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A Standard for Judicial Review of Administrative Decisionmaking Under SEPA—Polygon Corp. v. City of Seattle, 90 Wn. 2d 59, 578 P.2d 1309 (1978)

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A Standard for Judicial Review of Administrative Decisionmaking Under SEPA—*Polygon Corp. v. City of Seattle*, 90 Wn. 2d 59, 578 P.2d 1309 (1978).

In 1974 Polygon Corporation began planning construction of a thirteen-story condominium on Queen Anne Hill in Seattle. Before applying for a building permit, Polygon submitted an "environmental checklist" to the Seattle building department.[1] On the basis of the checklist, the building department determined that issuance of a permit would constitute a "major [action] significantly affecting the quality of the environment,"[2] and thus required the preparation of an environmental impact statement (EIS) under the Washington State Environmental Policy Act (SEPA).[3] A draft EIS was prepared and circulated, and meetings between Polygon and the building department were held. A final EIS was released in April 1975, and in an atmosphere of political controversy[4] the Superintendent of Buildings denied Polygon's application for a building permit. Polygon petitioned a superior court of King County both to review the permit denial and to grant a writ of mandamus compelling the Superintendent of Buildings to issue a permit. The trial court denied the writ, granting summary

1. Seattle has incorporated by reference the procedures set out in chapter 197-10 of the Washington Administrative Code for the implementation of the procedural requirements of the State Environmental Policy Act. Seattle, Wash., Ordinance 105735 (Aug. 9, 1976), *as amended by* Ordinance 107501 (July 17, 1978). The administrative code provides that an environmental checklist form should be completed by an action proponent when it is unclear whether the action will trigger the impact statement requirement. Wash. Admin. Code § 197-10-050 (1977). *See* note 3 *infra*.

2. Wash. Rev. Code § 43.21C.030(c) (1976).

3. Wash. Rev. Code ch. 43.21C (1976 & Supp. 1977). SEPA, which is patterned generally after the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, 4331-4335 (1976), requires that before a state agency or local government can undertake an action which will significantly affect the environment, it must prepare and circulate a report which details the environmental impacts of that action and consider that information in its decisionmaking. Wash. Rev. Code § 43.21C.030 (1976). *See generally* Comment, *Environmental Law: Progress Toward a Coherent Standard for the Threshold Determination*, 54 Wash. L. Rev. 159 (1978). The administrative code defines "action" to include both governmental licensing of activities which will involve modification of the environment, and government activities which themselves might have environmental impacts. Wash. Admin. Code § 197-10-040 (1977). These activities include construction, the sale or lease of natural resources, and the adoption or amendment of legislation. *Id.*

4. Polygon contended the decision was based on political, not environmental considerations. *See* Brief of Appellant at 15-25, Polygon Corp. v. City of Seattle, 90 Wn. 2d 59, 578 P.2d 1309 (1978). According to one of Polygon's architects, the superintendent decided to deny the permit after a local newspaper reported Mayor Uhlman's alleged opposition to the project. *Id.* at 19-20. *See* note 39 *infra*.

judgment for the city of Seattle. The Washington Supreme Court accepted direct review and affirmed the trial court in *Polygon Corp. v. City of Seattle*.[5] The court held that the Superintendent of Buildings had authority to deny the permit application on the basis of adverse environmental impacts disclosed in the EIS,[6] emphasizing that the SEPA requirements are supplemental to all existing state and local law.[7] More significantly, the court held that the superintendent's decision was reviewable and that the standard of review it would apply was the "clearly erroneous" test.[8]

This note will discuss the necessity of judicial review of administrative decisions[9] which are made after the evaluation of an EIS. The

5. 90 Wn. 2d 59, 578 P.2d 1309 (1978).

6. *Id.* at 65, 578 P.2d at 1313. The 1977 amendments to SEPA made clear the legislative intent to grant such authority to agency decisionmakers:

> [A]ny governmental action, not requiring a legislative decision, *may be conditioned or denied pursuant to this chapter* only on the basis of specific adverse environmental impacts which are both identified in the environmental documents prepared pursuant to the chapter and stated in writing by the responsible official of the acting governmental agency.

WASH. REV. CODE § 43.21C.060 (Supp. 1977) (emphasis added).

7. 90 Wn. 2d at 64–65, 578 P.2d at 1312–13. Polygon argued that the Superintendent of Buildings had no authority to deny Polygon's permit application. Under the Seattle Municipal Code, the superintendent is required to issue a building permit if an application reveals that the proposed project conforms to the building code. *See* SEATTLE, WASH., CODE § 3.03.020(e) (1972).

Citing with approval a court of appeals decision, Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wn. App. 59, 510 P.2d 1140, *review denied*, 83 Wn. 2d 1002 (1973), the supreme court held that SEPA confers substantive authority upon governmental agencies to act on the basis of the environmental impacts disclosed in an EIS, and pointed out that polices mandated by SEPA would be meaningless absent such authority. 90 Wn. 2d at 64, 578 P.2d at 1312. The court also held that because SEPA is supplemental to all existing state and local laws under R.C.W. § 43.21C.060, it renders discretionary actions which were previously ministerial. *Id.* at 65, 578 P.2d at 1313. Thus, although prior to the legislature's enactment of SEPA the superintendent would have been required to issue the permit if the proposed structure conformed to the zoning code, after SEPA he had discretion to deny the permit because of adverse environmental impacts. In effect, SEPA is one of the "pertinent laws" the superintendent must consider under Seattle Code § 3.03.020(e). *Id.*

8. 90 Wn. 2d at 69, 578 P.2d at 1314–15. Of the tests considered by the court, the clearly erroneous test allows the greater scrutiny of agency decisions. *See* Part I-*A infra*.

9. An administrative decision is one made by an administrative agency, which has been defined as

> a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication, rulemaking, investigating, prosecuting, negotiating, settling, or informally acting. An administrative agency may be called a commission, board, authority, bureau, office, officer, administrator, department, corporation, administration, division, or agency.

K. DAVIS, ADMINISTRATIVE LAW § 1.01 (1972) (hornbook).

note concludes that the relatively broad standard chosen by the court is appropriate for the review of administrative decisions made under SEPA.

I. BACKGROUND

A. Available Standards of Review

The Washington Administrative Procedure Act[10] contemplates two standards of judicial review: the arbitrary and capricious standard and the clearly erroneous standard.[11] Although judicial application of the two standards of review has at times been confused,[12] there are clear differences between the two tests.

The Washington Supreme Court has stated that an action is arbitrary and capricious only when "there is no support in the record for the action."[13] When there is a basis for two opinions, an action is not arbitrary and capricious if the decisionmaker acted honestly and with due consideration of the facts.[14] A reviewing court is thus limited to searching the record for evidence supporting the finding. If such evidence is found, the decision will be upheld.

Conversely, the court has found an action clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed,"[15] despite the presence of evidence supporting the action. The clearly erroneous test further requires a consideration of the public policy contained in the relevant legislative act.[16]

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10. WASH. REV. CODE ch. 34.04 (1976 & Supp. 1977).

11. R.C.W. § 34.04.130(6) provides:

> The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> ....
>
> (e) clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; or
>
> (f) arbitrary or capricious.

WASH. REV. CODE § 34.04.130(6) (Supp. 1977).

12. *See* Andersen, *Judicial Review of Agency Fact-Finding in Washington: A Brief Comment,* 13 WILLAMETTE L. REV. 397 (1977).

13. Hayes v. Yount, 87 Wn. 2d 280, 286, 552 P.2d 1038, 1042 (1976).

14. *See, e.g.,* Anderson v. Island County, 81 Wn. 2d 312, 317, 501 P.2d 594, 597 (1972); Bishop v. Town of Houghton, 69 Wn. 2d 786, 794, 420 P.2d 368, 373 (1966).

15. Ancheta v. Daly, 77 Wn. 2d 255, 259–60, 461 P.2d 531, 534 (1969).

16. WASH. REV. CODE § 34.04.130(6)(e) (Supp. 1977), *reproduced in* note 11 *supra.*

The arbitrary and capricious test is thus a relatively narrow[17] standard of review in that it restricts judicial scrutiny to a search for some evidence in the record to support the decision. The clearly erroneous test is a broader standard[18] in that it requires a review of the entire record, which necessarily involves some weighing of the evidence, as well as a consideration of the public policy embodied in the relevant act.

B. *Substantive Judicial Review Under SEPA Prior to* Polygon

Prior to *Polygon,* the Washington Supreme Court had not addressed the question of judicial review of substantive administrative decisions which follow the preparation and evaluation of an EIS.[19] The court had, however, determined that the broader clearly erroneous test was appropriate in reviewing negative threshold determinations.[20] In *Norway Hill v. King County Council,*[21] the court reviewed a council determination that approval of a particular subdivision plat was not a major action significantly affecting the quality of the environment and thus did not require the preparation of an EIS.[22]

The *Norway Hill* court reasoned that in determining the appropriate scope of review it was "important to consider the broad public policy"[23] promoted by SEPA. The court suggested that the policies incorporated in SEPA would be thwarted if an EIS were not prepared

See Norway Hill v. King County Council, 87 Wn. 2d 267, 274, 552 P.2d 674, 678 (1976).

17. In this note, the term "narrower" will refer to a relatively less rigorous standard of review, while the term "broader" will refer to a more rigorous standard.

18. Norway Hill v. King County Council, 87 Wn. 2d 267, 274, 552 P.2d 674, 678 (1976).

19. Substantive review refers to review of decisions to determine whether they are in accordance with the policies found in SEPA. Procedural review refers to an examination of whether, in its decisionmaking, an agency has complied with the SEPA procedural requirements. *See* notes 46 & 47 and accompanying test *infra.*

20. A negative threshold determination is a finding that a proposed government action is not a major action significantly affecting the quality of the environment and thus does not require the preparation of an EIS. *See* note 3 *supra.*

21. 87 Wn. 2d 267, 552 P.2d 674 (1976).

22. The council, on appeal, had upheld the decision of a hearing examiner that an EIS was not necessary. *Id.* at 270, 552 P.2d at 676. *See* note 27 *infra.*

23. *Id.* at 272, 552 P.2d at 677. The policy goals are contained in R.C.W. §§ 43.21C.010 and 43.21C.020. WASH. REV. CODE §§ 43.21C.010 & .020 (1976). These policies include protecting the environment for future generations and providing "safe, healthful, productive, and esthetically and culturally pleasing surroundings" for all Washington citizens. *Id.* § 43.21C.020(2)(a) & (b).

in all appropriate cases,[24] and that limiting review of threshold determinations to the arbitrary and capricious test would allow local governments to " 'short-circuit the [EIS] process by setting statement thresholds as high as possible within the vague bounds of the arbitrary and capricious standard.' "[25]

The court of appeals recently addressed the question of the appropriate standard for reviewing a legislative decision based on an EIS. In *Ullock v. City of Bremerton,*[26] the court reviewed a decision of the Bremerton City Council to grant a rezone request which had been denied by the city's planning commission. The court held that the council decision should be reviewed under the arbitrary and capricious test.[27] However, because the *Ullock* court relied on reasoning traditionally applied by courts in reviewing zoning decisions[28] before the enactment of SEPA, the decision did not clarify the extent to which SEPA would affect judicial review of local government decisionmaking.

24. 87 Wn. 2d at 275, 552 P.2d at 679.

25. *Id.* at 273, 552 P.2d at 678 (quoting Andersen, *The National Environmental Policy Act,* in FEDERAL ENVIRONMENTAL LAW 238, 361 (E. Dolgin & T. Guilbert ed. 1974)). The *Norway Hill* court felt that adoption of the clearly erroneous test for review of negative threshold determinations was consistent with R.C.W. § 43.21C.090, which requires that determinations of government agencies relative to the requirement or absence of a requirement under SEPA be accorded substantial weight. The court found that use of the clearly erroneous test would allow the reviewing court to accord substantial weight to agency determinations, but at the same time would allow the court to examine the determinations in light of the public policies which SEPA promotes. *Id.* at 275, 552 P.2d at 679. *See* note 23 *supra.*

26. 17 Wn. App. 573, 565 P.2d 1179 (1977).

27. *Id.* at 582, 565 P.2d at 1185. The *Ullock* court inadequately distinguished *Norway Hill* by noting that "zoning is a discretionary exercise of police power by a legislative authority" and that "[i]n reviewing legislative action the courts have traditionally exercised judicial restraint because of the separation of powers doctrine." *Id.* (footnote omitted). *Norway Hill* also reviewed a decision by a legislative body after an appeal from an administrative decision. The *Norway Hill* court did not seem concerned that it was reviewing a legislative affirmation of an administrative decision, and focused its discussion on judicial review of administrative decisions under SEPA. Because *Polygon* dealt with review of an administrative decision, it leaves unanswered the question of the standard of review of legislative decisions following the EIS process. It is noteworthy, however, that *Norway Hill* adopted the clearly erroneous test to review an administrative decision which had been appealed to a legislative body. This procedure is now available to all parties who feel aggrieved by the conditioning or denial of a permit application pursuant to SEPA under its 1977 amendments. WASH. REV. CODE § 43.21C.060 (Supp. 1977). *Norway Hill* suggests that the availability of legislative review of administrative decisions does not affect the adoption of the clearly erroneous test.

28. *See, e.g.,* Myhre v. City of Spokane, 70 Wn. 2d 207, 422 P.2d 790 (1967) (court held that a zoning action will not be reviewed unless there has been a manifest abuse of legislative discretion).

II. THE *POLYGON* COURT'S REASONING

The *Polygon* court initially noted that *Norway Hill* had adopted the clearly erroneous test in order to ensure that the policies contained in SEPA were realized, and that the same broad standard of review should be available to a property owner denied a building permit on the basis of SEPA. The court reasoned that the higher degree of judicial scrutiny provided under the clearly erroneous test was appropriate for review of agency decisions based on an EIS to protect landowners from "abusive and arbitrary land use regulations" and to ensure that "an appropriate balance between economic, social, and environmental values is struck."[29]

Two factors were of concern to the court. First, while it held that the superintendent properly gave great weight to aesthetic factors in deciding to deny the permit,[30] the court recognized that reliance on nonquantifiable and relatively subjective factors such as visual aesthetics creates an increased potential for arbitrary or abusive land use planning.[31] Underlying this reasoning was a concern that the "potential for abuse is even stronger where the decision must be made in a climate of intense political pressures."[32] Second, without the greater scrutiny available under the clearly erroneous test, it would be difficult to ensure that environmental values received proper weight in decisionmaking.[33]

III. ANALYSIS

Polygon reflects the court's view that landowners should be afforded the protection offered by relatively broad judicial review when their property is subjected to regulation on the basis of unquantifiable and often subjective environmental considerations.[34] The real

29. 90 Wn. 2d at 69, 578 P.2d at 1315.

30. *Id.* SEPA provides that a purpose of the Act is to "[a]ssure for all people of Washington safe, healthful, productive, and *esthetically and culturally pleasing surroundings.*" WASH. REV. CODE § 43.21C.020(2)(b) (1976) (emphasis added).

31. 90 Wn. 2d at 69, 578 P.2d at 1315.

32. *Id. See* note 4 *supra* & note 39 *infra.*

33. 90 Wn. 2d at 69, 578 P.2d at 1315.

34. The 1977 SEPA amendments provide that governmental actions not requiring a legislative decision may be conditioned or denied pursuant to SEPA only on the basis of specific adverse environmental impacts disclosed in the EIS and stated in writing by the acting governmental official. WASH. REV. CODE § 43.21C.060 (Supp. 1977). The amendment further provides that after September 1978, or September 1980 in the case of counties with a population less than 70,000 and cities with a population less than 37,000, such conditions or denials must be based on policies developed by the acting lo-

importance of *Polygon,* however, lies in the application of the clearly erroneous standard of review to agency decisions which approve actions after the preparation of an EIS.[35] As a result of *Polygon,* Washington courts are able to examine an agency's substantive decisionmaking to determine whether the environmental impacts disclosed by an EIS are in fact considered by the decisionmaker before an action is approved.

The remainder of this note outlines why substantive judicial review of agency decisionmaking under SEPA is necessary, and concludes that the broad standard chosen by the court is appropriate for reasons in addition to the need to protect landowners. First, in order to ensure that the policies promoted by SEPA are in fact incorporated into agency decisionmaking, it is necessary that the decisions be subject to critical review.[36] Second, the major basis for judicial deference to administrative decisions—the expertise of the particular agency—does not apply when the agency is acting outside the area of that expertise, as is usually the case under SEPA.[37] Third, the fundamental nature of the rights protected by SEPA makes a more intense standard of review appropriate.[38] Finally, because the legislature has made it clear that the mandate announced by SEPA is statewide, broader review of administrative decisions is necessary to ensure that the statewide policy is not undermined by inappropriate[39] political or economic pres-

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cal governments and incorporated into "resolutions, regulations, ordinances, plans, or codes." *Id.* This should both introduce greater certainty into decisionmaking and provide added protection for landowners.

35. *Polygon* involved an agency decision to deny a building permit to a developer. Presumably, the same standard of review would be applied to review agency decisions which hold that the benefits resulting from an action outweigh the adverse environmental impacts disclosed in the EIS.

36. The history of litigation under SEPA reflects that local governments have often complied with SEPA only after judicial review of their actions was sought. *See* Eastlake Community Council v. Roanoke Assoc., Inc., 82 Wn. 2d 475, 513 P.2d 36 (1973) (renewal of a building permit is a major action); Stempel v. Department of Water Resources, 82 Wn. 2d 109, 508 P.2d 166 (1973) (issuance of a water use permit is a major action which may require the preparation of an EIS); Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wn. App. 59, 510 P.2d 1140 (issuance of a grading permit is a major action), *review denied,* 83 Wn. 2d 1002 (1973). *See also,* Part III–*A infra.*

37. *See* Part III–*B–1 infra.*

38. SEPA provides that "each person has a fundamental and inalienable right to a healthful environment." WASH. REV. CODE § 43.21C.020(3) (1976). *See* Part III–*B–2 infra.*

39. The *Polygon* court was concerned that the superintendent's decision was made "in a climate of intense political pressures." 90 Wn. 2d at 69, 578 P.2d at 1315. The court did not differentiate, however, between those political pressures which naturally arise as a result of public participation in the EIS process, and those which undermine the process. Increased public participation in government decisionmaking is one of the

sures at the local level.[40]

A. Full Disclosure or Full Consideration: The Need for Substantive Review

SEPA provides that "to the fullest extent possible: (1) [t]he policies, regulations, and laws of the State of Washington shall be interpreted and administered in accordance with the policies set forth [herein]."[41] Those policies include ensuring "for all people of Washington safe, healthful, productive, and esthetically and culturally pleasing surroundings."[42] The primary vehicle provided for achieving these policy objectives is the EIS.[43] Under SEPA, before a branch of state or local government undertakes an action "significantly affecting the quality of the environment,"[44] it must prepare a detailed statement outlining specifically what the environmental effects of the action will be.[45]

In the sense that SEPA requires that environmental consequences of government actions be revealed before the action is taken, it is an environmental full-disclosure law.[46] SEPA, however, does more than

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goals promoted by SEPA. WASH. REV. CODE § 43.21C.020 (1976); WASH. ADMIN. CODE § 197-10-450 (1977). That participation necessarily involves the exertion of political pressure on government decisionmakers. *See* N. ORLOFF, THE ENVIRONMENTAL IMPACT STATEMENT PROCESS 104-22 (1978). How the "appearance of fairness" doctrine will limit this kind of activity in Washington remains unclear, despite the *Polygon* court's refusal to extend the doctrine to cover governmental decisionmaking when no public hearing is required. 90 Wn. 2d at 67-68, 578 P.2d at 1314. Clearly, however, some types of political pressures are inappropriate and should be guarded against. *See, e.g.*, Save a Valuable Environment v. City of Bothell, 89 Wn. 2d 862, 576 P.2d 401 (1978) (members of local planning commission associated with Chamber of Commerce).

40. *See* Part III-*B-2 infra*.

41. WASH. REV. CODE § 43.21C.030 (1976).

42. *Id.* § 43.21C.020(2)(b). *See* note 23 *supra*.

43. *See* note 3 *supra*.

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

45. In reality, when the action proponent is from the private sector, the proponent prepares the EIS. *See* WASH. ADMIN. CODE § 197-10-100(4) (1977).

46. *Norway Hill*, 87 Wn. 2d at 272, 552 P.2d at 677. It has been argued that SEPA is no more than that; in other words, once an agency has indicated what the impact of its action will be, it is not only free to ignore that information, it in fact does not have the authority to condition or deny that action on the basis of the impacts disclosed in an EIS. *See Polygon*, 90 Wn. 2d at 63, 578 P.2d at 1312; note 7 *supra*. The Washington Supreme Court suggested as early as 1973 that agencies in fact did have substantive authority to deny actions on the basis of impact disclosed in an EIS. In Stempel v. Department of Water Resources, the court quoted from R.C.W. § 43.21C.030(2)(b) in holding that SEPA required that the " 'presently unquantified environment amenities and values will be given appropriate consideration in decision making along with economic

impose procedural requirements; it confers substantive authority on decisionmakers and *requires* that they *consider* the environmental impacts before proceeding with an action.[47] Without review of agency decisions, there is a danger that the policy goals contained in SEPA would not be realized because agencies would be free to proceed with an action once the procedural requirements of SEPA were met, regardless of the environmental consequences.

An analysis of the cases under the National Environmental Policy Act of 1969[48] (NEPA), the legislation upon which SEPA is based,[49] suggests that review of agency decisions, as well as review of agency compliance with procedural requirements, is necessary in order to effectuate environmental policies. The NEPA cases reflect confusion as to whether the Act imposed more than procedural requirements on agency decisionmakers.[50] The reluctance of some federal courts to review agency decisions under NEPA has sometimes frustrated achievement of the goals of the Act.[51] As Judge Skelly Wright observed, "What possible purpose could there be in requiring . . . [an EIS] . . . if the boards are free to ignore entirely the contents of the statement?

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and technical considerations.' " Stempel v. Department of Water Resources, 82 Wn. 2d 109, 118, 508 P.2d 166, 172 (1973). *See also* Juanita Bay Valley Community Ass'n. v. City of Kirkland, 9 Wn. App. 59, 510 P.2d 1140, *review denied*, 83 Wn. 2d 1002 (1973). The 1977 SEPA amendments, which specifically refer to this substantive authority, resolve all doubt about the legislature's intent. *See* WASH. REV. CODE § 43.21C.060 (Supp. 1977); note 6 *supra*. *Polygon* should end all argument that SEPA does not confer substantive authority to agency decisionmakers.

47. *See* note 46 *supra*.

48. 42 U.S.C. §§ 4321, 4331–4335 (1976).

49. *See* Leschi v. Washington State Highway Comm'n, 84 Wn. 2d 271, 525 P.2d 774 (1974).

50. *Compare* National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971) (once the procedural requirements of NEPA are met, there can be no further judicial review), *with* Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289 (8th Cir. 1972) (substantive review is available). For a discussion of early cases under NEPA, see F. ANDERSON, NEPA IN THE COURTS (1973); Note, *The National Environmental Policy Act of 1969: Toward a Substantive Standard of Review*, 4 N.Y.U. REV. L. & SOC. CHANGE 153 (1974). *See also* Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974).

51. *See* Note, *The National Environmental Policy Act: What Standard of Judicial Review?*, 39 J. AIR L. & COM. 643, 651 (1973). One commentator suggested,

> As lawyers and jurists consider the potential for a second generation of NEPA cases dealing primarily with assuring that the actual substantive policies of the Act become a national reality, it is important that they remember that unenforceable obligations are not obligations at all, and unenforceable rights, no matter how grandly stated, are nothing more than empty words.

Yarrington, *Judicial Review of Substantive Agency Decisions: A Second Generation of Cases under the National Environmental Policy Act*, 19 So. DAK. L. REV. 279, 294 (1974).

NEPA was meant to do more than than regulate the flow of papers in the federal bureaucracy."[52]

By approving substantive review of agency decisions under SEPA, the Washington Supreme Court has avoided the confusion which has plagued interpretations of NEPA. Further, in choosing the relatively broad "clearly erroneous" test the court has brought the achievement of the goals embodied in SEPA a step closer to reality. Had the court chosen to apply the arbitrary and capricious test, reviewing courts could not have ensured that agencies considered environmental factors in decisionmaking. The court has stated that it would be a "rare occasion" to find that an agency had failed to meet the requirements of the arbitrary and capricious test.[53] Recent holdings indicate that the decision would be upheld as long as there was room for two opinions, and the decision had been made honestly.[54]

The clearly erroneous test, on the other hand, allows the court to review the entire record while considering the legislative statement of public policy as contained in SEPA.[55] Although the court will not substitute its judgment for the agency's or overturn an agency's decision unless it is convinced that a mistake has been made, this broader

52. Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1117 (D.C. Cir. 1971) (holding that the Atomic Energy Commission's internal procedures did not comply with NEPA). Judge Wright stated that the duty of the courts in interpreting NEPA was to see that "important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." *Id.* at 1111. Furthermore, "if the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse." *Id.* at 1115.

53. Northern Pac. Transp. Co. v. Washington Util. & Transp. Comm'n, 69 Wn. 2d 472, 479, 418 P.2d 735, 740 (1966) (reinstating the commission's order denying the company's request for extension of carrier authority).

54. *See* note 14 and accompanying text *supra*. Obviously there is room for two opinions in every case that reaches the final stage in the impact statement process. Further, because most agencies are not directly engaged in environmental protection, they may make a good faith decision without consideration of environmental impacts. Addressing this issue, a commentator wrote about NEPA:

> It does not set up an agency to supervise private conduct, nor does it pinpoint a particular ill, for which a precisely focused statute may legislate a cure. Instead, the Act attempts to regulate the way in which all federal agencies make decisions. They are told to consider matters alien to their own limited self-interest, to expend time and money on statement preparation, to delay favorite projects, and to do all this when the benefits of the process do not redound to the agency involved but to the good of the environment.

Anderson, *The National Environmental Policy Act*, in FEDERAL ENVIRONMENTAL LAW 238, 361 (E. Dolgin & T. Guilbert ed. 1974).

55. *See* notes 15 & 16 and accompanying text *supra*.

review may ensure that the legislative directive of actual consideration of the environmental impacts of proposed actions is implemented.

B. Further Bases for Broad Review Under SEPA

1. Limited agency expertise

The traditional reasoning supporting limited judicial review of agency decisionmaking, except in questions of law, is that overly broad review "would destroy the values of agencies created to secure the benefit of special knowledge acquired through continuous administration in complicated fields."[56] This reasoning is especially persuasive when an agency being reviewed was specifically created to administer a particular legislative enactment.[57] But the rule of deference to administrative decisionmaking, with all its apparent reasonableness, has its limitations. As then Professor Felix Frankfurter pointed out, the proper scope of judicial review in a particular context often cannot be responsibly determined by applying a rigid formula.[58] On the contrary, judicial review "is colored by the whole structure of which it forms a part, just as . . . it derives significance from the nature of the subject matter under review as well as from the agency which is reviewed."[59] Professor Louis Jaffe accurately stated that, "In judicial review, the court must evaluate the relevance and weight of expertness."[60] Thus, the proper scope of judicial review in a given case should reflect the particular circumstances inherent in that class of cases.

A strong justification for the court's adoption of the clearly erroneous test in *Polygon* is that the usual basis for limited review—defer-

56. SCHWARTZ, ADMINISTRATIVE LAW 579 (1976). There is also a separation of powers argument: courts should not intrude into areas in which agencies have been set up to function. Nevertheless, by providing for the clearly erroneous test for review of agency decisions, the legislature has made it clear that it does not perceive that standard of review as intrusive *per se*. Further, in examining the proper scope of review of agency decisionmaking in *Norway Hill*, the court made it clear that it did not perceive the clearly erroneous test as being overly intrusive. 87 Wn. 2d at 275, 522 P.2d at 679. *See* Part I–*A supra*.

57. *See, e.g.*, Securities & Exchange Comm'n v. Associated Gas & Elec., 99 F.2d 795 (2d Cir. 1938). The court reasoned that because a function of the S.E.C. was to administer the Interstate Commerce Act, its "interpretation of the act should control unless plainly erroneous." *Id.* at 798.

58. Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 619–20 (1927).

59. *Id.* at 620.

60. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 579 (1965) (emphasis omitted).

ence to administrative expertise—is not present in the class of cases under SEPA.[61] Because SEPA is supplemental to existing state and local law,[62] administrators in all agencies are required to incorporate environmental considerations into their decisionmaking. It cannot reasonably be suggested that, as a result of the legislature's enactment of SEPA, all administrators now qualify as experts in the implementation of the Act.

Comparing the expertise of agencies and courts is helpful in determing the proper scope of judicial review under SEPA. While administrators, if they are experts at all, tend to be trained either in limited, technical fields or in the administrative process itself, judges are experts in the balancing of economic, social, and policy interests. Because the goals embodied in SEPA require a balancing of such interests, it is appropriate for courts to investigate the degree to which those goals are implemented by administrators.[63] Applying the clearly erroneous test to review administrative decisions under SEPA is a re-

61. Lead agencies are required to circulate draft EIS's to other agencies which may have relevant environmental expertise. WASH. ADMIN. CODE § 197-10-460 (1977). Nevertheless, two factors militate against treating lead agencies as "expert" because they have sought the advice of other agencies. First, the process by which agencies review EIS's may or may not be adequate, due to lack of time, staff, and other resources. Second, the commenting agency will be responding only to information that is within its area of expertise. This leaves the lead agency to synthesize the information it has received and try to determine total environmental impact.

62. *See* note 7 *supra*.

63. Professor Bernard Schwartz has written:

> The utilization of administrative expertness does not, however, militate against control by the courts. "The well-learned lesson of democratic government with 'experts' is that they should be kept on tap but not on top." In ensuring this subordination the nonexpertness of our courts plays an essential part. It is the great virtue of our judicial process that it employs men not specialists in any one field of legal endeavor but capable by disposition and training of dealing with all types of cases. "The judicial process," as an eminent American jurist has put it, "requires a different kind of *expertise*—the unique capacity to see things in their context. . . ." The limitations of the expert—inability to see beyond the narrow confines of his own experience, intolerance of the layman, and excessive zeal in carrying out his own policy regardless of the cost to the other, broader interests of society—are subjected under our system to the trained scrutiny of the nonexpert judge, who, unhindered by the professional bias of the specialist, is able to take a broader view than that of merely promoting administrative policy in the case at hand without counting the ultimate cost.

B. SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD 319 (1954) (emphasis in original, footnotes omitted). Arguing for a broader standard of judicial review in NEPA cases, Justice Douglas stated:

> Although value judgments are inevitable and even though the Commission's balancing of environmental costs with other factors may be entitled to some deference, I share . . . doubts that . . . the balance struck by an agency unskilled in environmental matters should be reviewed only through the lens of the "substantial

sponsible exercise of judicial discretion in an area where judges, not administrators, possess the relevant expertise.[64]

2. *SEPA: Statewide Mandate That Certain Fundamental Rights be Protected*

Further justification for the broad review of agency decisionmaking under SEPA is the importance of the rights protected by the Act. SEPA states that "each person has a fundamental and inalienable right to a healthful environment."[65] This is a strong statement of legislative intent[66] and provides support for those commentators who argue that environmental rights should be granted constitutional status.[67] Indeed, the fact that SEPA is supplemental to all existing state and local laws[68] gives the Act a constitutional dimension. The nature of these environmental rights makes it appropriate, and may require, that courts more closely scrutinize administrative actions when personal interests in life, health, and safety are involved.[69]

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evidence" test.

Scenic Hudson Preservation Conference v. Federal Power Comm'n, 407 U.S. 926, 931 (1972) (Douglas, J., dissenting), *denying cert. to* 453 F.2d 463 (2d Cir. 1971). *See also* Sive, *Some Thoughts on an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 629–30 (1970).

64. L. JAFFE, *supra* note 60, at 580. Professor Jaffe has noted another problem: the tendency of administrators to inject their own policy values into decisionmaking.

> The expert is often . . . seeking to advance his conception of policy, and to give it greater sanctity by embodying it in the seeming objectivity of an "expert discipline." . . . The expert judgment is rarely "pure," rarely determined solely by the criteria in its field. In most cases, the administrative action will be as much determined by power drives and legal attitudes as it is by technical considerations.

Id.

65. WASH. REV. CODE § 43.21C.020(3) (1976).

66. The language in SEPA is more forceful than the NEPA preamble, which "recognizes that each person should enjoy a healthful environment." 42 U.S.C. § 4331(c) (1976). Because SEPA is identical to NEPA in many respects, one must assume that the legislature was fully aware of the added strength of this language. "The choice of this language in SEPA indicates in the strongest possible terms the basic importance of environmental concerns to the people of this state. It is a far stronger policy statement than that found in the National Environmental Policy Act. . . ." Leschi Improvement Council v. Washington State Highway Comm'n, 84 Wn. 2d 271, 280, 525 P.2d 774, 781 (1974).

67. *See, e.g.*, Roberts, *The Right to a Decent Environment; $E=MC^2$: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674 (1970); Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970).

68. Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wn. App. 59, 510 P.2d 1140, *review denied*, 83 Wn. 2d 1002 (1973).

69. Judge Bazelon wrote, in 1971:

> We stand on the threshold of a new era in the history of the long and fruitful col-

Further, R.C.W. § 43.21C.010 declares environmental protection to be a "state policy."[70] Effectuation of that policy requires that local decisionmaking be somewhat insulated from local political and economic pressures.[71] Without the broader scrutiny provided under the clearly erroneous test, however, it would be difficult for reviewing courts to determine whether decisions made in communities unsympathetic to SEPA's environmental policies were in fact made after an appropriate consideration of the the environmental impacts of a proposed action.

IV. CONCLUSION

The real significance of *Polygon* lies in the court's willingness to undertake substantive review of final agency decisions after the evaluation of an EIS. Without such review, SEPA would be destined to become a meaningless exercise in bureaucratic paper shuffling, for once the procedural requirements of the Act had been met, decisionmaking could go on as before whether or not the decisionmaker had actually read the EIS. This was not the intent of the legislature in enacting SEPA.

The implications of *Polygon* may cause anxiety in some quarters. Nevertheless, both the legislature and the courts should resist any attempts to limit the court's holding. *Polygon* will neither end nor severely limit development in Washington; it will merely allow reviewing courts to ensure that the environmental policies contained in SEPA are incorporated into agency decisionmaking, not only in procedure but also in substance. This should lead to more thoughtful and

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laboration of administrative agencies and reviewing courts. For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the "substantial evidence" test, and a bow to the mysteries of administrative expertise. . . . [T]he character of administrative litigation is changing. . . . [C]ourts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health, and liberty. These interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a ratemaking or licensing proceeding.

To protect these interests from administrative arbitrariness, it is necessary . . . to insist on strict judicial scrutiny of administrative action.

Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 597–98 (D.C. Cir. 1971). *See also* Anderson, *supra* note 54, at 280–81.

70. WASH. REV. CODE § 43.21C.010(1) (1976).

71. *See* note 39 *supra*.

reasoned development and will help preserve one of Washington's most important resources: its environment.

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