Environmental Law: Progress Toward a Coherent Standard for the "Threshold Determination"

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ENVIRONMENTAL LAW: PROGRESS TOWARD A COHERENT STANDARD FOR THE "THRESHOLD DETERMINATION"

Concern for the environment\(^1\) is a long recognized value of society,\(^2\) but is relatively new to law.\(^3\) In the National Environmental Policy Act of 1969 (NEPA),\(^4\) Congress incorporated mandatory consideration of environmental effects into the approval procedures for federal projects. Many states responded to the federal commitment to informed environmental decisionmaking by enacting similar legislation.\(^5\) Washington enacted the State Environmental Policy Act (SEPA)\(^6\) in 1971, which required that consideration be given to environmental factors for all developments proposed by either private or public entities.\(^7\)

The legislature delegated authority\(^8\) to promulgate rules for SEPA's interpretation and implementation to a specially created state agency, the Council on Environmental Policy (CEP).\(^9\) The CEP was specifi-

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1. Environment may be generally defined as that collection of surrounding influences and forces, natural, social and cultural, which shape communities into the composites observed. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 760 (1961). The term "environment" should be distinguished from two related terms, "conservation" and "ecology." A function of conservation is planned utilization of natural resources, balancing the tension between preservation and consumption. *See id.* at 483. Ecology represents a third point of view with respect to resource allocation. It is that branch of science which deals with the relationship of a community to its environment and which focuses upon quantifiable measures of these complicated interrelationships. *See id.* at 720.

2. In an 1831 essay entitled "A Fortnight in the Wilds," Alexis de Tocqueville said:
Man gets accustomed to everything . . . . He gets used to every sight. An ancient people . . . is vanishing daily like the snow in sunshine, and disappearing from view over the land. In the same spots and in its place another race is increasing at a rate that is even more astonishing. It fells the forests and drains the marshes; lakes as large as seas and huge rivers resist its triumphant march in vain. The wilds become villages, and the villages, towns. The American, the daily witness of such wonders, does not see anything astonishing in all this. This incredible destruction, this even more surprising growth, seems to him the usual progress of things in this world.


7. *Id.* § 43.21C.020.

8. *Id.* § 43.21C.110.

9. *Id.* NEPA establishes a Council on Environmental Quality (CEQ), 42 U.S.C. §§ 4341–4344 (1970), which has authority similar to the CEP, but is very different in struc-
cally directed to detail the procedures for completion of the "thresh-
old determination,"10 the test to determine whether an environmental
impact statement (EIS) must be prepared. Responding to this task, it
issued the SEPA Guidelines11 in December 1975, the culmination of
two years of extensive drafting and public hearings.12

This comment will discuss the choice of the agency required to
make the threshold determination13 and will outline how the determi-
nation should be made. Preparation of an EIS is required whenever
"major actions significantly affecting the quality of the environ-
ment"14 are proposed. Theoretically, all actions are subject to the
threshold determination analysis because there are no express excep-
tions to the statute.15

Preparation of an EIS requires a significant expenditure of re-
sources,16 and, perhaps more importantly, often involves considerable
delay.17 Thus, in the interest of economic efficiency18 and social wel-
fare,19 the procedure for completing the threshold determination

ture. The CEQ is a permanent federal agency which is directed to recommend policies
and to undertake annual review of the effect of NEPA. The CEP was not permanent,
and has been incorporated into the Department of Ecology. WASH. REV. CODE §
43.21C.100 (1976).
12. Foreword to SEPA Guidelines, WASH. ADMIN. CODE §§ 197–10–010 to
15. There are, however, limited exemptions in the SEPA Guidelines. See note 57
and accompanying text infra.
16. For example, in assessing the impact of a proposed Trans-Canada natural gas
pipeline, Judge Berger of British Columbia held public hearings in forty-five municipal-
ities. These hearings produced 281 volumes of testimony (40,791 pages), from which a
245 page report was written. Berger, The Berger Report: Northern Frontier, Northern
Homeland, Living Wilderness, April/June 1977, at 4, 5.
17. "A final and perhaps most dangerous dysfunctional consequence has been that
of delay. The external process into which the EIS has evolved defies the expressed intent
of the Act's authors that it be efficient." Dreyfus & Ingram, The National Environmen-
Cf. Parkridge v. City of Seattle, 89 Wn. 2d 454, 573 P.2d 359 (1978) (SEPA should not
be used to delay a project merely because it is unpopular).
18. At equilibrium in an efficient free market system (pure competition), price,
marginal cost and marginal revenue are equal, and resources are optimally allocated.
Although it may be difficult to quantify precisely, it is not impossible to establish an
economic value for environmental factors. See, e.g., J. DALES, POLLUTION, PROPERTY,
19. According to one economics text:
Economics broadly defined is a study of a society's use of scarce resources with ref-
erence to (1) the extent to which they are used, (2) how efficiently they are used, (3)
the choice between competing alternative uses, and (4) the nature and consequence
of changes in productive power of the resources over time.
R. LIPSEY & P. ŠTEINER, ECONOMICS 9 (2d ed. 1969). To maximize social welfare, costs
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should be as simple as possible, yet maintain an acceptable balance between the competing policies of informed environmental decision-making and continued economic expansion.

Four inquiries are essential to the analysis of how the threshold determination should be made:

1. By whom should the decision be made?
2. When should it be made?
3. What procedures should be followed?
4. Upon what facts should the decision be based?

involved in meeting a society’s desire to expand must be minimized to promote efficiency. The policy of resource allocation must incorporate the factor that a society is generally willing to assume greater risks than individuals because it has the benefit of spreading any resulting loss. See generally H. RAIFFA, DECISION ANALYSIS (1968); R. SCHLAIFER, ANALYSIS OF DECISIONS UNDER UNCERTAINTY 137-98 (1969).


At present, local zoning boards, typically county commissioners, have jurisdiction to make the threshold determination. Their authority is delegated through statutes and the state constitution, which manifest the belief of the legislature and the electorate that local zoning control is appropriate. See, e.g., WASH. REV. CODE §§ 35.63.010-.120 (1976).

There is some dispute as to the validity of such a grant. Haskell argues that local control is currently not efficient with respect to its structure, finance and planning, but may be in the future. Haskell, Land Use and the Environment: Public Policy Issues, 5 ENVIR. REP. Monograph 20 at 11 (BNA 1974). In fact, there is precedent for central control. Michigan adopted a statute which created an agency having jurisdiction over the environment, but left that agency powerless. Lanning, State Management of the Environment Part One: An Evaluation of the Michigan Experience, 8 U. Mich. J. L. Ref. 286, 307-08 (1975). See also Markey, Science and Law—Toward a Happier Marriage, 59 J. Pat. Off. Soc’y 343 (1977) (expressing concern over the ability of laymen to decide issues combining science and law).

A single state agency responsible for the preparation of threshold determinations and environmental impact statements would eliminate duplication of costs and talent and would enhance consistency in decisionmaking. Environmental costs would be better distributed across the state rather than allocated according to the level of local concern and the consequences of development, especially given that the location of natural resources is not controllable. The collection of expertise into a single state agency would result in superior analysis and a more thorough understanding of the state’s environmental policy.

Reasonable expertise is especially important in Washington because of the doctrine of appearance of fairness. Review must be fair in both substance and appearance. Smith v. Skagit County, 75 Wn. 2d 715, 453 P.2d 832 (1969). The doctrine asks “whether a fair-minded person in attendance at all of the meetings on a given issue, could, at the conclusion thereof, in good conscience say that everyone had been heard... and that the legislative body... gave reasonable faith and credit to all matters presented...” Id. at 741, 453 P.2d at 847.

An aura of impropriety or partiality, even if ungrounded in fact, is sufficient to be a violation. Chrobuck v. Snohomish County, 78 Wn. 2d 858, 480 P.2d 489 (1971) (alternative holding). Impropriety may occur whenever the decisionmaker does not appear objective. Buell v. City of Bremerton, 80 Wn. 2d 518, 495 P.2d 1358 (1972). Arguably, lack of scientific expertise could be a ground for invocation of the appearance of fairness doctrine, especially when an agency fails to implement an interdisciplinary ap-
The fourth inquiry may be further analyzed in three independent segments: what is a major action, what constitutes the scope of the environment, and when is that environment "significantly affected"?

In completing this analysis of the threshold determination process, the SEPA Guidelines' test for the determination will be presented along with a synopsis of the Washington and federal decisions and the legislative history of NEPA. The determination of significance will be emphasized because it has been the most problematic element of the test. Also, because it is important to understand the policies incorporated into the SEPA Guidelines in order to appraise effectively and critically their results, the Guidelines' procedures will be applied to a set of facts which have a known outcome.

_Norway Hill Preservation & Protection Association v. King County Council_ provided an appropriate opportunity for the Washington Supreme Court to test the utility of the SEPA Guidelines. The court, however, refused to order compliance with the Guidelines, stating that they had not become effective at the time the threshold determination had been made by the local board and, consequently, should not enter the decisionmaking process at the appellate review stage.

Nevertheless, the court ultimately overturned the decision of the local zoning board and ruled that an EIS should be prepared. Either _Norway Hill_ represented a situation in which it was difficult to make the threshold determination correctly, or it indicated that bias at the local decisionmaking level may lead to undue risk of environmental damage. These two alternatives are discussed in conjunction with an approach in its study of the environmental factors. Creation of a single state agency might obviate this problem.

21. The Washington Supreme Court has stated in dicta that it is appropriate to incorporate federal law and policies into interpretations of SEPA because it is virtually a verbatim transcription of NEPA. Eastlake Community Council v. Roanoke Assocs., 82 Wn. 2d 475, 513 P.2d 36 (1973). The amendments made by the Washington legislature appear to strengthen the goal of environmental protection. E.g., _Wash. Rev. Code_ § 43.21C.020(3) (1976) ("fundamental and inalienable right to a healthful environment").

22. 87 Wn. 2d 267, 552 P.2d 674 (1976).
23. _Id._ at 277 n.7, 552 P.2d at 680 n.7.
24. _Id._ at 278, 552 P.2d at 681. The court held that the King County Council determination that the stipulated major action would not have a significant impact was "clearly erroneous." The action, therefore, was subject to the SEPA procedures. _Id._ at 279, 552 P.2d at 681.
25. The court found that there was a significant effect even though the project was a logical extension of the surrounding use, was given extensive consideration, and was consistent with the comprehensive zoning plan. _Id._ at 279, 552 P.2d at 681.
26. The court stated that the project was significant on its face in spite of the local board's decision. _Id._ at 278, 552 P.2d at 681. This interpretation of _Norway Hill_ was ac-
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analysis of the utility of the SEPA Guidelines in making the threshold determination.

I. BY WHOM SHOULD THE DETERMINATION BE MADE?

A "responsible official" of the "lead agency" having jurisdiction over the proposed action is charged by law with the duty to prepare a detailed statement on the potential environmental impact of the action. The responsible official is defined as that person or group of persons within the lead agency designated by the agency's guidelines to act on its behalf. The lead agency is that agency charged with the duty to make the threshold determination and to supervise any subsequent activity initiated by the proponent of the action; it is responsible for implementing the policies of SEPA.

An agency which proposes an action or which is the first to be approached by the proponent should also determine which is to be the lead agency by following the detailed directions of the Guidelines. Generally, there are three major rules for assigning status. An agency which is also the proponent will be its own lead agency. If only one agency has jurisdiction, it will be designated. A priority system accepted by the Washington Court of Appeals in City of Richland Homeowner's Preservation Ass'n v. Young, 18 Wn. App. 405, 568 P.2d 818 (1977).

27. WASH. REV. CODE § 43.21C.030(2)(c) (1976). See also 42 U.S.C. § 4332(2)(c) (1970). Ordinarily, this will be accomplished by requiring the proponent of a development to submit background information which will be reviewed independently by the responsible official.


30. Id. § 197–10–200. The lead agency must see that crisis decisionmaking which often leads to catastrophic environmental damage is avoided. The solution is to evaluate factors while there is still an opportunity to choose alternative courses of action. Eastlake Community Council v. Roanoke Assocs., 82 Wn. 2d 475, 496, 513 P.2d 36, 49 (1973).

31. WASH. ADMIN. CODE § 197–10–203(1) (1976). If a dispute arises over the validity of the designation, the CEP, now a part of the Department of Ecology, has power to resolve it. Id. §§ 197–10–203(2) to (4), –260. The lead agency is selected from those agencies which have jurisdiction, that is, those agencies which are asked to issue nonexempt licenses for the project or which will act on applications for grants or loans to finance the proposal. Id. 197–10–040(4).

32. Id. §§ 197–10–205 to –230.

33. Id. § 197–10–205.

34. See note 31 supra (jurisdiction defined).

should be followed if neither of these conditions is satisfied. For example, if a city or county has jurisdiction, it will be declared the lead agency ahead of competing agencies. However, agreements between potential lead agencies may alter the Guidelines' pattern of appointment, and certain types of proposed actions, such as thermal power generation and use of geothermal energy, are dealt with specifically. Finally, the responsibility may be transferred in certain circumstances, even after a "declaration of non-significance" has been prepared and entered.

The lead agency determination has never been an important issue in Washington's decisional law. Because the Guidelines provide a determinative, but flexible procedure for assigning status, no problems should arise. Should there be any difficulty, the Guidelines provide an appeal mechanism for resolution of the dispute.

II. WHEN MUST THE THRESHOLD DETERMINATION BE MADE?

It is a fundamental policy of SEPA that agencies make reasoned, informed decisions on proposed actions while reasonable alternatives are still available. The process should begin early to allow adequate time to collect data and to review it in a meaningful way.

36. Id. § 197-10-225.
37. Id. § 197-10-220.
38. Id. § 197-10-240.
39. Id. § 197-10-230.
40. Id. § 197-10-235 (allows transfer in the limited circumstance when a small local entity has lead agency priority but a state agency better suited to decisionmaking has concurrent jurisdiction).
41. The declaration of non-significance, sometimes called a negative declaration, is the written decision by the lead agency that a proposal will not have a significant adverse impact. Id. § 197-10-040(9).
42. Id. § 197-10-345 (procedure to be followed). In such cases the agency assuming lead agency status must supervise the drafting of an EIS. Id. § 197-10-545(3).
43. Id. § 197-10-260.
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SEPA states that an EIS should be included in "every recommendation or report on proposals for legislation and other major actions" which significantly affect environmental quality. The threshold determination must be made well before any reports of a proposal are filed in order to "utilize a systematic interdisciplinary approach" in environmental decisionmaking, and to account for the considerable amount of time spent in preparing a final EIS. Unfortunately, the SEPA directive does not clarify the proper time to institute the process, even when the judicial decisions interpreting SEPA are included in the analysis. The SEPA Guidelines, however, have made a contribution to resolving this confusion, although they address the timing issue in a somewhat convoluted fashion.

A section in the Guidelines entitled "Recommended Timing for the Threshold Determination" would appear to be directed to the question of when to begin the process. However, it establishes only the amount of time which the process is estimated to take. The section provides that fifteen days should be adequate to prepare for and to complete the threshold determination. An introductory section specifies that the process should be instituted at a stage when the proposal is sufficiently definite that meaningful environmental analysis may be undertaken. The determination should be started as soon as possible after the lead agency has been appointed, but no later than the time actual construction begins on a proposal or licenses and permits for such work are issued.

In summary, the threshold determination should be as early as possible, yet at a stage when the proposal will be concrete—that is, when it has solidified to the extent that meaningful review may be accomplished. Although imprecise, the Guidelines add some substance to the statutory law.

49. Id. § 43.21C.030(2)(a).
51. Id. (usually not to exceed 15 days).
52. Id. § 197–10–055.
53. Id. § 197–10–310(2) (may begin as soon as an application is filed with the lead agency).
54. Id. § 197–10–055(2).
55. Id.
III. WHAT PROCEDURES SHOULD BE FOLLOWED?

The Guidelines divide the threshold determination into two parts. To require preparation of an EIS, a proposed action must be "major" and must have a "significant effect." All actions are presumed to be major unless specifically excluded by the Guidelines.57 The "major action" test, therefore, involves an examination of possible exemptions. If an action is not exempted, the lead agency should complete an environmental checklist58 and should make a determination of significance based upon its findings.59

The significance determination "must be based upon information reasonably sufficient to determine the environmental impact of a proposal."60 Usually, the lead agency will require that a proponent independently complete a checklist, and this is the suggested format under the Guidelines.61 Should the lead agency need additional information, it may require the proponent to conduct additional research and field investigation62 for those areas specifically covered by the checklist.63 The lead agency may institute its own studies,64 or consult with other agencies,65 and it must investigate the potential impact until it is adequately informed whether the proposal will have a significant effect.66

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57. WASH. ADMIN. CODE §§ 197-10-150 to -190 (1976). WASH. ADMIN. CODE § 197-10-170 focuses upon particular activities as exemptions whereas § 197-10-175 deals with classification on the basis of the lead agency involved. For example, issuance of certain permits does not fall within the confines of SEPA. Examples of exempted activities include repair of existing facilities where no expansion or alteration of use occurs, appropriations of less than one cubic foot per second of surface water, animal control licenses, and all actions of the state legislature.

58. Cf. WASH. ADMIN. CODE §§ 197-10-050, -100 (1976) (a checklist must be filed with all applications).

59. Id. § 197-10-360(1).

60. Id. § 197-10-10-330(1). Fear has been expressed that proponents will write EIS's in unwarranted situations to avoid the necessity of establishing a basis for a negative declaration because preparation of an EIS may be easier. ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW 358 (1974).


62. Id. § 197-10-100(3) (1976). "Agencies may not require a complete assessment or 'mini-EIS' at this [checklist] stage." Id. § 197-10-100(2).

63. Id. § 197-10-330(1)(a).

64. Id. § 197-10-330(1)(b).

65. Id. § 197-10-330(1)(c).

66. Id. § 197-10-320.
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If the agency determines that the action is significant, the agency must prepare a draft EIS, usually with the cooperation of the proponent. If the agency determines otherwise, it must enter a declaration of non-significance. Either decision is subject to modification, but modification should be used with reservation to avoid the appearance of unfairness.

IV. UPON WHAT FACTS SHOULD THE DECISION BE BASED?

The threshold determination answers this question: Is this a major action which significantly affects the quality of the environment? The relevant issues are first, what is a major action; second, what constitutes the environment; and third, when does an action significantly affect the environment? Although this approach differs from the generally adopted procedure, a tripartite approach is more appro-


68. Id. § 197–10–320(2)(a). In complying with the procedural dictates of § 197–10–340, the lead agency must utilize substantially that form recommended in § 197–10–355.

69. Id. §§ 197–10–370, –375.

70. See note 20 supra (discussion of the appearance of fairness doctrine).

71. WASH. REV. CODE § 43.21C.030(2)(c) (1976).

72. The court has power to be influential in developing standards for analysis because the determination of significance is a question of law. See Norway Hill Preservation & Protection Ass’n v. King County Council, 87 Wn. 2d 267, 273, 552 P.2d 674, 678 (1976) (more than a simple finding of fact); Leschi Improvement Council v. State Highway Comm’n, 84 Wn. 2d 271, 285, 525 P.2d 774, 784 (1974) (conclusion of an agency about environmental matters is a question of law).

The significance test is similar to the obviousness test of patent law where three inquiries are to be made. The first is a general overview to describe the area of concern; the second, a search for the essence of the proposal; and finally, a focus on surrounding elements, but only to an extent which meets with unstated policies.

Describing the application of 35 U.S.C. § 103 (1970), the Supreme Court said: Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness of the subject matter is determined.


Although the test is not precisely defined, see, e.g., Note, Standards of Obviousness and the Patentability of Chemical Compounds, 87 HARV. L. REV. 607 (1974), the determination of obviousness is so closely analogous to the determination of significance that the obviousness test may be useful in delimiting the standards of significance to be applied.

73. Most jurisdictions divide the threshold determination into two segments, major actions and significant effects. E.g., Kleppe v. Sierra Club, 427 U.S. 390 (1976), rev’g
ropriate. In the usual analysis, the attributes of the environment are presumed and are assumed to remain static. In reality, they are dynamic. Although the elements of the environment are rigidly defined at any given time, the definition is likely to change over time to reflect changed policies. Because the scope of the environment may change, it should be analyzed as an independent variable.

A. What is a Major Action?

A primary goal of SEPA is full disclosure of environmental impacts through a process which leads to reasoned decisionmaking. Thus, courts have carefully limited the number of exempted actions which escape the rigors of the significance test. A "major action" is defined as any "discretionary non-duplicative stage" arising in the course of a proposed development which requires agency approval. Almost all

Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973); CEQ Guidelines 40 C.F.R. § 1500.6 (1976); Druley, Federal Agency NEPA Procedures, 7 ENVIR. REP. Monograph 23, at 10 (BNA 1976). However, there has been substantial criticism; the critics suggest a single test. E.g., City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975); Minn. Pub. Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974); F. Anderson, NEPA IN THE COURTS 89-96 (1973); Comment, Environmental Law: Judicial Review of Federal Agency Actions Under NEPA, 28 OKLA. L. REV. 866 (1975). The critics of the two-fold test primarily fear that very significant impacts may not trigger the initial major action threshold. For example, individual private developers could have constructed small portions of the Norway Hill project without SEPA violation because independent development is categorically exempted. WASH. REV. CODE § 197-10-170(l)(a) (1976). But, because of the cumulative effect, the proposed development initiated by a single developer did require preparation of an EIS. Norway Hill Preservation & Protection Ass'n v. King County Council, 87 Wn. 2d 267, 552 P.2d 674 (1976).

In determining whether an action has met the first prong of the two-pronged test, the agency must consider all contemplated development logically following from the proposal rather than limiting its review to the precise proposal. See Part IV-B, infra. See also Loveless v. Yantis, 82 Wn. 2d 754, 513 P.2d 1023 (1973) (a purpose of SEPA is the avoidance of progressive degradation). However, Kleppe v. Sierra Club, 427 U.S. 390 (1976), a 7-2 decision, may confuse the cumulative effect standard. The Court found that a study being conducted on the utility and feasibility of developing and producing Northern Great Plains coal did not trigger the EIS preparation requirements, although each possible proposal under consideration, if selected, would meet the threshold determination standard because of its devastating environmental consequences. The Court said that no proposal had been adopted as the means for development, and that without such a decision, it would be mere speculation to attempt to categorize the impacts associated with it. The Court held that the study was an action which was not sufficiently ripe to allow meaningful review. See 55 N.C.L. REV. 484 (1977). Cf. 52 N.D.L. REV. 601 (1976).

WASH. ADMIN. CODE § 197-10-444 (1976) (limits the scope of review to the elements listed).


75. See also Loveless v. Yantis, 82 Wn. 2d 754, 513 P.2d 1023 (1973).
actions pass this judicial hurdle in the SEPA examination because consideration is given to the total proposal and to its cumulative effects.77

"Action" is defined circularly by the Guidelines as "an activity potentially subject to the environmental impact statement requirements of [SEPA]."78 The range of desired coverage may be broadly categorized as including governmental licensing, sale of public and private lands, zoning, waste disposal, and transportation as well as other types of planning and practice.79 All actions are presumed to be major unless specifically exempted.80 This approach simplifies the determination process. If the exemptions are selected to reflect sound social policy, this method is conservative because it operates to protect the environment during investigation of the impact of the proposal.

The Guidelines delegate authority to lead agencies to stipulate environmentally sensitive areas within their jurisdictions for which preparation of an EIS is likely to be required.81 Through this mechanism, agencies are able to presume not only that the action is major, but that, within an area, the effect of any action will be significant.82

For the purposes of the threshold determination, a proposal is defined to include all activity functionally related to the proposed action, including the potential direct and indirect impacts.83 This definition, however, is not so simple as it may appear.84 The problem of bioaccumulation is illustrative.85 Relatively small amounts of pol-

78. WASH. ADMIN. CODE § 197-10-040(2) (1976).
79. Id.
80. Id. § 197-10-040(24) (definition of major action). Examples of exempted activities include minor new construction such as construction of a barn or less than four residential units, inspections by any agency for any purpose, open burning permits, licenses or approvals to gather firewood, and issuance of hunting licenses or tags. See id. § 197-10-177.
81. Id.
82. But see id. § 197-10-160. The nature of the site thus places a heavier burden upon the proponent to show that there will not be damage to the environment through development.
83. Id. § 197-10-060(2) (total proposal defined). An agency should consider whether the total proposal will induce additional growth or serve as a precedent for future proposals or zoning changes. Contemporaneous causally connected development must be included in the evaluation. Id. § 197-10-060(4), (5) (allowing limitation of the scope of the proposal at the discretion of the lead agency in particular circumstances).
84. See, e.g., City of Davis v. Coleman, 521 F.2d 661, 673 (9th Cir. 1975).
85. See, e.g., Clayton, Pavlou & Breitner, Polychlorinated Biphenyls in Coastal Marine Zooplankton: Bioaccumulation by Equilibrium Partitioning, 11 ENV'TL SCI. &
Lutants may combine to form toxic substances or may accumulate in the environment with the ultimate toxic effect. For example, small discharges of mercury into waterways, believed to disperse harmlessly because the concentration of the pollutant was greatly reduced by dilution, were discovered to accumulate in the tissues of fish and crustaceans, organisms which served as amplifiers for the mercury along the food web. Sufficient increase in concentration occurred until detrimental reactions were observed in people and livestock. A major problem resulted from the complexity of the pollution problem; an unseen ripple in one corner of the environmental pool had become a tsunami. Similarly, other potential indirect impacts may be initially overlooked.

B. What Constitutes the Environment?

The underlying policy and purpose of NEPA was expounded by Senator Henry Jackson. Its "action-forcing" procedures were intended to reduce problems created by federal projects, such as overcrowding and congestion, haphazard growth, and inconsistent or incoherent land use. Senator Jackson stated,

An environmental policy is a policy for people. Its primary concern is with man and his future. The basic principle of the policy is that we must strive, in all that we do, to achieve a standard of excellence in man's relationships to his physical surroundings. If there are to be departures from the standard, they will be exceptions to the rule and the policy. And as exceptions, they will have to be justified in light of public scrutiny.


86. See, e.g., F. D'ITRI, THE ENVIRONMENTAL MERCURY PROBLEM (1972).
88. 115 CONG. REC. 40417 (1969). NEPA was also intended to prevent loss of open spaces, to avoid critical air and water pollution problems, to diminish loss of recreation areas, to limit soil erosion, to avoid degradation of unique ecosystems, to promote development of efficient and effective transportation systems, to improve design and aesthetic planning, to lessen noise, and to regulate the use of chemicals, and was intended to protect any other concerns. Id. These goals embodied the principal axioms of ecology. Aldo Leopold wrote, "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise." A. LEOPOLD, A SAND COUNTY ALMANAC 240 (1966). Harmony between man and his environment was the ultimate goal; symbiosis was preferred to parasitism.
See also WASH. REV. CODE § 43.21C.010 (1976) (the purposes of SEPA).
89. 115 CONG. REC. 19009 (1969).
To fulfill these goals, SEPA states that an interdisciplinary approach\textsuperscript{90} for review of the impact should be instituted.\textsuperscript{91} To satisfy the wish that information be gathered on all of man's surroundings, the search should be as broad as is reasonably possible.\textsuperscript{92}

The SEPA Guidelines attempt to define more precisely the scope of the relevant environment.\textsuperscript{93} By restricting the domain which is subject to consideration, the Guidelines adopt policies deemed suitable by the state to protect the environment and to reduce the labor required of the lead agency. The underlying policies may change, however, and if they do, the scope of the environment should be changed accordingly.\textsuperscript{94}

The Guidelines' definition divides the "environment" into two major subdivisions: the physical and human environments.\textsuperscript{95} The central focus of the physical environment is resource management,\textsuperscript{96} while that of the human environment is the individual's interaction with her surroundings.\textsuperscript{97} For example, the human environment encompasses the effect of transportation systems, energy use, health, recreation, and aesthetics as part of one's enjoyment of the environment.

Washington's approach to defining the scope of the environment differs only slightly from that employed by the Council on Environ-

\textsuperscript{90} See Wash. Rev. Code § 43.21C.030(2)(a) (1976) (analogue of the NEPA dictate). See also Wash. Admin. Code § 197-10-330 (1976) (lead agency must consult other agencies at the threshold determination stage); id. § 197-10-465 (directory of agencies specifying their areas of expertise).

\textsuperscript{91} Senator Jackson believed that knowledge should be drawn from "the broadest possible range of social and natural scientific knowledge and design arts" when planning or considering the utility of a proposal. 115 Cong. Rec. 40419 (1969).

\textsuperscript{92} Because the value of particular items in the environment is difficult to quantify, economic policy may not be a valuable factor in the analysis. Even if economic policy is not a pivotal consideration, improving the procedure to add a more definite structure for completing the analysis would promote certainty, efficiency, and equality.

\textsuperscript{93} "Environment means, and is limited to, those areas listed in WAC 197-10-444." Wash. Admin. Code § 197-10-040(13) (1976).

\textsuperscript{94} The Guidelines are a legislative synthesis of the policies of SEPA. By confining the environment to a limited class of concerns, the legislature has decided that this specified portion of the environment is, for Washington purposes, all that must be reviewed to make acceptable decisions. The legislature must believe that these areas encompass the broad spectrum which will provide the protection SEPA desires. See Wash. Rev. Code §§ 43.21C.010, .020 (1976). There is no reason to believe that this decision will be static.

\textsuperscript{95} See Wash. Admin. Code § 197-10-444(2), (3) (1976). NEPA is concerned with the human environment only. 42 U.S.C. § 4332(2)(c) (1970). Therefore, SEPA might require an even greater depth of study. See also Wash. Rev. Code § 43.21C.020(3) (1976) (the environment is a fundamental interest). However, comparison of the goals and the scope of review shows that approximately the same area is protected.

\textsuperscript{96} The physical environment is composed of earth, air, water, flora and other elements. Wash. Admin. Code § 197-10-444(2) (1976).

\textsuperscript{97} Id. § 197-10-444(3).
mental Quality (CEQ). Under NEPA the environment is unlimited. The CEQ Guidelines suggest areas of consideration in much the same manner as the SEPA Guidelines, and cover the same general areas, but reflect a federal policy that strict formalism might be counterproductive. Although the SEPA Guidelines may be susceptible to an interpretation which would encompass expanding environmental concerns, as do the federal guidelines, it is uncertain whether they will be so interpreted.

Merely listing the components of the environment, however, is insufficient to reveal the required scope or intensity of the lead agency's search of the potential impacts on each element. The components are not individually defined, nor is the locale for the search categorized. Thus, the Guidelines offer no concrete advice to resolve these issues. Instead the Guidelines rely upon the implicit assumption

100. Id. § 1500.6(b).
101. Oversight could lead to irreversible harm which might not be detectable with sufficient quickness to impede environmental damage. By allowing agency input into the scope of the environment while requiring review of specified areas, better protection may be afforded. The lead agency could correct the fault of the formal system.
102. An example will best serve to illustrate the problem of whether a search should be local, multi-district, intrastate, interstate, or international.

Photochemical smog is the product of a complex system of interrelated reactions, especially between sulphur dioxide ($SO_2$), nitrogen oxides ($NO_x$) and hydrocarbons. Sea aerosol serves as a suitable medium for condensation of reactants, and, thus, is an effective catalyst for the system. J. Seinfeld, Air Pollution, Physical and Chemical Fundamentals (1975). See also S. Friedlander, Smoke, Dust, and Haze: Fundamentals of Aerosol Behavior (1977); Bottenheim, Braslavsky & Strausz, Modeling Study of Seasonal Effect on Air Pollution at 60°N Latitude, 11 Envt'l Sci. & Tech. 801 (1977).

Smog is a well-known and widely publicized problem of the Los Angeles Basin. Since there are three counties in the basin, it is unclear which should act as lead agency for any proposed development. Under the Washington system, the county approached by the proponent would be designated the lead agency (subject to appeal), although it may not be the most appropriate choice.

The basin is a vast urban area which has widely diverse atmospheric characteristics due to the topology. Torrance is an industrial city in Los Angeles County and supports oil refining as a major business. However, the smog which is partially a consequence of its industry does not plague it. Instead of remaining over Torrance, the emissions are carried by sea breezes northward to collect against the San Gabriel Mountains which form the natural boundary of the basin. Characteristically, Torrance will be clear while Pasadena will be submerged in smog. Because Torrance will not realize the effect of its development, it may not be a suitable entity to decide.

The collection of smog in Pasadena is really just the beginning of the smog problem. Nightly breezes carry the smog eastward into San Bernardino County, where, unfortunately, there is little outlet for it. The smog will settle there and its toxicity will be enhanced by photochemical reaction and addition of further pollutants. Only a minor amount will drift across the San Gabrieles to rest and linger in the outlying communities of the San Bernardino desert.

This multidistrict problem may not be adequately considered at the local scale. There
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that persons reasonably skilled in assessing environmental impacts will conduct a reasonable analysis and will obtain expert assistance whenever they believe it necessary in interpreting the legislative suggestions. The Guidelines alleviate some of the uncertainties of the scope of the environment by limiting the number of areas subject to review. The state’s policy is reflected by this definition of the environment. Unfortunately, the degree of intensity required is not discernible; either it will have to be ascertained by experts who can provide the necessary specificity to the vague directions, or the court will have to address the issue. For the present, certainty and equality of application are lacking.

C. What Facts Determine Significance?

1. The judicial standard

In a 1973 decision, the Washington Supreme Court adopted the generally accepted federal standard for determining whether an action significantly affects the quality of the environment. The proce-

are a multitude of potential lead agencies, the outlying desert communities being the least likely to come to mind when industrialization is proposed in Torrance. Failure to consider the project thoroughly may result from local bias of the decisionmaker or from lack of understanding of the development’s potential consequences.

This example presents two problems that are coupled in their resolution. First, which entity should be the decisionmaker, and, second, how broad an inquiry should it be expected to undertake? When proposals are suggested, their consequences are often very uncertain or unknowable, especially to a parochial local board. Proposals do not have widespread publicity in most cases, and, therefore, a decision may be made before important voices are heard. Unless it is clear that a sufficiently in-depth inquiry will be conducted so that degradation is avoided, the proper protection will not be effectuated. Hindsight is not an adequate remedy or consolation. A better statement of the pertinent policy of SEPA is necessary to resolve these problems, and to eliminate delay which presently prevails while agencies act under uncertainty.

When considering a rezone and the sufficiency of an EIS prepared to assess the impact thereof, the board must serve the welfare of the project’s entire affected community by protecting against potentially serious impacts not typically within the board’s jurisdiction. The court has stated that the policy of SEPA is to encourage interjurisdictional planning and cooperation. Save a Valuable Environment v. City of Bothell, 89 Wn. 2d 862, 576 P.2d 401 (1978).

103. Reasonable persons may differ, and there is no guarantee that the local decisionmaker will have the requisite expertise to assess the problem. See note 20 supra.

104. The court has said that multidistrict planning is encouraged by SEPA, but it has given no indication of how such planning should be instituted, or how much is required. Save a Valuable Environment v. City of Bothell, 89 Wn. 2d 862, 576 P.2d 401 (1978).


procedure announced required lead agencies to consider the direct environmental effects caused by the proposed development, and to attempt to quantify the absolute impact, including anticipated cumulative effects.\textsuperscript{107} This test proved unsatisfactory, however, because it was subjective;\textsuperscript{108} it gave the lead agency so much discretion that the consistency and stability of decisionmaking was suspect.\textsuperscript{109} The two requirements of the test were obvious factors to consider, but offered little guidance on how to proceed.

Cognizant of the weaknesses of the test, the Washington Supreme Court decided in \textit{Norway Hill Preservation & Protection Association v. King County Council}\textsuperscript{110} that because SEPA required decisionmaking based on full consideration of pertinent environmental data,\textsuperscript{111} the threshold determination test should be modified and expanded.\textsuperscript{112} It recognized that a general guideline rather than a value-laden definition would be a more appropriate means to delimit the significance test.\textsuperscript{113} Consequently, the court stated that "the procedural requirements of SEPA . . . should be invoked whenever more than a moderate effect on the quality of the environment is a reasonable probability."\textsuperscript{114} In addition, in order to have the necessary flexibility to review a lead agency's decision in a meaningful way, the court readopted and applied the twofold standard of \textit{Stempel v. Department of Water Resources}.\textsuperscript{115} This test combines the "clearly erroneous" test\textsuperscript{116} with the "arbitrary and capricious" standard of review.\textsuperscript{117} The result is a

\begin{itemize}
\item \textsuperscript{107} \textit{id.} at 423, 526 P.2d at 902.
\item \textsuperscript{108} \textit{Norway Hill Preservation & Protection Ass'n v. King County Council, 87 Wn. 2d 267, 277, 552 P.2d 674, 680 (1976) ("a precise and workable definition is elusive because judgments in the area are particularly subjective").
\item \textsuperscript{109} Many decisions have been reversed on appeal without making clear the basis for the decision. \textit{E.g.}, \textit{id.}; \textit{Swift v. Island County, 87 Wn. 2d 348, 552 P.2d 175 (1976); Sisley v. San Juan County, 89 Wn. 2d 78, 569 P.2d 712 (1977).}
\item \textsuperscript{110} 87 Wn. 2d 267, 552 P.2d 674 (1976).
\item \textsuperscript{111} \textit{id.} at 272, 277, 279, 552 P.2d at 677, 679, 680.
\item \textsuperscript{112} \textit{id.} at 272–76, 552 P.2d at 677–79. \textit{See also Swift v. Island County, 87 Wn. 2d 348, 552 P.2d 175 (1976).}
\item \textsuperscript{113} 87 Wn. 2d at 278, 552 P.2d at 680.
\item \textsuperscript{114} \textit{id.}
\item \textsuperscript{115} 82 Wn. 2d 109, 508 P.2d 166 (1973).
\item \textsuperscript{116} The "clearly erroneous" test, codified at \textit{Wash. Rev. Code § 34.04.130(6)(e)} (1976), requires that an appellate court reviewing the entire record be "left with the definite and firm conviction that a mistake has been committed." \textit{Ancheta v. Daly, 77 Wn. 2d 255, 259–60, 461 P.2d 531, 534 (1969).}
\item \textsuperscript{117} The "arbitrary and capricious" test, codified at \textit{Wash. Rev. Code § 34.04.130(6)(f)} (1976), requires that the decision be based on a consideration of the relevant factors contained in the record. \textit{Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).} To overturn, the court must hold that the decision was a wilful and un-
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test of reasonableness which allows a court the opportunity to conduct a review of the merits, although the court must still give substantial weight to the lead agency's determination.\textsuperscript{118}

The combination of the reasonability guideline for the significance test together with the Stempel standard of judicial review yields a test for the threshold determination similar to the federal "standard of reasonableness."\textsuperscript{119} In fact, the Washington Supreme Court relied upon a Ninth Circuit decision, \textit{City of Davis v. Coleman},\textsuperscript{120} as authority for its significance guideline. In \textit{Davis}, however, the federal court of appeals dealt with the standard of judicial review, not with the definition of significance. Because the Washington court did not distinguish the settings involved, and because it placed direct reliance on \textit{Davis} as support for its guideline, one can infer that the court believed the issues involved in the two determinations to be similar. Implicitly, the Washington court adopts the standard of reasonableness for judicial review although it prefers to label it under terms prevailing in the existing Washington law.

The standard of reasonableness is similar to the analysis proposed in Justice Friendly's dissenting opinion in \textit{Hanly v. Kleindienst (Hanly II)},\textsuperscript{121} and it represents a substantial change in Washington law. Explaining the test more thoroughly, the Ninth Circuit Court of Appeals, in \textit{Davis}, identified the relevant question to be whether it is un-

\footnotesize
\textsuperscript{118} \textit{WASH. REV. CODE} § 43.21C.090 (1976). The new standard allows the court to consider a broad base of factors including important public policies such as SEPA's full disclosure requirements and economic efficiency. Utilizing such a standard, the court should prove to be a valuable check in the EIS process. \textit{See Sisley v. San Juan County, 89 Wn. 2d 78, 569 P.2d 712 (1977); Newaukum Hill Protective Ass'n v. Lewis County, 19 Wn. App. 162, 574 P.2d 1195 (1978).}

However, the court may be withdrawing from full exercise of its power, and returning to use of only a part of the Stempel review standard. In \textit{Lassila v. City of Wenatchee, 89 Wn. 2d 804, 576 P.2d 54 (1978)}, the court stated that the appropriate review standard was the clearly erroneous standard alone, relying on \textit{Norway Hill. Id. at 817, 576 P.2d at 61. Unless the arbitrary and capricious test is but a subset of the clearly erroneous test, the court has contracted its power. In any case, it has not adequately explained the rationale for this change.}


\textsuperscript{120} 521 F.2d 661 (9th Cir. 1975).

\textsuperscript{121} 471 F.2d 823 (2d Cir. 1972), \textit{cert. denied}, 412 U.S. 908 (1973). Judge Friendly believed that an action was significant whenever it arguably would have an adverse environmental impact. \textit{Id.} at 830–31.
reasonable to conclude that the project will have an adverse impact.\textsuperscript{122} It stated that "[the] threshold test is met when a plaintiff 'alleges facts which, if true, show that the proposed project would materially degrade any aspect of environmental quality.'"\textsuperscript{123}

The \textit{Norway Hill} decision is a step toward obtaining a manageable definition of significance and a structure within which to make the threshold determination, but it still leaves considerable latitude to the lead agency. When coupled with the \textit{Stempel} review standard,\textsuperscript{124} \textit{Norway Hill} increases court control of the threshold determination. Yet, the decision provides little additional guidance to lead agencies seeking to comply with the procedural mandates of SEPA.

2. \textit{The administrative approach}

The SEPA Guidelines have provided a structure—the environmental checklist\textsuperscript{125}—through which elucidation may be forthcoming.\textsuperscript{126} The checklist presents a series of questions designed to be answered by responses of "Yes," "No," and "Maybe," covering all aspects of the environment as defined by the Guidelines. Each applicant must complete a checklist upon application to a lead agency,\textsuperscript{127} unless the proponent and the lead agency agree to proceed immediately to drafting an EIS.\textsuperscript{128} All questions answered "Yes" or "Maybe" must be explained and supported with necessary information.\textsuperscript{129} Upon receiving a completed checklist, the lead agency must make an independent assessment of the potential impact, indicating its answers to the questions on the same form which the proponent used.\textsuperscript{130}

\textsuperscript{122} 521 F.2d at 673.
\textsuperscript{123} \textit{Id.} (quoting Environmental Defense Fund v. Armstrong, 487 F.2d 814, 817 n.5 (9th Cir. 1973)).
\textsuperscript{124} \textit{See} notes 115–18 and accompanying text \textit{supra}.
\textsuperscript{125} \textit{WASH. ADMIN. CODE} § 197–10–365 (1976).
\textsuperscript{126} \textit{Id.} § 197–10–050. \textit{See also} \textit{id.} § 197–10–310.
\textsuperscript{127} \textit{Id.} § 197–10–310.
\textsuperscript{128} \textit{id.} § 197–10–300(2). Such a means of avoiding the formality of the threshold determination could lead to the preparation of too many EIS's, because it may be easier to prepare an EIS immediately rather than attempting to provide an adequate record to support a negative declaration. \textit{See} \textit{ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW} 358 (1974). Economics dictates that only those actions which meet the policy threshold should be burdened with the preparation of an EIS. \textit{See} notes 18 & 19 \textit{supra}. \textit{See also} \textit{Norway Hill Preservation \\& Protection Ass'n v. King County Council, 87 Wn. 2d 267, 277, 552 P.2d 674, 677–78 (1976)}.
\textsuperscript{129} \textit{WASH. ADMIN. CODE} § 197–10–310(1) (1976). The lead agency may not require the proponent to prepare a mini-EIS at the threshold determination stage. \textit{ld.} § 197–10–100(2).
\textsuperscript{130} \textit{ld.} § 197–10–320(1). The checklist serves as a means of verifying the "good
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Although designed for convenience, the checklist does not eliminate all of the problems. First, although individual checklist questions indicate both adverse and beneficial consequences, the Guidelines limit the overall consideration by the lead agency to adverse impacts. They state that "[t]he question at the threshold determination level is not whether the beneficial aspects of a proposal outweigh its adverse impacts, but rather if the proposal involves any significant adverse impacts upon the quality of the environment. . . . No test of balance shall be applied at the threshold determination level." Overall, the checklist provides protection for environmental interests by establishing a very conservative standard. Since the decisionmaker should be an expert, however, the elimination of balancing is arguably neither justified nor worthwhile.

A second problem in the Guidelines is that they do not specify the level of indicated adverse impacts which is necessary to require the preparation of a draft EIS. "It is probable there will be affirmative answers to several of these questions while the proposal would still not necessarily have a significant adverse impact . . . ." The actual threshold is ultimately left to the discretion of the lead agency subject only to judicial review. The Guidelines could be improved by clari-
fying this necessary level of impact. Completed checklists could be published as examples. Agencies could compare the checklists which they develop with these examples in order to divine the state's environmental policy from the vague statutory language. A clearer legislative statement of the underlying policy would also reduce the uncertainty.

The form of the checklist questions poses another problem. Some questions lack the specificity to make them useful measures. For example, an affirmative answer to the question, "Will the proposal result in: (a) air emissions or deterioration of ambient air quality?", must be given if either there are emissions or there is deterioration. Most developments will produce emissions during the construction or operation stages. The drafters must have contemplated that an emissions threshold be met before an affirmative answer to this question is required. The proponent will probably not be familiar with such an implied threshold, and will almost always answer the first part of the question affirmatively.

The second part of the question is similarly lacking in utility. Whereas emissions are characterized easily and observed readily, deterioration of ambient air quality is much more difficult to determine without resorting to speculation. Actual determination of deterioration requires the development of an atmospheric model, but the

\[ \text{environmental policy. See notes 110-24 and accompanying text supra.} \]


139. Id. § 197-10-365(2).

140. Only minor construction is exempted. See, e.g., WASH. ADMIN. CODE § 197-10-170(1) (1976).

141. For example, open burning permits are categorically exempted, id. § 197-10-170(14), although emissions are characteristically associated with burning.

142. The proponent, however, may supplement that answer with an explanation. Id. § 197-10-365(2).

143. Modeling attempts to reduce a natural phenomenon to a mathematical expression which may be tested when significant variables are altered. An algorithm for solving the problem and to represent the observed facts must be developed. If the model which accomplishes this mapping is of general applicability, it may be used to estimate resulting characteristics of the system. Air pollution modeling is particularly complex as it combines physical transport phenomena with multiple chemical reaction kinetics. Exact solutions may not be obtainable but estimates may be made and checked for the important equations. See S. FRIEDLANDER, SMOKE, DUST, AND HAZE: FUNDAMENTALS OF AEROSOL BEHAVIOR (1977); J. SEINFELD, AIR POLLUTION, PHYSICAL AND CHEMICAL FUNDAMENTALS (1975); Morgan, Monitoring the Quality of Ambient Air, 11 ENV'T'L SCI. & TECH. 352 (1977); Bottenheim, Braslavsky & Strausz, Modeling Study of Seasonal Effect on Air Pollution at 60°N Latitude, 11 ENV'T'L SCI. & TECH. 801 (1977).

Another example of the complexity of the problem may be seen in smelter pollution. Emissions from smelters do not appear to be dangerous to the unwary observer, but experience shows that the trace metals contained in particulate emissions do cause substantial damage. See Ragain, Ralston, & Roberts, Environmental Trace Metal
amount of time, energy, and expertise necessary to develop a suitable model to answer this question would transform the checklist into an abbreviated EIS, and would thereby conflict with an expressed purpose of the Guidelines. Also, the amount of work involved would be grossly disproportionate to that required by the first half of the disjunctive. The question is reasonable, however, and should be answered. Deterioration of air quality is, after all, what is often sought to be controlled.

The checklist has a number of questions which require models to answer them properly, that is, to answer them in a manner which represents reasoned decisionmaking. Even for those questions concerned with the human environment, modeling has proven a useful technique for quantifying the so-called unquantifiables such as aesthetics and social impacts. The use of modeling, however, requires a computer and an expert to operate it. Local decisionmakers often lack both. A recommended solution which would also promote optimal use of modeling would be to create a unified state agency to coordinate and complete threshold determinations. Objective, adequate review could then be established.

The Guidelines have provided a structure within which to operate, but they have not adequately particularized the “significantly


144. WASH. ADMIN. CODE § 197–10–100(2) (1976).
145. Id. § 197–10–365 (agencies are to answer the checklist questions as completely as possible based upon the information available to them).
146. WASH. REV. CODE § 43.21C.010(2) (1976).
147. Modeling assists the decisionmaker not only by providing more detailed answers, but also by reducing the level of local bias impressed upon the decision. Extensive research is being conducted on the suitability of modeling social impacts. The early models are encouraging, and they already aid in reducing the subjectivity. E.g., Olsen & Merwin, Battelle Human Affairs Research Centers, Toward a Methodology for Conducting Social Impact Assessments Using Quality of Social Life Indicators (1976); Calligan, Craig, Devine, Newberger, & Osborne, The Oregon State Simulation Model: A Laboratory for Policy Makers (1976) (on file at Washington Law Review); Pease & Smardon, Perception and Assessment of Visual Attributes of Scenic Rivers in Oregon (Sept. 1976) (a proposal submitted to the National Science Foundation, on file at Washington Law Review).
148. A state agency would increase uniformity, would reduce problems associated with the interdisciplinary approach desired, would be more readily alterable when policies change, and would spread the cost among all those who benefit from environmental protection rather than levying disproportionate assessments on some due to their location close to environmentally sensitive areas.
149. The actual checklist form is flexible so long as all of its concerns are covered by questions framed in substantially the same language. The checklist is supplementary to other procedural requirements invoked by federal, state or local law. WASH. ADMIN. CODE § 197–10–365(1) (1976).
affecting" test. In addition, the competing policies of full considera-
tion and the expense and inconvenience of rigorous analysis have not
been clearly merged. Both the decisional law and the legislative guide-
lines are deficient in some respects, although they represent progress
toward delimiting the amorphous boundaries of the threshold deter-
mination.

V. THE ENVIRONMENTAL CHECKLIST AND THE
NORWAY HILL FACTS

The utility of the environmental checklist may be tested against the
Norway Hill facts. Completed checklists for projects which are "obvi-
ously" significant and for those which are difficult to predict from a
cursory analysis of the major components of the project should have
markedly different characteristics. Norway Hill, however, may indi-
cate a contrary result. Use of the checklist to analyze the Norway Hill
facts should demonstrate the obvious significance of the project, the
result reached by the court without a checklist. The proposal, how-
ever, was apparently one for which the issue of significance was genu-
inely difficult to resolve.

A. What Facts Influenced the Norway Hill Court?

In Norway Hill, a developer of single family, residential develop-
ments applied for a preliminary plat for a fifty-two acre tract located
just south of Bothell. The proposed plat described 198 lots in an
urban-type development including sewers, streets, sidewalks and utili-
ties. The King County Council, acting through its administrative
departments, studied the proposal extensively, assessing its compli-
ance with applicable county ordinances. It approved the plat, and
entered a "negative threshold determination" as required by SEPA. A
citizens' group appealed to the council twice, seeking reconsideration
of the determination, first, because of inadequate soil studies, and sec-
ond, because of subsequent enactment of an applicable county ordi-
nance. After each appeal the council re-evaluated its determination

150. 87 Wn. 2d at 269, 552 P.2d at 675.
151. Id. at 269, 552 P.2d at 676.
152. Id.
153. KING COUNTY, WASH., CODE §§ 20.44.010-.170 (1976) (county environmental
   policy ordinance, including criteria for determining the significance of a proposal).
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and re-entered a negative declaration. The citizens' group petitioned the superior court for a writ of certiorari, claiming that the council, by approving the plat without requiring an EIS, had acted unlawfully. The court denied the writ, and the group appealed.

The Washington Supreme Court held that the proposed action was significant, "since the Norway Vista project on its face involves the size and type of environmental change to which the full information requirement of SEPA was obviously meant to apply." Although the project was a logical extension of the surrounding area, was considered extensively by the council, and was consistent with the comprehensive zoning plan and the present uses of the surrounding land, the court held that the project would be a complete change of the existing use. The development, therefore, would have a significant effect—an effect which should be examined under SEPA.

B. How Would the Environmental Checklist Have Been Completed?

The facts of Norway Hill do not allow a complete assessment of the checklist because they are not sufficiently developed in the opinion to provide answers to many of the checklist questions. Neverthe-

154. 87 Wn. 2d at 270, 552 P.2d at 676.
155. Id. at 271, 552 P.2d at 676.
156. Id. at 279, 552 P.2d at 681.
157. Id. at 278, 552 P.2d at 681.
158. Id. at 279, 552 P.2d at 681. Thus, although the development was accepted at the local level in all particulars and was potentially of economic benefit to the community, the court ordered that an EIS be prepared so that the environment would be protected. See note 20 supra (discussion of the appropriateness of local decisionmaking).
159. Part I of the checklist is designed to provide the lead agency with background information about the project to prepare the lead agency for its independent assessment of the proposal. This portion is not important to test the value of the checklist mechanism, so concentration will be on Part II, which asks the proponent and the lead agency questions about the impact of the proposal. These questions are designed to be answered "Yes," "No," and "Maybe." WASH. ADMIN. CODE § 197-10-365(2) (1976).
160. The Norway Hill facts would require affirmative answers to the questions centering on displacement of soil and increased erosion. Air emissions will occur and objectionable odors might result. Local air movement may be disrupted by the construction. Surface run-off may be altered in its pattern, amount and water quality. Clearing of the 52 acres might change the diversity of plant and animal species because natural habitats will be destroyed. Domestic animals will be introduced to the area. An urban-type development will increase noise levels, produce additional light, and require an alteration in the present use of the land. Use of natural resources will be increased by the additional housing contemplated for the area. The increase in population and the construction of streets will increase vehicular traffic and will create demand for additional parking. Existing transportation systems will be taxed by the alteration of
less, the completed checklist would have at least thirty-four questions (approximately sixty percent of the total) which could not be answered in the negative. Such a result should normally indicate that an EIS should be prepared. The total number of nonnegative answers would serve as an indication that there was a reasonable probability the environment would be significantly affected by the development. This numerical indication alone would justify preparation of an EIS, especially because balancing of potential impacts or weighting of the importance of particular checklist questions is forbidden. Thus, the court's holding in *Norway Hill* was consistent with the suggested outcome of the SEPA Guidelines.

The results of the hypothetical completion of a checklist for the *Norway Hill* project suggest two possible explanations. The first is related to weaknesses in the checklist. Three negative declarations by the King County Council and refusal of the writ of certiorari by the superior court would seem to indicate that the determination of significance was a close case on the facts. If this was so, however, the checklist, which overwhelmingly supports the decision to require more extensive review, may be overly protective, conceivably leading to an unnecessary completion of environmental impact statements with marginal benefit to society. The Guidelines are too stringent to be useful if it is possible to answer sixty percent of the questions in the affirmative and yet still have a borderline case. To correct this problem, the Guidelines should be rewritten to indicate more clearly their underlying policy and the threshold which must be attained before a question is answered in the affirmative.

The second possibility is that the project was in fact significant on its face, as the court concluded and the Guidelines suggest. The

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162. 87 Wn. 2d at 270–71, 552 P.2d at 676.
163. *Id.* at 278, 552 P.2d at 681. Three categories of development are generally regarded as being significant on their face: (1) highway projects, Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d

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case would then illustrate a recurring problem with local decision-making—local bias. Although state policy favors reasoned decision-making, a local agency has power to short-circuit that policy, producing either unwarranted environmental damage or needless and expensive litigation. The broad power of judicial review does serve as a protection against the first consequence of misuse, but there is no check against the latter.

VI. CONCLUSION

The SEPA Guidelines provide a well-planned, logically ordered approach to the threshold determination. Problems remain, however, the most troublesome of which is that the Guidelines do not describe the point at which an action becomes “significant.” They do cover the essential elements of who, when, what, and how, but do so in such a vague fashion that the utility of the Guidelines is still in doubt. 164

The courts have also failed to define specifically the “significantly affecting” test. In Norway Hill the Washington Supreme Court solidified its foundation for meaningful judicial review,165 but it offered no clear a priori guidance in its threshold determination test.

Conservation is a compromise between maximum utilization of resources and staunch environmentalism. A growing society places increasing demands upon resources to supply the products and services essential to growth. The cost of such growth should not be increased unreasonably because of policies which fail to reflect public sentiment


164. Amendments to SEPA were proposed during the 1977 legislative session that would reduce the influence of the Guidelines or would repeal them entirely. WASH. S.B. 2473 & 2953 (1977). These bills document the unrest concerning the utility of the Guidelines.

165. 87 Wn. 2d 267, 552 P.2d 674 (1976). The Washington Supreme Court confirmed its broad powers of review when it decided Sisley v. San Juan County, 89 Wn. 2d 78, 85, 569 P.2d 712, 716–17 (1977). The court stated that it sits as a trial court in reviewing the record of the lower courts to determine whether a proposal could reasonably be said to have potentially more than a moderate effect on the environment. In Sisley, the court ordered preparation of an EIS to determine the impact of a marina at Deer Harbor, but did not discuss the applicability of the procedural elements of the SEPA Guidelines. Id. at 89, 569 P.2d at 719. Thus, the utility of the “significantly affecting” provisions of the Guidelines have yet to be reviewed or discussed by the court.
or which are published in an ambiguous manner. The Guidelines should be re-evaluated to verify their propriety in light of competing public values. To promote greater certainty and predictability in making the threshold determination, they should also be amended to incorporate a clearer and more comprehensive statement of the underlying state environmental policy.

Even if the legislative reinvestigation of the Guidelines is not undertaken promptly, problems may be avoided by creative judicial interpretation and explanation. In *Norway Hill* the court wisely chose to adopt a broad, flexible standard for the “significantly affecting” test by combining a reasonableness test for significance with a review standard which allows for judicial intervention. This combination will enable a court to clarify the intent and purpose of the Guidelines. A court, however, should attempt to do so as soon as possible to avoid needless expense and uncertainty.

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