantly affecting" test: dilution of government analysis of each individual project in such a manner as to satisfy only the letter, but not the spirit, of SEPA.

70. See text accompanying notes 47-48 supra.
71. To avoid such dilution of analysis, governmental agencies may be tempted to establish sweeping and perhaps unwise categorical exemptions of projects, including "major" projects, which at first blush do not significantly affect the quality of the environment, but upon closer analysis may have serious environmental effects. For example, King County Code § 20.44.180 (1973) exempts from EIS requirements, "the engagement of consultants to furnish planning, design and related services for proposed county projects," id. § 20.44.180(e), and, "the county's procurement of general supplies and services and assessment and collections of taxes . . . ." id. § 20.44.180(i). The activities exempted by the former subsection may well be similar to the research and development programs found susceptible to EIS analysis under
If certain financing techniques and funding programs were available to administrative agencies and local governments for implementation of SEPA, the dilemma discussed above could be largely avoided: additional manpower and resources would enable government administrators to conduct environmental analyses, under the "significantly affecting" test, of all discretionary nonduplicative actions, regardless of whether the included project is "major." Thus, if adequate financing is available, the "character of the project" criterion would no longer be essential to the "major action" test. Although this approach effectively construes "major action" to mean "any action," it is nonetheless the desirable mode of analysis because it permits the "significantly affecting" inquiry to be reached in a broader spectrum of cases, thereby most fully implementing SEPA's environmental planning goals.

II. WHAT MAJOR ACTIONS "SIGNIFICANTLY AFFECT THE QUALITY OF THE ENVIRONMENT"?

An action found to be "major" under the first step of this analysis will fall within SEPA's EIS requirement only if, under the second step, it is found to "significantly [affect] the quality of the environment." This examination for environmental "significance" itself involves a two step analysis:

1. a definition of "environment", and
2. construction of the term of art, "significantly affecting".

NEPA in Scientists' Institute for Public Information v. AEC, 481 F.2d at 1089–90. "Procurement of general supplies," exempted by the latter subsection, may well have serious environmental impact if those "general supplies" are natural resource materials. See, e.g., National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1973).


73. CEQA requires state agencies to submit budget requests specifically for environmental protection, Cal. Pub. Res. Code § 21,106 (West Supp. 1973), implying that those requests will be given serious consideration.

74. This would comport with the California scheme under CEQA. See text accompanying note 43 supra. If this scheme is implemented in Washington, SEPA should be amended to make all "discretionary actions" (rather than "major actions") subject to analysis for environmental "significance." Such an amendment would be necessary since SEPA's existing "major action" language carries with it NEPA's judicial gloss, including the recognition of "character of the project" as a criterion of the "major action" determination.

A. The Meaning of "Environment"

Only by carefully defining the subject "environment" will a governmental agency know which impacts to study; and only if the "environment" is affected, need a court or agency examine those impacts for significance. Thus, the importance of precisely defining "environment" cannot be overemphasized.

The drafters of NEPA found that the elusive term "human environment" included: "those life-support systems—natural and manmade—upon which the health, happiness, economic welfare, and physical survival of human beings depend ...." While the physical environment was certainly foremost in the thoughts of NEPA's drafters, and is the most commonly conceived "environment", the federal courts have extended the term "environment" beyond the merely physical context. The economic environment, for example, was considered in National Helium v. Morton, while the sociological environment was evaluated in Hanly v. Mitchell (Hanly I).

76. Webster's New Collegiate Dictionary 278 (7th Ed. 1963) describes "environment" as:
   ... (a) the complex of climatic, edaphic, and biotic factors that act upon an organism or an ecological community and ultimately determine its form and survival .... (b) the aggregate of social and cultural conditions that influence the life of an individual or community.

77. In the broadest sense of the term, 'Environmental Policy' would encompass the entire body of Federal law from the Constitution to the least significant administrative ruling .... Obviously, operational definitions must be devised ....

78. NEPA, 42 U.S.C. § 4332(2) (C).


80. See 115 Cong. Rec. 40416–17 (1969) (remarks of Senator Jackson). The "physical" environment would include the spatial (geographical) environment, as well as biological, geological, acoustical and nuclear environments.


82. 460 F.2d 640 (2d Cir. 1972). In Tierrasanta Community Council v. Richardson, 6 BNA Environ. Rep. 1065, 1068 (S.D. Cal. 1973) (construction of a Federal Bureau of Prisons youth facility near planned elementary school), the court held:
   The ecological effect of the proposed federal youth facility ... is not significant, but the effect of a youth facility on the human environment in a planned residential area in close proximity to a proposed elementary school site is so significant that an agency decision to the contrary is so questionable as to render it arbitrary and capricious.
   Contrast Nucleus of Chicago Homeowners v. Lynn, 6 BNA Environ. Rep. 1094 (D. Ill. 1973) (HUD-financed public housing project). In Nucleus, the plaintiffs (homeowners in the vicinity of the proposed project) argued that an influx of public housing tenants, who alleged a "higher propensity toward criminal
California partially avoids the definitional problems encountered by the NEPA courts by applying CEQA only to the “physical” environment. This definition is considerably more limited than that presently materializing in the NEPA courts. It is improbable, for instance, that California courts would consider a social criterion such as “diversity and variety of individual choice” as a part of CEQA’s “environment”.

In Washington, the Legislature, courts and administrative agencies have provided only minimal guidance for defining “environment”. It appears nonetheless that “environment” in Washington will be described much as it has been described in the federal courts. The Washington State Department of Ecology Guidelines, for example, provide that “environmental conditions” may be “physical, social [or] biological.” Moreover, the Washington Supreme Court identifies the

behavior . . . a disregard for the maintenance of real and personal property, and a lower commitment to hard work” than existing residents, would create significant environmental effects. Id. at 1095. The court rejected this argument, holding that psychological and social impact was not part of the determination of significant effects. The court reasoned:

Prognosticating human behavior and analyzing its consequences on the environment is an especially difficult, if not impossible task . . . . The law regards the prospective tenants as free, legally responsible individuals, not as sociological factors in deterministic formulae.

Id. at 1096.

83. CEQA defines “environment” as follows:

‘Environment’ means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance.

84. NEPA, 42 U.S.C. §4331(b) (4); SEPA, WASH. REV. CODE § 43.21C.020(2) (e).

85. San Francisco Ordinance No. 134-73, Apr. 11, 1973, interprets CEQA’s definition of “environment” as follows:

The ‘environment’ is defined by CEQA and the State Guidelines as the physical conditions existing in the area which will be affected by a proposed project. Therefore, projects that will have no physical effects are excluded from the State law.

Id. § 31.12(a).

86. Washington State Department of Ecology, Guidelines for the Implementation of the State Environmental Policy Act of 1971, at 7, December, 1972. (The Department of Ecology currently has no authority under SEPA to issue rules or regulations. The Guidelines promulgated by that agency are informal and noncompulsory. They have not, as of this writing, been cited as authority by any Washington appellate court.)

One local jurisdiction in Washington suggests that

[environment] is not intended to mean those things which are physical in nature only. Environment expressly includes economic, social, political, cultural and other
purpose of SEPA as being to “prevent and eliminate damage to the environment and biosphere, as well as to promote the welfare of humans and the understanding of our ecological systems.” This language seems to envision “sociological” and “economic,” as well as “physical,” environments.

It is appropriate that SEPA’s “environment” extend beyond physical aspects to include economic and social aspects, especially in view of the inherent difficulty in creating a meaningful distinction between “physical” and “nonphysical” environments. However, a major action which affects only the social or economic environment would not significantly affect the “environment” described by SEPA. The language of the Act suggests that there must be some identifiable association with the physical environment to bring an action within its requirements. Once this association initially is established, proper environmental analysis of the major action then should encompass the full range of the action’s social, economic and physical impacts.

It is as important as it is obvious to recognize that the “environment” contemplated by NEPA and SEPA is a dynamic, not a static, entity. This dynamic environment is characterized by verbs as well as by nouns—by activities, uses, impacts and changes, as well as by conditions, dimensions, arrangements, and appearances. Recognition of this obvious point can aid measurably in arriving at a meaningful conditions and relationships that exist within or have potential effect upon a given area under analysis.


87. Stempel, 82 Wn.2d at 117, 508 P.2d at 171.

88. The Act itself recognizes that, “social, economic, and other requirements” are worthy of environmental consideration. WASH. REV. CODE § 43.21C.020(1) Compare CEQ Guidelines § 1500.8 (a)(3)(ii), 38 Fed. Reg. at 20,553.

89. Thus a governmental decision on the release of a motion picture affects “the public environment,” Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2641 (1973), as does the giving of a public speech, Terminiello v. Chicago, 337 U.S. 1, 16 (1949) (Jackson, J., dissenting); but neither action should be subject to SEPA’s EIS requirement. Similarly, changes in police station procedures affect the “interrogation environment,” Miranda v. Arizona, 384 U.S. 436, 457 (1966), but should not be subject to SEPA.

90. A major action should be deemed to have an “identifiable association” with the physical environment if it has any discernible, potential effect upon the physical environment.

91. SEPA recognizes man’s dependence upon “biological and physical surroundings,” and his continuing impact upon the “natural environment,” as being the underlying conditions which call for implementation of state environmental policy. Therefore, SEPA’s implementing mechanisms should focus upon these “physical” and “natural” conditions. WASH. REV. CODE § 43.21C.020(1).
definition of "environment," and hence can aid in analyzing the "significance" of environmental effects.

B. The Search for "Significant Effects"

Analysis to this point has been merely preliminary to an actual examination of the significance of the proposed action's environmental effects, and has served only to narrow the range of actions to be given careful environmental study. The actual analysis of effects for their "significance" should be detailed and sophisticated. Such analysis necessarily involves considerable governmental time and effort. Whatever decision is reached by an administrative agency or local government as to the "significance" of environmental impacts is subject to strict judicial scrutiny.92 A finding by either agency or court that a major action "significantly" affects the environment invokes all of SEPA's affirmative "action-forcing" provisions, including the EIS requirement.93 Thus, the search for significant environmental effects is truly the heart and soul of analysis under SEPA because, after all, it was concern over the degradation of the environment by such "significant effects" that prompted environmental legislation.

Once a court or agency defines the subject "environment," it must then identify whether the defined environment is being or will be "affected" by a major action. Only when it is determined that in fact the environment is or will be "affected," need the decision-maker search for the significance of these effects. Since NEPA and SEPA require detailed environmental analysis only of "significant" effects, any phenomenon which is arguably an "effect" or "impact" upon the environment should be considered for its significance.94 The purposes of NEPA and SEPA should not be frustrated by hypertechnical classifications of phenomena as not being environmental "effects."

Under NEPA, the federal courts generally have found a major action "significantly affecting the quality of the human environment"95 to be one which degrades the environment (e.g., highway

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93. WASH. REV. CODE § 43.21C.030(2)(c).
94. Although SEPA pertains to actions "significantly affecting" the environment, the "detailed statement" requirement pertains to environmental "impacts." Whether there is any meaningful distinction between "environmental effects," and "impacts upon the environment" (other than the rather tenuous cause-effect distinction) is doubtful.
construction, curtails the range of beneficial uses (e.g., lease of government property), creates both detrimental and beneficial uses (e.g., erosion control project), or serves short-term to the disadvantage of long-term environmental goals.

California has led the “little NEPA” states in providing some scintilla of meaning to the phrase “significantly affecting the quality of the environment.” CEQA requires a finding of significant effect if any of the following conditions exist:

(a) A proposed project has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage of long-term, environmental goals;
(b) The possible effects of a project are individually limited but cumulatively considerable;
(c) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.

This language indicates that CEQA requires consideration of many of the same factors as does NEPA, as construed by the federal courts.

In Washington, SEPA’s “significantly affecting” phrase has received sparse treatment by the Legislature, administration and courts alike. The presence of “significant” effects was undisputed in all three Washington Supreme Court cases thus far addressing that threshold question, although the court did not identify, in any of the cases, which factors or analysis led to this conclusion.

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96. See, e.g., Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1332 (4th Cir. 1972) (“Without a doubt the Department of Transportation was intended to be included within NEPA’s sweeping language.”).
97. See, e.g., Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) (lease of Indian Reservation lands); Natural Resources Defense Council (NRDC) v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (lease of government land for oil and gas mining).
100. CEQ Guidelines § 1500.6(b), 38 Fed. Reg. at 20,551.
102. Moreover, the California Supreme Court has shown that it will interpret CEQA’s “significantly affecting” phrase with a vigor equaling that of the federal courts, by warning in Mammoth that “courts will not countenance abuse of the significant effect qualification of CEQA as a subterfuge to excuse the making of impact reports . . . .” 8 Cal. 3d at 271, 104 Cal. Rptr. at 777, 502 P.2d at 1065.
103. The best legislative treatment of this phrase in Washington is found in KING COUNTY CODE § 20.44.050 (1973).
104. Eastlake, 82 Wn. 2d at 488, 513 P.2d at 45; Loveless, 82 Wn. 2d at 764, 513 P.2d at 1029; Stempel, 82 Wn. 2d at 119, 508 P.2d at 172.
Although a determination that given environmental effects are "significant" is a particularly subjective one, perhaps too subjective, certain factors have been used as guideposts by the judiciary in construing the term "significantly affecting." Focus upon these factors in the form of a hypothetical will serve to illustrate how their consistent application can provide for a more objective analysis of "significance."

Suppose, for instance, a developer applies for a building permit for a four-story, sixteen-unit condominium in a medium-size city. The primary factor for consideration is as important as it is obvious; namely, new environmental effects are judged relative to the existing impacts and effects of the defined dynamic environment. If these existing impacts and effects have been properly identified, and if the decision-maker brings them to bear upon the "significantly affecting" analysis, the new and distinct effects can then be evaluated in their proper perspective. Concomitantly, the new, distinct effects of a major action under study should be analyzed in terms of the likelihood of their cumulation with existing impacts and effects. In our hypothetical, then, the condominium's traffic effects should be measured both against, and in cumulation with, existing traffic patterns to determine "significance," and visual effects should be likewise measured relative to the existing neighborhood structural environment.

With this primary factor in mind—that is, the relative "significance" of new and distinct effects as measured within a dynamic framework—the decision-maker can properly commence a reasonably objective examination of the significance of these effects. Such an examination should involve separate consideration of: (1) the quality (nature) of effects; (2) the quantity (magnitude) of effects; and (3) possible conflicts with relevant environmental control standards.

The Juanita Bay trial court found the fifty-five acre grading permit not to have a significant effect upon the quality of the environment, but this finding was reversed by the court of appeals and remanded for agency determination. 9 Wn. App. at 67, 73, 510 P.2d at 1146, 1149. 105. Wyoming Outdoor Coordinating Council v. Butz, 5 BNA ENVIRON. REP. 1844, 1846 (10th Cir. 1973).


107. CEQ Guidelines § 1500.6(a), 38 Fed. Reg. at 20,551.

108. If the construction site is located amidst preexisting multi-story apartments, the foreseeable visual effect might well be deemed "insignificant."
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1. **Qualitative differences between new and existing effects**

If the decision-maker finds that the new effects of the subject major action are *qualitatively* different from existing impacts and effects in the defined environment, those effects are "significant," and an EIS is prima facie required unless they are deemed de minimus.\(^{109}\) New qualitative effects are exhibited by new insults upon the environment, whereas, new quantitative effects are merely an extension of existing insults. These new insults will be "significant" to most human beings and organizations since they require the development of new compensatory or corrective mechanisms; whereas, extension of existing insults requires only that people and organizations strengthen or adapt already existing mechanisms. In our hypothetical, if the proposed condominium site were in a single family residence area with a one-story skyline, the visual effects of the completed structure would be *qualitatively* different from existing effects;\(^ {110}\) conversely, the effect of the project upon traffic patterns would be only *quantitative*, since in all likelihood existing traffic volume merely would be increased.

2. **Quantitative differences between new and existing effects**

If no *qualitative* differences are found—and, indeed, most major actions simply compound existing environmental effects—the court or agency should then analyze the significance of any *quantitative* differences identified. In ascertaining the magnitude of the quantitative differences between new and existing effects, a number of contributing factors must be considered. Courts, in attempting to objectify the search for environmental "significance," have often referred directly to one or more of these contributing factors as conclusive determinants of "significance." Under the analysis here, however, reference to the contributing factors aids first in determining quantitatively the magnitude of the effects; the determined magnitude of these new effects is

\(^{109}\) The use of the de minimus exception, admittedly a quantitative modifier to an ostensibly qualitative test, seems to be a practical necessity. For example, a single one-day military maneuver in a public park may create qualitatively different environmental effects, but it would be so de minimus as to not require the preparation of an EIS.

\(^{110}\) More obviously, construction of a nuclear reactor in virgin timber land would lead to environmental effects (radiation, increased stream water temperature) which are clearly qualitatively different from any preexisting conditions.
then compared with the magnitude of existing effects in the defined environment to arrive at a reasonably objective finding of "significance."

First, an identifiable consequence of a given major action under NEPA and SEPA may be either indirect or secondary, as well as direct or primary, to justify a finding of "significantly affecting."\textsuperscript{111} In our condominium hypothetical, the presence of a greater concentration of people in the condominium area may indirectly lead to increased demand for goods and services. Direct effects usually will be of a greater magnitude than indirect effects.

Second, whether a given effect is one which is highly probable,\textsuperscript{112} substantially possible\textsuperscript{113} or merely arguable,\textsuperscript{114} is of considerable importance in analyzing its "significance." The federal courts disagree as to which of these standards is appropriate.\textsuperscript{115} A court's decision to label a particular effect "direct" or "indirect" naturally foreshadows its inclination in determining the degree of probability of that effect and, hence, its "significance" or lack thereof.\textsuperscript{116} Thus, the probability that effects upon utility systems—undoubtedly "direct" effects—would result from condominium construction is high, if not absolute; whereas, the likelihood that commercial activity, e.g., the opening of a store, would indirectly result from condominium construction would be only possible, or perhaps merely arguable.

Third, the longevity of each type of effect is an important factor for analysis of NEPA's "significantly affecting" provision. As one commentator suggests, there is "a greater need for better discrimination in setting priorities between 'persistent and irreversible insults to the environment and insults that are relatively temporary and nonpersis-

\textsuperscript{111} See CEQ Guidelines § 1500.8(a) (3) (ii), 38 Fed. Reg. at 20,553.

\textsuperscript{112} This seems to be the Second Circuit's position. See Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973); Morningside Renewal Council v. AEC, 482 F.2d 234 (2d Cir. 1973).

\textsuperscript{113} See Scientists', supra note 48; see also the dissent of Judge Oakes in Morningside, supra note 112.

\textsuperscript{114} See Maryland Planning Comm'n v. Postal Service, 5 BNA ENVIRON. REP. 1719 (D.C. Cir. 1973); see also the dissent of Judge Friendly in Hanly v. Kleindienst (Hanly II), 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

\textsuperscript{115} Compare the cases cited in notes 112–14 supra.

\textsuperscript{116} Thus in First National Bank of Homestead v. Watson, 363 F. Supp. 466, 472–73 (D.D.C. 1973) (review of Comptroller of Currency's preliminary approval of bank charter), the court noted that mere government approval of the proposal did not determine that the project would commence as planned. The court held that NEPA requires assessment only of direct effects of approval, not speculative, indirect effects. The court then found that the government action did not "significantly affect" the environment.
tent.' For example, a five-day military landing exercise would not "significantly" affect the environment; whereas a program for repeated landing exercises in a specified area, over a period of months or years, might well do so. In the hypothetical, most effects from construction would be relatively permanent by the very nature of the project.

Fourth, whether the new effects are deemed "beneficial" or "detrimental" will inevitably bear upon their "significance." After all, it was concern over the degradation of the environment which prompted environmental legislation. However, the NEPA cases establish the proposition that beneficial effects as well as detrimental effects can be environmentally significant.

With the above contributing factors in mind, a court or agency can properly analyze the quantitative difference between new and existing effects, and thereby ascertain the "significance"—or lack thereof—of the new effects. This analysis might proceed as follows:

If the magnitude of the new effects, when considered in light of the above contributing factors, is measurably greater than that of average existing effects in the defined environment, those effects are "significant," and an EIS is prima facie required. This conclusion is justified in that measurably greater effects are "significant" within the ordinary meaning of that term; moreover, great quantitative changes are not so far removed from, and indeed, at some indiscernible degree of magnitude become regarded as, qualitative changes. Thus, if the hypothetical

119. The "impact longevity" criterion looks strangely like the "duration of action" criterion used in determining if an action is major. See text accompanying note 47 supra. The distinction, however, is conceptually clear: the "duration" criterion applies to the cause (e.g., a major project), while the "longevity" criterion applies to the effect (e.g., a significant impact). In practice, it may be difficult to separate the creator from its creation. Nevertheless, it appears that the federal courts will, properly, adhere to the conceptual distinction as far as possible. See, e.g., Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973) (requiring analysis of the cumulative and precedential values of amendments to HUD urban renewal contracts to determine if those amendments constitute "major Federal actions"); and see National Helium Corp. v. Morton, 326 F. Supp. 151 (D. Kan. 1973), aff'd, 455 F.2d 650 (10th Cir. 1973) (requiring analysis of long-range environmental effects of concededly major action).
120. Presumably, the more "detrimental" the effect, the more "significant." See CEQ Guidelines § 1500.2(b), 38 Fed. Reg. at 20,550. However, merely because an effect is deemed "beneficial" does not mean that is necessarily "insignificant." See, e.g., Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971).
four-story condominium were to be placed in an area of single-story structures, it could be surmised that projected traffic congestion, population density, and burdens upon sewage and other utility systems would be measurably greater than, and in some respects qualitatively different from, existing conditions, and that therefore an EIS would be required.\textsuperscript{122}

If, on the other hand, the magnitude of the new effects, when considered in light of the above contributing factors, is measurably less than that of average existing effects in the defined environment, those effects are not "significant," and an EIS is prima facie not required. This conclusion is justified in that effects of measurably less magnitude are not "significant" within the ordinary meaning of that term; moreover, to require analyses of voluminous "insignificant" activities diverts energies from analyses of more serious environmental concerns. Where the hypothetical four-story condominium would be located in an area comprised of existing high-rise apartments and/or commercial establishments, an EIS should be prima facie unnecessary.\textsuperscript{123}

The difficult cases will be those in which the magnitude of the new effects, when considered in light of the contributing factors, is neither measurably greater nor measurably less than that of average existing effects in the defined environment. Such a case would be presented if the hypothetical four-story condominium were to be constructed amongst several other existing four-story structures. Doubtful cases of this type should be resolved in favor of preparation of an EIS, to avoid progressive degradation of the environment without the comprehensive planning which SEPA mandates; "it is unquestionable that numerous, modest, and common governmental actions may be as damaging to the environment as a single, vigorous and critical action."\textsuperscript{124}

3. \textit{Analysis of relevant environmental control standards}

Upon reaching a conclusion as to "significance" using either the qualitative or quantitative mode of analysis, the decision-maker

\textsuperscript{122}. An easier case would be the proposal to build a sixty-story building amongst existing twenty-story buildings.

\textsuperscript{123}. There may be instances, however, where local regulations designed to protect the environment could require the preparation of an EIS where it would not otherwise be required. See text accompanying notes 125-35 infra.

\textsuperscript{124}. \textit{Eastlake}, 82 Wn. 2d at 492, 513 P.2d at 47.
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should postpone the final decision pending an examination of local, state or national environmental standards pertaining to the activity being considered. For instance, an otherwise “insignificant” activity may “significantly affect” the environment because of its noncompliance with standards of environmental control developed in conjunction with jurisdiction over functions such as clean air and water maintenance,125 land use and zoning,126 transportation planning,127 solid-waste management,128 or urban renewal.129

Whether or not a given major action conflicts with “community” environmental goals and plans may be a weighty factor in determining the “significance” of the effects.130 Of course, to rely upon community standards to determine significance of environmental effects is to sacrifice a degree of uniformity in application of state environmental policy.131 Even more troublesome is the susceptibility of local jurisdictions to pressure from powerful interest groups.132 Local zoning practices, for example, have on occasion been racially133 and

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132. Private parties often are permitted to, “invoke the constitutional power of the municipality or other local unit to achieve what are in fact only private ends,” R. Babcock, The Zoning Game 138 (Paperback ed. 1969).

133. See, e.g., Buchanan v. Worley, 245 U.S. 60 (1917) (striking down a city ordinance which denied to blacks the right to occupy homes in city blocks in which the greater number of homes were occupied by whites.) One of the environmentalists’ biggest problems will be convincing minorities that environmental law is not a “plot
economically restrictive; they have favored heavy industrial construction, created urban sprawl, and effectively destroyed open space and shorelines access. Thus the application of community standards should not in all cases determine the "significance" of new environmental effects. Rather, the community standards related to the proposal being scrutinized should merely contribute to, and perhaps modify, the preliminary decision of environmental "significance" already reached.

III. EXEMPTIONS

The discussion under Sections I and II has attempted to give meaning to the phrase, "major action significantly affecting the quality of the environment." When a Washington court decides that the subject of litigation is a major action significantly affecting the quality of the environment within the meaning of SEPA, the Act then requires that a "detailed statement" (EIS) be prepared. There are, however, numerous governmental activities which are definitely not "major actions significantly affecting the quality of the environment," and thus need not be analyzed at all. Such activities should be "exempted" from SEPA's EIS requirement by either the judicial, the legislative or, with proper authority, the administrative branch.

Federal agencies seldom create "categorical" administrative exemptions from NEPA's EIS requirement, because their actions are generally regarded as being so "major," and their effects so "significant," that an EIS will most often be required. Moreover, NEPA exhibits

by the rich to keep what they have in beauteous array." 1 V. YANNACONE, ENVIRONMENTAL RIGHTS & REMEDIES 344 (1972). Further, application of the equal protection doctrine to local restrictive zoning could seriously debilitate environmental control measures. Sussna, Environmental Control and Land Use, 48 J. URBAN L. 689, 697-98 (1971).

134. A state environmental policy must insure that economically backward areas are not forced to remain depressed as the price of environmental protection of more fortunate communities. F. GRAD, Intergovernmental Aspects of Environmental Controls, in ENVIRONMENTAL CONTROL: PRIORITIES, POLICIES AND THE LAW 182 (1971).


136. WASH. REV. CODE § 43.21C.030(2)(c).

no legislative intent to confer authority upon federal agencies to create exempt categories. CEQA, by contrast, requires state and local government agencies to create and maintain classifications of actions exempt from the requirements of the Act.\textsuperscript{138}

SEPA, like NEPA (and unlike CEQA), exhibits no express legislative intent to confer exemption authority upon either state or local government agencies;\textsuperscript{139} consequently, administrative involvement in Washington has been minimal.\textsuperscript{140} The lack of administrative regulations pursuant to SEPA has created an unfortunate result in local jurisdictions. Confused and frustrated by the 1973 judicial interpretations of SEPA,\textsuperscript{141} several Washington counties and municipalities forged ahead with their own regulations and exemptions, notwithstanding the lack of express legislative authority to do so.\textsuperscript{142} The result is a patchwork of localized procedures which the courts may well disregard.\textsuperscript{143}

\textsuperscript{138} CAL. PUB. RES. CODE § 21,083.

\textsuperscript{139} SEPA itself exempts "single family" structures from its mandates, ch. 179, § 1 [1973] Wash. Laws, 1st Ex. Sess. The 1974 amendments to SEPA, signed by the Governor during final editing of this note, see notes 146–52 infra, provide that the newly-established "Council on Environmental Policy" shall identify actions "exempt" from SEPA's EIS requirement. Ch. 179, § 6(l)(a) [1974] Wash. Laws, 1st Ex. Sess.

\textsuperscript{140} The Washington State Department of Ecology has promulgated regulations interpreting and applying the "single family residence" exemption, supra note 139. See WASH. ADMIN. CODE 173-34-010 et seq. (1973).

\textsuperscript{141} For example, uncertain of the ramifications of the Eastlake opinion, defendant City of Seattle maintained a ten-day moratorium on the issuance of building permits until city policy could be established in compliance with the opinion. Seattle Times, Aug. 18, 1973, at A4, col. 3; Seattle Post-Intelligencer, Aug. 28, 1973, at A3, col. 2.


\textsuperscript{143} [In Washington] 'a state law will not be construed as impliedly taking away from a first class city an existing power.' [Rather, it must appear,] in clear and unambiguous language, that the legislature intended to make the act mandatory and not permissive .... Nelson v. City of Seattle, 64 Wn.2d 862, 866, 395 P.2d 82, 84 (1964) (emphasis added). Since SEPA is clearly and unambiguously a "mandate to every state and local agency and department," Stempel, 82 Wn. 2d at 118, 508 P.2d at 171, Washington courts need not defer to local legislation interpreting the requirements of the Act. See generally Trautman, Legislative Control of Municipal Corporations in Washington, 38 WASH. L. REV. 743, 769–81 (1963).
Under little NEPAs, vis-à-vis NEPA itself, "categorical" exemptions are appropriate and, sometimes, essential. The broad police power asserted by the states and their subdivisions has supported a great variety of environmental control measures, of all degrees of importance. 144 Hence, unlike the Federal government, where most actions are "major," and most effects "significant," states engage in many "minor" and "insignificant" activities. Thus, the states must engage in considerable selectivity so as to apply their little NEPAs to their most serious environmental problems, without dissipating limited resources on minor environmental impacts. It is therefore inappropriate and impractical for a state such as Washington to follow the federal lead by precluding administrative determinations of exempt categories.

IV. THE NEED FOR ADMINISTRATIVE RULEMAKING

In 1973, four Washington appellate court opinions addressed themselves to the single question of when an EIS is required by SEPA. The contribution of those decisions can, at this juncture, be but imperfectly assessed; yet it is clear from SEPA's batting average in the courts (the Act was found applicable and binding upon the parties in all four cases) that the Washington judiciary champions the environmental cause.

What is not clear, however, is whether the game that the environmentalists have been so consistently winning has any rules. The Washington Supreme Court, in a trilogy of opinions (Stempel, Eastlake and Loveless), has done little more than describe the bare bones of a definition of "major action" under SEPA. Not one of the four opinions rendered in 1973 made more than a cursory analysis of SEPA's crucial phrase, "significantly affecting the quality of the environment." 145 The Washington Legislature and administration have been even less helpful. In short, the work has yet to begin to make SEPA a viable and predictable piece of legislation. 146 Predictability and fore-

145. WASH. REV. CODE § 43.21C.030(2)(c).
146. During the final editing of this note, the Governor signed (with certain vetoed exceptions) S.B. 3277, which substantially amends many of SEPA's provisions, ch. 179, [1974] Wash. Laws, 1st Ex. Sess. As explained in the following notes, many of the recommendations suggested by this note have now been enacted in ch. 179.
warning of SEPA’s applicability to projects is most desirable, so that all parties are aware of the groundrules before the die, or perhaps more appropriately, the concrete, is cast. The Washington Legislature could measurably increase SEPA’s viability and predictability by:

(1) authorizing promulgation of broad, uniform SEPA master regulations of statewide application;\(^{147}\)

(2) authorizing adoption of rules and regulations by individual state agencies and local governments to implement SEPA’s master regulations, all in substantial conformance with the SEPA master regulations;\(^{148}\)

(3) authorizing identification, by any state agency or local government, of activities “exempt” from SEPA, so long as such determinations do not violate the public policy of SEPA nor deviate from the SEPA master regulations;\(^{149}\)

(4) specifying a uniform standard of judicial review applicable to all administrative and local government threshold determinations made pursuant to SEPA, the SEPA master regulations and applicable rules and regulations,\(^ {150}\) and a standard procedure for reviewing rules and regulations adopted pursuant to SEPA;\(^ {151}\)

(5) enacting a meaningful statute of limitations with respect to challenges of governmental actions which have been found to be a “major action significantly affecting the environment” and those which have not been so found.\(^ {152}\)


\(^{150}\) See, e.g., the Washington Administrative Procedure Act (WAPA), WASH. REV. CODE ch. 34.04 (1963); § 34.04.130 (Supp. 1973). Although WAPA does not apply to decisions of local jurisdictions, an amendment to SEPA could so apply it. This would establish uniform judicial review of all decisions made pursuant to SEPA, regardless of the decision-making body. None of the 1973 or 1974 amendments to SEPA accomplish this purpose.

\(^{151}\) This has been accomplished by the 1974 amendments, which provide that the rules adopted by the Council on Environmental Policy (CEP) and those adopted by state agencies, “shall be subject to the review procedures of R.C.W. § 34.04.070 and § 34.04.080.” Ch. 179, §§ 6(3), 8(2) [1974] Wash. Laws, 1st Ex. Sess. Rules adopted by public and municipal corporations, political subdivisions, and counties are to be reviewed by the CEP for conformance with the CEP rules and guidelines, and its decisions are final. Id., § 9(3).

SEPA's master regulations should be primarily definitional and explicative. These regulations might adopt the framework for analysis suggested in this note. Thus:

(1) Analysis under the "major action" test should include scrutiny of:
   (a) the nature of the governmental decision;
   (b) the character of the subject project; and
   (c) the "nexus" between decision and project.

(2) Analysis under the "significantly affecting" test should include:
   (a) description of the surrounding environment; and
   (b) identification of ascertainable environmental effects, and analysis of their "significance," by: (i) identification of any "qualitatively different" new effects; (ii) measurement of the magnitude of new effects after consideration of factors such as directness, probability, longevity and detriment, and comparison of the new effects with existing effects in the defined environment; (iii) examination of local standards relevant to determinations of environmental "significance."

The SEPA master regulations should provide a framework within which governmental agencies could identify exempt categories. The starting point, of course, would be an examination of the criteria pertaining to the "major action" and "significantly affecting" threshold determinations. If a given type of activity does not satisfy those criteria, it may be eligible for "exempt" classification.

These broad master regulations, however, should leave sufficient play in the joints to allow for local interpretation of SEPA's EIS requirement. Local interpretation could be responsive to environmental problems peculiar to a certain community, and could be integrated with existing local environmental control techniques such as zoning.

The above suggestions are not panacean; rather, they serve to describe certain "practicable means" by which to implement the...
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public policy of SEPA. This note proposes a mode of analysis, not black-letter rules, by which to effectuate SEPA's policy. If SEPA, with its newly-acquired judicial gloss, is recognized as the "continuing policy of the state of Washington," it then remains for the decision-makers of the state to live up to their "continuing responsibility ... to use all practical means" to make SEPA work for the citizens.

John D. Alkire

156. WASH. REV. CODE § 43.21C.020(2).
157. Id. § 43.21C.020(1).
158. Id.
APPENDIX A
ANALYTICAL FLOWCHART

Analytical process for determination of whether an environmental impact statement should be prepared

is the activity exempted by law or authorized regulation? yes

is the governmental decision “discretionary” and “nonduplicative?” no

is there a “major project” involved? yes

is there sufficient “nexus” between decision and project? no

A “MAJOR ACTION” IS PRESENT

identification of the surrounding “dynamic environment”

is the major action “affecting” the identified environment? no

can new “qualitatively different” effects be identified? yes

consideration of factors for quantitative analysis

what is the measure of the “quantitative difference” between new and existing effects?

new effects measurably greater than existing
new effects approximately the same as existing
new effects measurably less than existing

closer scrutiny of quantitative factors

consideration of relevant environmental control standards

EIS REQUIRED

are “SIGNIFICANT” EFFECTS present? yes

EIS NOT REQUIRED