

The Prima Facie Burden and the Vanishing SEPA Threshold: Washington’s Emerging Preference for Efficiency over Accuracy

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I. INTRODUCTION

The purpose of the Washington State Environmental Policy Act¹ (“SEPA”) is simple: governmental action should be environmentally informed.² This simple goal stands in contrast to a history of development, permitting, legislative proposals, and other governmental actions that are memorable for

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1. WASH. REV. CODE § 43.21C.010 (2000).

2. *Norway Hill Pres. & Prot. Ass’n v. King County Council*, 87 Wash. 2d 267, 272, 552 P.2d 674, 677 (1976).

the lack of foresight with which the decisions were made. To preclude recurrences of such action, SEPA requires agencies to prepare “a detailed statement”³ that acts as “the basis upon which the responsible agency and officials can make the balancing judgment mandated by SEPA between the benefits to be gained by the proposed ‘major action’ and its impact upon the environment.”⁴ This detailed statement is a procedural means to ensure that decision makers have “sufficient information to make a reasoned decision”⁵ and requires a thorough, searching inquiry (environmental impact statement (“EIS”)) whenever the initial environmental review of a proposal (the threshold determination) indicates that the proposal will cause a “significant, adverse environmental impact.”⁶ This process does not mandate environmentally-friendly decisions, but is intended to guarantee that the government will act in light of environmental consequences.

Although the informational goals of SEPA culminate with the EIS, the heart of agency efficiency and informed decision making lies in the threshold environmental determination. The threshold determination, which is required for every non-exempt proposal, requires the relevant agency to have a basic understanding of whether the proposal will significantly affect the environment;⁷ whether, based on context and intensity, a particular proposal will cause “a reasonable likelihood of more than a moderate adverse impact on environmental quality.”⁸ SEPA regulations require agencies to base their threshold determinations “upon information reasonably sufficient to evaluate the environmental impact of a proposal.”⁹ Furthermore, where any particular information would be essential to a reasoned decision and “the costs of obtaining it are not exorbitant, agencies shall obtain and include the information in their environmental documents.”¹⁰ Accordingly, the agency making the threshold determination must at least have a minimally adequate record of information, defined generally as that quantity and quality of facts required to make an informed decision.¹¹ On the other hand, the threshold determination process embodies agency efficiency by recognizing that not all

3. WASH. REV. CODE § 43.21C.030(2)(c) (2000).

4. *Juanita Bay Valley Cmty. Ass’n v. City of Kirkland*, 9 Wash. App. 59, 68, 510 P.2d 1140, 1146 (1973).

5. *Citizens Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wash. 2d 356, 362, 894 P.2d 1300, 1304 (1995).

6. WASH. REV. CODE § 43.21C.031(1) (2000).

7. § 43.21C.030(2)(c).

8. WASH. ADMIN. CODE § 197-11-794(1) (2001).

9. WASH. ADMIN. CODE § 197-11-335 (2001).

10. WASH. ADMIN. CODE § 197-11-080 (2001).

11. *See Anderson v. Pierce County*, 86 Wash. App. 290, 302, 936 P.2d 432, 439 (1997).

projects require the expensive and detailed preparation of an EIS.¹² The process limits review to the probable, but not speculative, environmental impacts,¹³ and provides judicial deference for the agency's threshold determination.¹⁴

Despite the simplicity and common sense underlying SEPA, a breakdown between SEPA's goals and duties has appeared at the threshold stage in the environmental review process. In just over thirty years of SEPA litigation, the legislature, courts, regulatory agencies, developers, and even the concerned public have obfuscated the SEPA landscape by creating inventive interpretations of the simple procedural scheme. The result is a complex system of burdens and presumptions, occasionally borne by agencies, occasionally by project proponents, and sometimes by private attorneys general seeking to enforce SEPA mandates. This circumstance, which might otherwise be operable if the burdens were left well-defined, has resulted in a quagmire of crafty burden-shifting arguments and nightmarish procedural rhetoric. The simplicity of SEPA has become lost in the law. Oddly, these recent changes may be intended to protect the independence and efficiency of agency decision making.

This Article discusses the demise of the procedural requirements¹⁵ of SEPA by focusing on recent statutory and judicial developments that have diminished the effectiveness of the threshold requirement. Part II provides the background and history of the SEPA threshold determination process and suggests sources of possible misconstruction of SEPA. Part III leaps into recent developments in SEPA and analyzes the impacts such changes have had on the effectiveness of the SEPA threshold. Finally, Part IV considers the potential benefits of these developments, but finds no reconciliation between the goals of SEPA and the vanishing SEPA threshold.

II. THE STATE ENVIRONMENTAL POLICY ACT AND THE LAY OF THE BURDEN

Compliance with SEPA amounts to an exercise in information gathering

12. The lead agency may issue a negative threshold determination, even where the likelihood of significant environmental impacts is apparent, by requiring mitigation measures that will minimize the impacts below the threshold level of significance. WASH. ADMIN. CODE § 197-11-350(1)-(2) (2001).

13. WASH. ADMIN. CODE § 197-11-060(4), -782 (2001).

14. See WASH. REV. CODE § 43.21C.090 (2000); see also *Victoria Tower P'ship v. City of Seattle*, 59 Wash. App. 592, 596, 800 P.2d 380, 382-83 (1990).

15. This Article does not concern the more contentious issue of the substantive standards of SEPA. For affirmation of SEPA's substantive standards, see *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 63, 578 P.2d 1309, 1312 (1978).

to ensure that agencies are “cognizant of and responsive to possible environmental consequences [of] their actions.”¹⁶ The SEPA threshold determination is the gateway to our understanding of the inevitable environmental effects of our actions and constitutes a paradigm of administrative simplicity. The SEPA threshold duty merely requires agencies to consider, based on a relatively cursory inquiry, whether an EIS is needed to provide a deeper understanding of the probable adverse environmental impacts before action is taken.¹⁷ The threshold determination is often the most important element of SEPA compliance, since in the event the lead agency issues a Determination of Nonsignificance (“DNS”) (a finding that the proposed action will not cause any significant impacts), the threshold determination is all that is required under SEPA. It is in these situations that SEPA is most vulnerable to misuse and misunderstanding.

A. *The SEPA Process*

The first required act under SEPA is that, when faced with proposals for legislation or other major actions significantly affecting the environment, agencies must perform a preliminary investigation into the foreseeable and probable environmental impacts to determine whether such effects surpass the “threshold” level of significant adversity.¹⁸ Notably, the threshold obligation is triggered not by the probability of adverse environmental impacts, but by the existence of a non-exempt proposal, and is intended to determine the significance of those projected impacts.¹⁹ Threshold review is then undertaken

16. *Merkel v. Port of Brownsville*, 8 Wash. App. 844, 847, 509 P.2d 390, 393 (1973).

17. *See* WASH. REV. CODE § 43.21C.031(1) (2000).

18. *Id.*

19. *See id.* Although this claim may have been contentious at one time, I believe it has since become a settled question. On the one hand, section 43.21C.030(2)(c) requires a “detailed statement” for “every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment.” WASH. REV. CODE § 43.21C.030(2)(c) (2000). Non-legislative projects fall into the category of “other major actions significantly affecting the quality of the environment,” and early SEPA case law focused on determining which types of actions were “major actions significantly affecting the quality of the environment.” *Id.*; *see, e.g., Downtown Traffic Planning Comm. v. Royer*, 26 Wash. App. 156, 160, 612 P.2d 430, 433 (1980). For two reasons, the latter phrase regarding significance dropped out of the agency review of SEPA’s applicability. First, an understanding of the significance of an action is the purpose for the threshold determination. At least for the threshold determination, significance is a triggering event for the EIS, not the threshold determination. Second, due to judicial foresight, legislative designation of categorically exempted actions, and some borrowing from NEPA case law, “major actions” now have predictable application. *See, e.g., Kucera v. State Dep’t of Transp.*, 140 Wash. 2d 200, 216-17, 995 P.2d 63, 72 (2000) (finding that approval of a passenger ferry constituted a major action).

as an independent analysis of direct and indirect, secondary and cumulative impacts from a given proposal.²⁰

As a matter of practice, the SEPA threshold requirement is not particularly burdensome. The applicant or proponent of the subject proposal is required to submit information on the probable environmental impacts of the proposal.²¹ The information is disclosed in the form provided in the SEPA regulations, entitled the “environmental checklist.”²² The environmental checklist was designed to be comprehensive enough to compel disclosure of impacts on each of the elements of environment as defined in the regulations,²³ yet simple enough to permit compliance by laypersons, rather than consultants with expertise in environmental science.²⁴

The lead agency²⁵ under SEPA assesses the environmental checklist, as well as other information needed to understand the impacts of the proposed action, and makes a threshold determination.²⁶ If persistent circumstances indicate a likelihood of a “more than moderate” adverse effect, the agency

20. WASH. ADMIN. CODE § 197-11-060(4) (2001). SEPA imposes the following requirements upon agencies making environmental determinations:

Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on: (i) the environmental impact of the proposed action; (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented; (iii) alternatives to the proposed action; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

§ 43.21C.030(2)(c).

21. § 43.21C.031(1).

22. WASH. ADMIN. CODE §§ 197-11-315(1), -960 (2001).

23. WASH. ADMIN. CODE §§ 197-11-444, -960 (2001).

24. The preparation of the environmental checklist by laypersons may itself cause the deterioration of environmental review discussed in this Article. At least on paper, the redeeming element of the environmental review process is the mandate of independent environmental review by the lead agency required under section 197-11-330. WASH. ADMIN. CODE § 197-11-330 (2001).

25. Typically, only one agency acts as the lead agency for purposes of environmental review. The lead agency is responsible for demonstrating compliance with the procedural requirements of SEPA, including gathering and assessing the environmental impacts from all aspects of the proposal. WASH. ADMIN. CODE § 197-11-050 (2001); *see also* WASH. STATE DEP'T OF ECOLOGY, PUB. NO. 98-114, STATE ENVIRONMENTAL POLICY ACT HANDBOOK 16 (1998) [hereinafter SEPA HANDBOOK], *available at* <http://www.ecy.wa.gov/pubs/98114.pdf> (last visited June 6, 2002).

26. WASH. ADMIN. CODE § 197-11-330(1)-(3). The lead agency, should it conclude that not enough information exists to make a threshold determination, may obtain further information through applicants, the agency's own violation, or other agencies. WASH. ADMIN. CODE § 197-11-335 (2001).

issues a Determination of Significance²⁷ (“DS”), which indicates that a more thorough study must be prepared.²⁸ If, however, the lead agency finds that the environmental impact will be negligible, the agency issues a DNS and the project may proceed.²⁹ Alternatively, the agency may impose conditions to mitigate the significant impacts and, so long as those conditions promise to lower the environmental impacts below the threshold of significance, the agency may issue a Mitigated Determination of Nonsignificance (“MDNS”).³⁰ The lead agency’s threshold determination, whether it be a DS, DNS, or MDNS, is entitled to judicial deference by statutory decree.³¹

In most situations, SEPA regulations require the lead agency to seek public involvement and comment as an element of the review process.³² As a matter of course, not until after the threshold determination is made is the public invited for involvement, at which point the threshold determination is circulated to relevant regulatory agencies,³³ neighbors of the project, and other interested entities.³⁴ The proposal applicant must then wait fourteen days from the issuance of a DNS while the lead agency accepts and analyzes public comments on the threshold determination.³⁵

Notably, the threshold determination process was not a codified requirement of the original SEPA legislation. SEPA originally required only that the lead agency prepare a “detailed statement” assessing significant environmental impacts.³⁶ Courts were initially frustrated by undocumented and unreviewable agency decisions that an EIS would not be required.³⁷ To

27. See WASH. ADMIN. CODE § 197-11-794 (2001).

28. WASH. ADMIN. CODE § 197-11-360(1) (2001). “The SEPA rules provide that if . . . the lead agency determines that a proposal continues to have a probable significant adverse environmental impact, even with mitigation measures, an EIS [Environmental Impact Statement] shall be prepared.” *Anderson v. Pierce County*, 86 Wash. App. 290, 304, 936 P.2d 432, 440 (1997); see also *Murden Cove Pres. Ass’n v. Kitsap County*, 41 Wash. App. 515, 524, 704 P.2d 1242, 1248 (1985) (citing *Norway Hill Pres. & Prot. Ass’n v. King County Council*, 87 Wash. 2d 267, 278, 552 P.2d 674, 680 (1976)).

29. See WASH. ADMIN. CODE § 197-11-340(1) (2001).

30. WASH. ADMIN. CODE § 197-11-350 (2001).

31. See WASH. REV. CODE § 43.21C.090 (2000).

32. WASH. ADMIN. CODE § 197-11-502 (2001).

33. WASH. REV. CODE § 43.21C.030(d) (2000).

34. See WASH. REV. CODE §§ 43.21C.080, 087 (2000).

35. WASH. ADMIN. CODE § 197-11-340(2)(a) (2001).

36. State Environmental Policy Act of 1971, § 3(2)(c), ch 109, 1971 Wash. Laws. 623, 625 (codified as amended at WASH. REV. CODE § 43.21C.030(a)(c) (2000)).

37. See, e.g., *Gardner v. Pierce County Bd. of Comm’rs*, 27 Wash. App. 241, 245, 617 P.2d 743, 746 (1980) (holding a government agency must sufficiently consider environmental factors to comply with SEPA procedural requirements); *Juanita Bay Valley Cmty. Ass’n v. City of Kirkland*, 9 Wash. App. 59, 73, 510 P.2d 1140, 1149 (1973) (holding that section 43.21C.030(2)(c) of the Washington Revised Code requires the agency to comply with

overcome the unreliability of *ad hoc*, unsupported decisions on the significance of an action, and further, to obviate the prevalence of *post hoc* justifications for those decisions (prepared only when ordered to do so by the court) the court has held that “SEPA requires that a decision *not* to prepare an Environmental Impact Statement must be based upon a determination that the proposed project is *not* a major action significantly affecting the quality of the environment.”³⁸ Early judicial review of threshold determinations, therefore, emphasized the need for a reviewable administrative record, but did not go so far as to require the formalization of the determination in a particular format.³⁹ Not surprisingly, as the notion of a “SEPA threshold” developed in the courts, it trickled down to local and state agencies and was formalized in the first round of administrative guidelines, Chapter 197-10 WAC, effective January 16, 1976.⁴⁰

Of course, even before codification of a formal “threshold determination” requirement, Washington courts delineated the scope of agency duties at the threshold level of SEPA.⁴¹ In *Juanita Bay Valley Community Ass’n*, one of the first reported threshold determination decisions, the Appellate Court denied deference to the agency’s negative environmental determination because the agency was unable to prove that it gave adequate consideration to environmental factors.⁴² The court stated, in an oft-cited rule, that “before a court may uphold . . . a [threshold] decision, the appropriate governing body must be able to demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA.”⁴³ The court ruled that because SEPA imposed an informational burden on agencies, they should be held to establish that, as a procedural matter, prima facie duties have been satisfied.

In implementing the policy against cursory environmental review, the Washington Supreme Court has consistently described SEPA’s prima facie duties in burden terms, stating routinely that the burden of proof is first borne by the agency to make its prima facie showing: “The burden is upon the governmental body subject to SEPA to show that it made a threshold

procedural requirements of SEPA by considering environmental factors in deciding whether or not to issue an EIS).

38. *Juanita Bay Valley Cmty. Ass’n*, 9 Wash. App. at 73, 510 P.2d at 1149 (emphasis in original).

39. See *Hayden v. City of Port Townsend*, 93 Wash. 2d 870, 613 P.2d 1164 (1980), *overruled in part by*, *Save a Neighborhood Env’t v. City of Seattle*, 101 Wash. 2d 280, 286 n.1, 676 P.2d 1006, 1010 n.1 (1984).

40. See SEPA HANDBOOK, *supra* note 25, at 3.

41. See, e.g., *Juanita Bay Valley Cmty. Ass’n*, 9 Wash. App. at 73, 510 P.2d at 1149.

42. *Id.*

43. *Id.* (citing *Hanly v. Mitchell*, 460 F.2d 640, 648 (2d Cir. 1972)).

determination which ‘demonstrate[s] that environmental factors were considered in a manner sufficient to be a prima facie compliance with the procedural dictates of SEPA.’”⁴⁴ This rule has been reinforced in Washington courts. For instance, *Gardner v. Pierce County Board of Commissioners*⁴⁵ concerned a SEPA approval for a preliminary plat, the soils of which were of questionable and unstudied suitability for sewage retention or attenuation.⁴⁶ Neighbors of the development drew water from wells in the vicinity of the site.⁴⁷ The court, recognizing a deficiency in the record of soil studies, first responded to the alleged failure on the part of the challengers to demonstrate the probability of adverse impacts to groundwater; it stated that “the County’s failure to present evidence establishing ‘engineering justification’ on the record cannot be attributed to ambush tactics by petitioner.”⁴⁸ The court held that the prima facie case was the government’s burden to meet: “Whether or not property owners in petitioner’s position specifically raise a SEPA challenge.”⁴⁹ The only way to read the court’s prima facie mandate is that, to receive the judicial deference otherwise deserved, the agency must prepare an administrative record proving that the agency has acted as required.⁵⁰ After the lead agency demonstrates prima facie compliance with SEPA’s procedural requirements, the burden shifts to the challenger to demonstrate deficiencies in the quality of environmental review.⁵¹ Any other interpretation would defy the purpose and intent of SEPA and place the public in the position of initiating environmental review. However, the threshold determination is the agency’s to make: the burden of production rests in the lead agency until actual consideration is adequately evident.⁵²

It should be noted that scholarly attention to SEPA’s reign did not incite radical theories of interpretation or garner particularly condemning criticisms. That is, SEPA generally performed as expected, after accounting for inevitable litigation to smooth out the rough legislative edges. Having said that, it is also the case that SEPA no longer performs in practice as on paper. As discussed

44. *City of Bellevue v. King County Boundary Review Bd.*, 90 Wash. 2d 856, 867, 586 P.2d 470, 477 (1978) (quoting *Lassila v. City of Wenatchee*, 89 Wash. 2d 804, 814, 576 P.2d 54, 59-60 (1978)).

45. 27 Wash. App. 241, 617 P.2d 743 (1980).

46. *Id.* at 242, 617 P.2d at 744.

47. *Id.* at 244, 617 P.2d at 745.

48. *Id.* at 245, 617 P.2d at 746.

49. *Id.*

50. *Gardner*, 27 Wash. App. at 245-46, 617 P.2d at 746.

51. See *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir. 1990) (holding that in the case of NEPA the appellants met their burden by pointing out the absence of cumulative impact studies in the EIS.).

52. See *Gardner*, 27 Wash. App. at 245, 617 P.2d at 746.

in the following section, the threshold procedures of SEPA, albeit simple, have been the subject of some ambiguity and misunderstanding.

B. *Prima Facie SEPA Compliance—Negative
Threshold Determination*

As noted, to earn the deference afforded agency determinations, the agency shouldered with SEPA obligations must first demonstrate a prima facie compliance with the procedural requirements of SEPA. The most declarative, if not only, statement on this issue is that the agency bears the burden to illustrate “actual consideration of environmental factors.”⁵³ As simple as this may sound, it may need some unpacking: oddly, although Washington courts have proven an unwavering loyalty to SEPA in reciting the agency’s burden of demonstrating prima facie compliance, the confines and criteria of the “prima facie” case of SEPA compliance have not been explored to great depth. What does it mean to certify prima facie compliance under SEPA?

What, for instance, constitutes “actual” consideration? A plain reading implies that actual consideration requires a demonstration of a veracious, genuine, historical fact that the agency seriously considered the evidence before it. At base, this translates into a requirement that the relevant information “actually” be found in the administrative record so that the court can in fact review the information that was relevant to the agency’s environmental review. Early SEPA case law supports this reading and signifies a reluctance to uphold post hoc justifications for negative threshold determinations.⁵⁴ Of course, asking a court to review the “actualness” of an agency’s consideration is tricky. In theory, when the administrative record is completely devoid of information regarding a particular imminent impact, or worse, when an agency chooses to forego assessment of certain publicized impacts, one can assume the actuality element is not satisfied. In practice, when the agency presents post hoc testimony that the relevant impacts were considered, despite an absence of information in the record, the court is faced with a difficult decision.

53. *Id.* Notably, this test follows the four part test, applied to the threshold determination under NEPA:

First, the agency must have accurately identified the relevant environmental concern. Second, once the agency has identified the problem it must have taken a “hard look” at the problem in preparing the EA. Third, if a finding of no significant impact is made, the agency must be able to make a convincing case for its finding. Last, if the agency does find an impact of true significance, preparation of an EIS can be avoided only if the agency finds that changes or safeguards in the project sufficiently reduce the impact to a minimum.

Sierra Club v. United States Dep’t of Transp., 753 F.2d 120, 127 (D.C. Cir. 1985).

54. *See, e.g., Gardner*, 27 Wash. App. at 245, 617 P.2d at 746; *Juanita Bay Valley Cmty. Ass’n v. City of Kirkland*, 9 Wash. App. 59, 73, 570 P.2d 1140, 1149 (1973).

Second, what constitutes “consideration”? Case law suggests the agency’s administrative record should illustrate the ways the particular proposal does or does not affect the environment: a mere conclusion does not suffice.⁵⁵ The *City of Bellevue* court found that, based on review of the entire record:

The record fails to show sufficient deliberation and consideration and contains little other than the conclusion that an EIS is unnecessary. . . . The materials to which Redmond and the board refer us contain nothing which would suggest that the board did anything other than accept this conclusion; they reveal a naked decision not to take any action under SEPA, a decision which is devoid of any serious consideration of environmental factors.⁵⁶

The court’s emphasis on the lack of detailed analysis suggests it sought a discussion of how the projected environmental impacts of the proposal related to the environmental values recited in the policy statement of SEPA.⁵⁷ Yet, the court fell short of issuing objective criteria to apply in subsequent cases.⁵⁸ Has the agency “considered” impacts if they appear in the environmental checklist? What if a particular impact is raised, perhaps incessantly, but left open-ended due to an inability to understand the relevant science?⁵⁹ In short, the consideration element of the *prima facie* case leaves unanswered questions.

Third, what factors or elements of the environment must be considered? That is, what values are sufficiently “environmental” values such that they must be included in the *prima facie* case of SEPA compliance? SEPA regulations require the agency to compile a “reasonably sufficient”⁶⁰ amount of information on the affected “elements of environment,” which appear to include the gamut of possible affected environmental values.⁶¹ In theory, a

55. See *City of Bellevue v. King County Boundary Review Bd.*, 90 Wash. 2d 856, 867, 586 P.2d 470, 477 (1978).

56. *Id.*

57. See WASH. REV. CODE § 43.21C.020 (2000).

58. The difficult question of establishing criteria for “consideration” is dealt with generally in John Watts, Comment, *Reconciling Environmental Protection with the Need for Certainty: Significance Thresholds for CEQA*, 22 *ECOLOGICAL L.Q.* 213, 240-41 (1995) (comparing California environmental policy law to other state laws, including Washington). Admittedly, objective criteria for reviewing “consideration” may be an impossible task, and would likely yield little more than the common sense reading of “consider.”

59. See, e.g., *Newaukum Hill Protective Ass’n v. Lewis County*, 19 Wash. App. 162, 166-68, 574 P.2d 1195, 1198-99 (1978). Unfortunately, the *Newaukum Hill Protective Ass’n* court concerned itself with the substantive conclusions drawn by the agency, rather than satisfaction of the *prima facie* burden, and so the holding neither supports nor challenges the argument presented herein. *Id.* at 168-69, 574 P.2d at 1199.

60. WASH. ADMIN. CODE § 197-11-335 (2001).

61. WASH. ADMIN. CODE § 197-11-444 (2001).

minimally sufficient study of environmental impacts must face the direct and indirect, secondary and cumulative impacts on the elements listed in the definition of the “environment.”⁶² In practice, the “environment” may become those factors on which the applicant and agency already have information or, on an even more cynical level, those factors that the local body politic deems important.⁶³

Finally, what is the purpose of the court’s reiteration of requiring compliance with “procedural” duties? Although the term “procedural” should be interpreted, as above, to require “actual consideration of environmental factors,”⁶⁴ it nonetheless causes serious disagreement between plaintiffs and agency attorneys. On the one hand, agency attorneys can cite to the SEPA regulations which require that, as a procedural matter, a negative threshold determination *must* be issued if no significant, adverse environmental impact is apparent.⁶⁵ However, if information is omitted from the environmental checklist and the public fails to provide evidence of significant environmental impacts, the record may not reveal any evidence of the impact and a negative threshold determination appears justified. In addition, SEPA regulations appear to require only that the agency “shall [conduct] its initial review of the environmental checklist and any supporting documents without requiring additional information from the applicant.”⁶⁶ Based on this limited reading of the SEPA rules, it seems an agency can limit its review to the environmental checklist without actually performing a thorough study.

On the other hand, the procedural requirements of SEPA clearly include a certification that as a procedural matter the agency consider each element of the environment in due course, including the direct, indirect, and cumulative impacts to each element. SEPA regulations state as much, requiring that the agency “shall [i]ndependently evaluat[e] the responses of any applicant and indicat[e] the result of its evaluation in the DS, in the DNS, or on the checklist.”⁶⁷ Furthermore, agencies are required to gather all pertinent information, so long as “the costs of obtaining it are not exorbitant.”⁶⁸ The

62. See WASH. ADMIN. CODE § 197-11-235 (2001).

63. See Watts, *supra* note 58, at 283-86 (discussing the political influence in the environmental process).

64. Gardner v. Pierce County Bd. of Comm’rs, 27 Wash. App. 241, 245, 617 P.2d 743, 746 (1980).

65. WASH. ADMIN. CODE § 197-11-340(1) (2001).

66. WASH. ADMIN. CODE § 197-11-330(1)(a)(ii) (2001).

67. WASH. ADMIN. CODE § 197-11-330(1)(a)(i) (2001).

68. WASH. ADMIN. CODE § 197-11-080(1) (2001). In such an event, agencies must “make clear that such information is lacking or that substantial uncertainty exists.” WASH. ADMIN. CODE § 197-11-080(2) (2001). Washington courts have not done justice to this requirement. In one of the few citations to this provision, Division I of the Court of Appeals,

SEPA rules do not, in fact, allow the agency to rely on the information submitted by the applicant;⁶⁹ an independent review requires the agency to perform review by obtaining information essential to the decision making process.⁷⁰

Judicial review of SEPA threshold determination appears to respond to this problem, providing that review of an agency's threshold determination is "extremely broad."⁷¹ Although limited to the administrative record, under the

in an unpublished opinion, upheld an hearing examiner's decision that the study of pollutants in Barlow Bay would include unreasonable costs. *Landau v. San Juan County*, No. 45693-8-I, 2001 WL 244352 (Wash. App., Mar. 12, 2001). The court accepted the hearing examiner's decision without inquiring into whether "unreasonable costs" met the "exorbitant" requirement. *See id.* at *4-*5. The court also found persuasive the voluminous record that included a variety of other studies, from which the hearing examiner found sufficient information to assess the probable impacts of the proposition. *Id.* at *4. The hearing examiner may have been correct on the cost issue. However, the hearing examiner's determination that "enough information" existed to support a negative threshold determination is surely a *non sequitur*—a negative threshold determination can always be supported by a record that does not disclose significant environmental impacts. *See id.*

69. One response to the dilemma might be to recognize the shortcomings in the expertise of SEPA-burdened agencies. That is, it may seem appropriate to defer to agency decisions because SEPA conclusions may be highly technical and require expertise, but only where the agency in fact has the expertise necessary to make environmental determination. While it may be efficient to equip agencies with a presumption of validity, the purpose of deferring to agency decision is neither to legitimate administrative abuse, nor to sacrifice accuracy. SEPA, after all, differs from its federal counterpart, the National Environmental Policy Act (NEPA) precisely on this point. NEPA duties are often borne by expert agencies—National Marine Fisheries Service, United States Fish and Wildlife Service, Bureau of Land Management, the Army Corps of Engineers, etc.—that do deserve a high level of deference due to their demonstrated expertise. *Id.*; Bradley Karkkainen, *Toward a Smarter NEPA Monitoring and Managing Government's Environmental Performance*, 103 COLUM. L. REV. 903, 911-12 (2002). Under SEPA, this dilemma is not answered by an estimation of the lead agency's expertise. SEPA obligations are typically borne by municipal entities and officials, who may have more proprietary than environmental interests at stake when making environmental determinations. *See generally* Lori Ann Terry, *SEPA: A Proposed Standard for Judicial Review of Agency Decisions Not to Require Preparation of a Supplemental Environmental Impact Statement*, 15 U. PUGET SOUND L. REV. 957, 970-73 (1992) (describing how SEPA has safeguards against agency abuse of discretion). *But cf.* Michael W. Elgass, *A Standard for Judicial Review of Administrative Decisionmaking Under SEPA—Polygon Corp. v. City of Seattle*, 54 WASH. L. REV. 693, 703-04 (1979) (arguing that agency abuse of discretion is occurring with increasing frequency and is virtually unchecked by the courts).

70. WASH. ADMIN. CODE § 197-11-330(1)(a)(i); *see also* SEPA HANDBOOK, *supra* note 25, at 20.

71. *Sisley v. San Juan County*, 89 Wash. 2d 78, 84, 569 P.2d 712, 716 (1977); *see also* *Asarco, Inc. v. Air Quality Coalition*, 92 Wash. 2d 685, 700-01, 601 P.2d 501, 512 (1979) ("The purpose of the broad scope of review is to ensure that an agency, in considering the need for an EIS, does not yield to the temptation of expediency, thus short-circuiting the thoughtful decision-making process contemplated by SEPA.").

clearly erroneous standard courts will not uphold an agency decision when the court is “left with the definite and firm conviction that a mistake has been committed.”⁷² Accordingly, the court determines whether the record at least demonstrates some evidence in support of the administrative decision. Under this standard, an incomplete record should not be upheld: an absence of evidence could not support the agency’s decision.

SEPA is designed to force agencies to gather and assess information so that the Washington environmental landscape is shaped “by deliberation, not default.”⁷³ In this process, agencies are required to ground their environmental decisions on reasonable inferences and conclusions, based on evidence that indicates a “complete disclosure of environmental consequences.”⁷⁴ The purpose and intent of the SEPA threshold is, unfortunately, losing its bite. As a result, the SEPA threshold is becoming a relic, vanishing from the scene. The vast majority of preliminary environmental decisions in Washington have resulted in negative threshold determinations.⁷⁵ That is, agencies have found that the overwhelming majority of legislative proposals, development plans, and construction proposals have no significant adverse effect on the environment. This circumstance naturally begs the question: have these proposals benefitted from the agency’s actual consideration of environmental factors?

III. THE VANISHING SEPA THRESHOLD

At its inception, the threshold of SEPA compliance was considered the gateway to a public understanding of the interrelation between human use of natural resources and the integrity of the environment. In the trenches of SEPA litigation, the actual process of the threshold determination is difficult to reconcile with its purpose. On occasion, agencies have unabashedly issued unsupported negative threshold determinations, accompanied by administrative records that are virtually impossible to analyze due to a glaring absence of

72. *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 69, 578 P.2d 1309, 1315 (1978) (quoting *Ancheta v. Daly*, 77 Wash. 2d 255, 259-60, 461 P.2d 531, 534 (1969)).

73. *Stempel v. Dep’t of Water Res.*, 82 Wash. 2d 109, 118, 508 P.2d 166, 172 (1973).

74. *Alpine Lakes Prot. Soc’y v. Wash. State Dep’t of Natural Res.*, 102 Wash. App. 1, 15-16, 979 P.2d 929, 936 (1999) (quoting *King County v. Boundary Review Bd.*, 122 Wash. 2d 648, 663, 860 P.2d 1024, 1033 (1993)).

75. The SEPA Register, updated each business day, is available online, at which a computer-savvy researcher can find hundreds of pending threshold determinations at any given time. WASH. STATE DEP’T OF ECOLOGY, SEPA REGISTER, at <http://www.ecy.wa.gov/apps/sepa/index.asp> (last visited Apr. 14, 2002). Although not all the reported applications are garnered by negative threshold determinations, the vast majority do indicate pending DNSs and MDNSs.

disclosure and consideration of probable environmental impacts.⁷⁶ Agencies simply are not threatened by a public challenging the completeness of environmental study, even where informational gaps are openly acknowledged.⁷⁷ Moreover, the courts are reluctant to force agencies to reopen threshold determinations, particularly where there is evidence that the agency is unlikely to reach a different decision, even if forced to conduct a more searching environmental inquiry.⁷⁸ As a result, in recently reported and unreported⁷⁹ cases involving SEPA challenges, the threshold determination is eroding at its foundations, and is receding into a pre-SEPA state transforming from a means to ensure erasure of environmental ignorance into a means to manage SEPA evasion. That is, the burden of demonstrating prima facie compliance with SEPA has fallen away from agency responsibility and hangs in the SEPA firmament, waiting for the public to challenge an agency's negative threshold determination and prematurely bear the burden of proving probable environmental impacts.

This section focuses on five recent appellate court and Growth Management Hearings Board decisions in Washington that evidence the emerging frustration of the prima facie standard. In *Moss v. City of*

76. Cf. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420-21 (1971) (remanding case to agency for further findings due to bare disclosure).

77. This was the situation found in earlier proceedings in the *Moss v. City of Bellingham* controversy. See *infra* notes 101-23 and accompanying text; see also *Indian Trail Prop. Owner's Ass'n v. City of Spokane*, 76 Wash. App. 430, 443, 886 P.2d 209, 218 (1994) (finding erroneous initial threshold determination due to improper piecemealing, though the error was eventually cured by the agency).

78. See, e.g., *infra* note 134 and accompanying text. But see *Metcalf v. Daley*, 214 F.3d 1135, 1145 (9th Cir. 2000) (invalidating a Finding of no Significant Impact due to evidence of predisposition, and remanding for further consideration).

79. The unreported cases cited herein are, of course, only illustrative of the argument and have no precedential force. See WASH. R. APP. P. 10.4(h). In particular, the frequency of unreported appellate decisions, combined with the relevance of those decisions to the vanishing SEPA threshold, are difficult to ignore. Therefore, although this Article is not intended to take a position on the constitutionality of unpublished decisions, see K.K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397, 417-18 (2001) (arguing for permissibility of citing unpublished opinions); Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to "Unpublish" Opinions*, 77 NOTRE DAME L. REV. 135, 161-63 (2001) (criticizing the judicial system's reluctance to rely on unpublished decisions). I think there may be an open issue regarding the use of unpublished decisions in the judicial escape from accountability: judges need not concern themselves with careful drafting of unpublished decisions, since they will not be used for precedent. It has even been suggested that the published or unpublished status of a case will determine whether the Washington Supreme Court will accept review. See Eron Berg, *Unpublished Decisions: Routine Cases or Shadow Precedents?*, WASH. B. NEWS, Dec. 2000, at 28, 31-32. Unfortunately, these notions are outside the scope of this Article.

Bellingham,⁸⁰ Division I of the Appellate Court rejected a procedural challenge to an MDNS for a large subdivision in Bellingham, Washington.⁸¹ In another example, the unpublished decision of *STAT (Stop the Amphitheater Today) v. Clark County*,⁸² Division II of the Appellate Court affirmed the approval of an amphitheater in southeastern Washington.⁸³ In both of these cases, the court found that the procedures of SEPA might have been violated, but refused to remand for further environmental study.⁸⁴ In both cases, the procedural violations were met with an inquiry into the sufficiency of the plaintiffs' evidentiary support.⁸⁵ The court appeared to require the public to produce actual evidence of significance as a prerequisite to finding a curable violation of SEPA.⁸⁶ The burden of proving its negative threshold determination was not borne by the agency in either case.⁸⁷ The reasoning in these cases may reflect a revision in the prima facie duties under SEPA: the threshold determination has lost its force de jure, replaced by an urgent sense of agency independence and efficiency.

Other appellate court decisions from Division II evidence a more direct attack on the threshold review process. In the first case, *Boehm v. City of Vancouver*,⁸⁸ the court affirmed later phases of a phased commercial development for which there had never been a cumulative impacts analysis.⁸⁹ In *Erikson v. City of Camas*,⁹⁰ the appellate court issuing another unpublished opinion, again affirmed the agency's decision not to review particular impacts to the environment.⁹¹ In both cases, the appellate court found that the record's absence of cumulative impacts necessarily made an analysis of cumulative impacts speculative.⁹² Hence, the appellate court shifted the burden of proof to the public to determine whether the proposal surpassed the threshold level of significance.

Finally, the Growth Management Hearings Board has indicated a willingness to engage in this trend with the recent decision in *Achen v. City of*

80. 109 Wash. App. 6, 31 P.3d 703 (2001).

81. *Id.* at 11, 31 P.3d at 706.

82. No. 26067-1-II, 2001 WL 898758 (Wash. App., Aug. 10, 2001), *review denied*, 145 Wash. 2d 1030, 42 P.3d 975 (2002).

83. *Id.* at *1.

84. *See Moss*, 109 Wash. App. at 20-21, 31 P.3d at 710-11; *see also STAT*, at *1-*2.

85. *See Moss*, 109 Wash. App. at 20-21, 31 P.3d at 710-11; *see also STAT*, at *1-*2.

86. *See Moss*, 109 Wash. App. at 12-13, 31 P.3d at 707.

87. *See id.* at 30, 31 P.3d at 716; *see also STAT*, at *3.

88. 111 Wash. App. 711, 47 P.3d 137 (2002).

89. *Id.* at 713-14, 47 P.3d at 139.

90. No. 25668-1-II, 2001 WL 567687 (Wash. App., May 25, 2001).

91. *Id.* at *4, *6.

92. *See Boehm*, 111 Wash. App. at 714, 47 P.3d at 139; *see also Erikson*, at *4-*5.

Battle Ground.⁹³ Since the result favored SEPA's informational goals, the *Achen* decision is less damaging to SEPA.⁹⁴ However, the decision may be the harbinger of things to come, as the Board voiced its "common sense" reading of SEPA.⁹⁵

A. *The Illusion of SEPA Burdens and the Quasi-Judicial
Threshold Determination*

The first issue arising in recent case law concerns the timing of threshold review. As stated above, SEPA burdens are primarily borne by an agency's SEPA official who analyzes the environmental checklist, as well as other pertinent information, and makes a threshold determination on the significance of the proposal's probable impacts.⁹⁶ The public is generally invited to comment on the proposal and, if unsatisfied, may appeal the threshold determination to the agency's appellate body.⁹⁷ The SEPA official must then demonstrate actual consideration of environmental factors for the determination to be upheld.⁹⁸ If the determination does not satisfy the prima facie case of SEPA compliance, the appellate body remands the determination for further consideration.⁹⁹

A problem is emerging wherein agency appellate bodies identify deficiencies in the "actual consideration" of a proposal's impacts. However, instead of invalidating the decision and remanding to the SEPA official, these appellate bodies have viewed the records and cured the deficiencies themselves by issuing more thorough threshold determinations.¹⁰⁰ Unfortunately, this trend detracts from the SEPA process and defies logic: if the relevant information was not actually considered by the SEPA official, and hence is missing from the record on review, the appellate body is in no better position to determine the significance of the unconsidered impacts. In such circumstances, this Article contends that the information will never be considered and the agency can effectively circumvent its responsibilities under SEPA.

The *Moss* case involved an application to develop a seventy-nine acre,

93. No. 99-2-0040 (W. Wash. Growth Mgmt. Hearings Bd., May 16, 2000), available at http://www.gmboards.wa.gov/western/western_decisions/ww1999/99_40_Fdo.htm.

94. *Id.*

95. *See id.*

96. *See supra* notes 76-95 and accompanying text.

97. *See* WASH. ADMIN. CODE § 197-11-502 (2001).

98. *See* Gardner v. Pierce County Bd. of Comm'rs, 27 Wash. App. 241, 245, 617 (P.2d 743, 746 (1980)).

99. *See id.*

100. *See supra* notes 76-95 and accompanying text.

172-lot subdivision on a vacant site in Bellingham, Washington.¹⁰¹ In the early stages of the application review, Bellingham's SEPA official requested additional information in the form of an environmental assessment.¹⁰² Based on that submission, the city's SEPA official issued a determination of nonsignificance.¹⁰³ However, in subsequent hearings, in light of testimony from over two hundred citizens, the planning staff issued a report recommending the rejection of the application, arguing that the proposal would be detrimental, even with mitigation measures in place.¹⁰⁴ The Bellingham Planning and Development Commission subsequently held a series of hearings and recommended that the Bellingham City Council approve the application with several additional conditions.¹⁰⁵ However, the commission did not withdraw the DNS or otherwise modify its determination.¹⁰⁶

The Bellingham City Council approved the subdivision application together with findings that the project required the imposition of thirty-three additional conditions of approval.¹⁰⁷ Essentially, the council issued the threshold determination for the project. The plaintiffs appealed, alleging that the threshold determination was invalid due to its timing.¹⁰⁸ The plaintiffs reasoned that the actual threshold determination, made long before the city even considered imposing mitigation measures, did not meet the *prima facie* requirements of SEPA.¹⁰⁹ The plaintiffs' reasoning was surely sound, since it would have been impossible for the SEPA official to consider the impacts of the project in light of mitigation which had not yet been proposed: the subsequent imposition of conditions supported the plaintiffs' argument that the SEPA official's threshold determination was not based upon reasonably sufficient information.

In large part, the plaintiffs in *Moss* argued that the size and topography of the project proposal justified a finding that the project would cause a *per se* significant impact, and hence would require an EIS as a matter of law.¹¹⁰ Relying on the *Norway Hill Preservation & Protection Ass'n* decision, the plaintiffs argued that projects of a particular size could not be properly

101. *Moss v. City of Bellingham*, 109 Wash. App. 6, 11, 31 P.3d 703, 706 (2001).

102. *Id.* at 12, 31 P.3d at 707.

103. *Id.*

104. *Id.* at 12-13, 31 P.3d at 707.

105. *Id.* at 12, 31 P.3d at 707.

106. *Moss*, 109 Wash. App. at 11, 31 P.3d at 706.

107. *Id.* at 13, 31 P.3d at 707.

108. In addition, the plaintiffs challenged the project under the Integration Act. See discussion *infra* notes 155-61.

109. See *Moss*, 109 Wash. App. at 22, 31 P.3d at 712.

110. *Id.* at 12, 31 P.3d at 706-07.

reviewed in a negative threshold determination.¹¹¹ The court, noting that *Norway Hill Preservation & Protection Ass'n* was decided prior to the induction of the MDNS to SEPA, determined that the suggestion in *Norway Hill Preservation & Protection Ass'n* that large projects require an EIS as a matter of law “is no longer good law.”¹¹²

Then, in a one-two punch from which the plaintiffs were unable to recover, the court shifted the burden of proof from the city to the plaintiffs.¹¹³ The city was no longer responsible for demonstrating prima facie compliance with the procedural requirements of SEPA. Instead, the court, by seeking evidence that “the project as mitigated will cause significant environmental impacts warranting an EIS,” first held plaintiffs responsible for proving that prima facie compliance was *not* met.¹¹⁴ The court found no such evidence.¹¹⁵ However, the court did not ask whether the plaintiffs were afforded a comment period following the completion of the threshold determination, which occurred when the council imposed the thirty-three mitigating conditions. The court did not consider whether such evidence would have been available had the threshold determination been issued after all of the information was available and the plaintiffs had a better understanding of the project’s impacts.

Next, the court inquired more directly into the city’s blatant procedural violations of SEPA. The court expressed some concern over the timing of the threshold determination, recognizing that “the MDNS process and WAC 197-11-158 focus on mitigating impacts before a threshold determination is made, not after.”¹¹⁶ Likewise, the court quoted the SEPA rules regarding the MDNS, which “allow clarifications or changes to a proposal prior to making the threshold determination.”¹¹⁷ The city’s SEPA official failed to comply with these requirements, and thus issued the threshold determination in violation of the prima facie requirements of SEPA.¹¹⁸ The court rightly concluded that “the DNS should not have been issued until the project proposal was properly conditioned.”¹¹⁹

In all likelihood, most Washington land use attorneys stopped reading the *Moss* decision after the court’s finding of a prima facie SEPA violation. In

111. *Id.* at 18, 31 P.3d at 710 (explaining appellants’ reliance on *Norway Hill Pres. & Prot. Ass’n v. King County Council*, 87 Wash. 2d 267, 552 P.2d 674 (1976)).

112. *Id.* at 21, 31 P.3d at 711.

113. *See id.* at 23-25, 31 P.3d at 712-13.

114. *Moss*, 109 Wash. App. at 23-24, 31 P.3d at 712.

115. *Id.* at 23-24, 31 P.3d at 712.

116. *Id.* at 24, 31 P.3d at 713.

117. *Id.* at 25, 31 P.3d at 713 (quoting WASH. ADMIN. CODE § 197-11-350 (2001)).

118. *See id.* at 24-25, 31 P.3d at 713.

119. *Moss*, 109 Wash. App. at 25, 31 P.3d at 713.

such cases, the SEPA decision is typically remanded for further review under circumstances that do not evidence predetermination.¹²⁰ However, the *Moss* court broke from precedent in deciding that the plaintiffs' failure to demonstrate a significant impact was conclusive evidence that such impact would not be probable.¹²¹ Without more evidence of significant impacts on the record, the court refused to force the agency to gather more information.¹²² The court was suspicious of the plaintiffs' argument that the council could reach a different decision on remand.¹²³ Hence, there was no prejudice and the determination would be affirmed.

STAT also supports the argument that SEPA procedures have been misconstrued.¹²⁴ The *STAT* court's misunderstanding of the SEPA *prima facie* case converges with the *Moss* reasoning in that the *STAT* court essentially approved a quasi-judicial threshold determination, made in an appellate forum to cure an otherwise deficient threshold determination. At issue in the *STAT* case was the approval of an outdoor amphitheater projected to draw entertainers from a wide variety of locations and influences and designed to be a facility of some regional significance.¹²⁵ The proposal was structured so that Clark County would own the facility and lease it to Q-Prime, who would construct and operate the facility.¹²⁶

The *STAT* plaintiffs challenged the approval under SEPA, pointing to an absolute absence of cumulative impacts studies or consideration.¹²⁷ Indeed, the county's thirty-eight page report, which covered a variety of impacts ranging from traffic to noise, failed to even mention the word "cumulative" in its analysis.¹²⁸ However, although the plaintiffs believed they had demonstrated that the MDNS was "clearly erroneous," the hearing examiner disagreed and approved the amphitheater.¹²⁹ The hearing examiner expressly found that cumulative impacts had not been considered during environmental review, but

120. See, e.g., *Gardner v. Pierce County Bd. of Comm'rs*, 27 Wash. App. 241, 242-47, 617 P.2d 743, 744-47 (1980).

121. See *Moss*, 109 Wash. App. at 30, 31 P.3d at 716.

122. See *id.*

123. *Id.* at 18, 31 P.3d at 710.

124. See, e.g., *STAT v. Clark County*, No. 26061-1-II, 2001 WL 898758, *2 (Wash. App., Aug. 10, 2001).

125. *Id.* at *1.

126. *Id.* The ownership of the facility was found by the appellate court to bear on the plaintiffs' challenge to the decision to exempt the amphitheater application from state noise standards, which exempts "officially sanctioned . . . public events" from noise standards. *Id.* at *3; WASH. ADMIN. CODE § 173-60-050(4)(h) (2001).

127. *STAT*, at *1.

128. *Id.*

129. *Id.* at *1-2.

refused to remand the application for further study.¹³⁰ Instead, the examiner took it upon himself to cure the SEPA deficiency and make the threshold determination for the lead agency.¹³¹ Upon review of the record, the hearing examiner found that “because of the insignificance of the discrete impacts, the disparate nature of those discrete impacts and the limit on the number of major events permitted per season,” the cumulative impacts from the facility would be negligible.¹³² Based on his findings, the examiner “filled any void” in the environmental documentation “by making his own finding of fact.”¹³³

The *STAT* court’s affirmation of the hearing examiner’s threshold determination evidences a misunderstanding of SEPA, stemming from a combination of the court’s undermining of the informational goals of SEPA, with its favoritism for consequentialist, rather than rule-based decision making. The court was reluctant to remand to an agency that would likely return with the same determination made by the hearing examiner.¹³⁴ However, the court was unable to cite precedent or any provision in SEPA allowing an appellate body to cure a violation of the agency’s *prima facie* duties.¹³⁵ In prior violations of SEPA duties, the appropriate remedy was to remand the

130. *Id.* at *1.

131. *See id.* at *2.

132. *STAT*, at *1.

133. *Id.* at *2; *see also* Washougal Motocross, CUP 2002-00001, SEP 2002-00003 (Land Use Hearings Exam’r, July 23, 2002).

[T]he examiner concludes the County’s Responsible SEPA Official (the “CRSO”) did not err in issuing the DNS in this case on procedural grounds, based on the following findings. However, before proceeding with those findings, the examiner opines that the CRSO did an overall poor job in this case. The DNS meets the letter of the law, but it does not meet the spirit of SEPA, and the Staff Report lacks an adequate discussion of disputed issue and an adequate level of detail to truly aid the decision-maker. The Motocross use has impacts that the DNS does not discuss, including noise. It does not discuss other impacts in the level of detail warranted by the use, including impacts to fish habitat. To reach the conclusion the CRSO reached, the examiner must infer from the evidence, because the findings are not there. Reasonable inferences can be drawn, but having to do so makes the examiner’s job reviewing the DNS and CUP a lot harder.

Id.

134. *See STAT*, at *2 & n.15 (agreeing with Superior Court’s finding of administrative harmless error). How the “harmless error” standard alters the standard of review under SEPA is undecided—however, the court should interpret “harmless error” in light of the informational purposes of SEPA. *Eastlake Cmty. Council v. Roanoke Assocs., Inc.*, 82 Wash. 2d 475, 490, 513 P.2d 36, 46 (1973) (“[T]he maintenance, enhancement and restoration of our environment is the pronounced policy of this state, deserving faithful judicial interpretation.”). A decision made without the benefit of complete disclosure and analysis is necessarily harmful error because it is not a fully informed decision. *See, e.g., Metcalf v. Daley*, 214 F.3d 1135, 1145 (9th Cir. 2000).

135. *See STAT*, at *2.

application to the lead agency to make a more comprehensive environmental determination.¹³⁶ The court missed the purpose for a remand under SEPA—to give the agency the opportunity to gather more information and supply a complete administrative record, particularly one that supports its decision.

In light of the *Moss* and *STAT* decisions, one is forced to wonder whether the SEPA threshold determination has become an illusion in the law. As a result, the future of SEPA prima facie duties is uncertain. The court's reluctance to remand procedural violations of SEPA for complete and accurate environmental review is a clear break from precedent. The court's replacement of prima facie duties by placing the burden on SEPA plaintiffs relinquishes the prima facie duty altogether and opens the door for uninformed decision making.

B. *Integration Act Amendments*

In 1995, SEPA was amended in the legislature's regulatory reform efforts under the Integration Act, which was intended to increase both the efficiency and accuracy of SEPA review.¹³⁷ On its face, the Integration Act amendment to SEPA offers agencies significant leeway and discretion by consolidating SEPA and other regulatory review.¹³⁸ However, the Integration Act also reaffirms the requirement to demonstrate actual consideration of environmental impacts under circumstances that might lead an agency to forego environmental review.¹³⁹ The Integration Act made the following changes to project review under SEPA:

(1) If the requirements of subsection (2) of this section are satisfied, a county . . . reviewing a project action may determine that the requirements for environmental analysis, protection, and mitigation measures in the . . . development regulations and comprehensive plans . . . provide adequate analysis of and mitigation for the specific adverse environmental impacts of the project action to which the requirements apply.¹⁴⁰

136. See, e.g., *Gardner v. Pierce County Bd. of Comm'rs*, 27 Wash. App. 241, 245, 617 P.2d 746, 747 (1980).

137. *Moss v. City of Bellingham*, 109 Wash. App. 6, 15-16, 31 P.3d 703, 708-09 (2001).

138. See WASH. REV. CODE § 43.21C.240(1)-(4) (2000).

139. WASH. REV. CODE § 43.21C.240. See also *Moss*, 109 Wash. App. at 16, 31 P.3d at 709 ("While simplifying the project review process, WASH. ADMIN. CODE § 197-11-158 maintains SEPA's function as an environmental full disclosure law by directing decisionmakers to decide whether the impacts have fully or partially been addressed or mitigated.").

140. § 43.21C.240(1).

Where development and other environmental regulations have contemplated the project, and the impacts were dealt with on the planning leave, the agency may not impose additional measures to mitigate those impacts.¹⁴¹ In addition, the agency is not permitted to revisit prior planning decisions to determine their validity.¹⁴² Accordingly, the regulatory reform amendments purport to increase administrative efficiency and decrease paperwork in administrative processes.

These amendments to SEPA were not, however, intended to afford an additional level of deference to agency decision making, or delegate overwhelming authority to agencies; the amendments were not intended to replace the threshold determination with a rubber stamp.¹⁴³ By combining review of environmental impacts with regulations designed to regulate the relevant impacts, the amendments purport only to increase the accuracy of environmental review while freeing agency attention to conduct a more searching inquiry. A plain reading of the amendments should tighten the informational controls of SEPA. Subsection two of Washington Revised Code section 43.21C.240, referenced above, provides as follows:

(2) A county, city, or town may make the determination provided for in subsection (1) of this section if:

(a) In the course of project review, including any required environmental analysis, the local government considers the specific probable adverse environmental impacts of the proposed action and determines that these specific impacts are adequately addressed by the development regulations or other applicable requirements of the comprehensive plan, subarea plan element of the comprehensive plan, or other local, state, or federal rules or laws; and

(b) The local government bases or conditions its approval on compliance with these requirements or mitigation measures.¹⁴⁴

According to the Integration Act amendments, the agency must consider specific, probable environmental impacts from the subject project proposal to determine whether the city's regulatory structure adequately addresses and mitigates the probable environmental impacts.¹⁴⁵ Only if the agency makes a site-specific determination that applicable environmental regulations will in fact mitigate the relevant impacts may the agency forego further review and rely on the applicant's compliance with those regulations.¹⁴⁶ In addition,

141. § 43.21C.240(3).

142. WASH. ADMIN. CODE § 197-11-158(5)-(6) (2001).

143. See SEPA HANDBOOK, *supra* note 25, at 88-90.

144. § 43.21C.240(2).

145. § 43.21C.240(4)-(5).

146. § 43.21C.240(2).

statutory language provides that SEPA requirements supplement, rather than supplant, the lead agency's duties during development review.¹⁴⁷ Accordingly, there is a presumption that even upon the satisfaction of all relevant development regulations, SEPA will impose additional duties.¹⁴⁸ As quoted above, the language behind the regulatory reform amendments supports that presumption. In the absence of an agency's site-specific review of regulatory applicability, the record will fail to "demonstrate that environmental factors were considered in a manner sufficient to amount to a prima facie compliance with the [express directives] of SEPA."¹⁴⁹

In this context, demanding agency compliance with the conditional statement in the regulatory reform amendments to SEPA is a puzzling task. A concerned public that questions the adequacy of environmental review, where other laws and regulations apply, may receive the cursory explanation that the applicant's probable future compliance with other relevant laws should suffice.¹⁵⁰ Yet, such an answer clearly does not satisfy the statutory requirements; for instance, where a local agency is faced with a project likely to affect local traffic, particularly where that proposal will incite a significant amount of new traffic through a specific troubled corridor. The question, for purposes of the regulatory reform amendments, is whether a determination of a project's satisfaction of traffic concurrency regulations also satisfies the lead agency's duties to study environmental impacts under SEPA.

An initial reading of the concurrency requirement suggests that a concurrency determination would not, and could not, constitute compliance with the agency's duty to study environmental impacts. The Growth

147. WASH. REV. CODE § 43.21C.060 (2000).

148. See *Donwood, Inc. v. Spokane County*, 90 Wash. App. 389, 391-92, 957 P.2d 775, 776-77 (1998).

149. *Gardner v. Pierce County Bd. of Comm'rs*, 27 Wash. App. 241, 245, 617 P.2d 743, 746 (1980) (emphasis added).

150. For instance, see the denial of the SEPA appeal in the Clark County Hearing Examiner's Royal Greens Phase II, SUB 99-039, 16-17 (Feb. 22, 2000) (Final Order).

Appellants also maintain that certain references in the Staff Report to *future* compliance issues necessarily mean that the County has failed to perform the necessary impact evaluation. The Staff Report does indeed declare that "[t]his project has not been reviewed for compliance with portions of [the previously cited sections] and Sections 12.05.020, .030, .040, .050, .075, .080, .090, .100, .330 and .365, but will be reviewed at subsequent phases of the project.' Although the Hearing Examiner concurs with Appellants that the Staff Report could be more explicit, the portions of the Transportation Standards which, according to the Staff Report have 'not been reviewed' either have no bearing on the subdivision approval process itself (such as those provisions that specify technical construction specifications or actual post-construction matters) or relate to aspects of development which receive no review during *preliminary* development review.

Id. (citations omitted).

Management Act (“GMA”),¹⁵¹ from which the concurrency mandate arises, does not include actual automotive impacts to the environment in the scope of a concurrency determination.¹⁵² By definition, concurrency analysis concerns a different scope of study than an environmental impact study of impacts from increased traffic on the natural and built environment, including roadway improvements.¹⁵³ Therefore, a determination on a concurrency application would likely avoid discussion of any environmental impacts unless the official assigned to the application was extremely ambitious; indeed, including such impacts in a concurrency determination might even be *ultra vires*.¹⁵⁴

One problem, from a SEPA compliance perspective, could be that the legislative adoption of concurrency standards are seldom accompanied by a thorough search into the secondary and cumulative impacts from changing or setting traffic patterns. Rather, such studies are considered speculative and conveniently left to the responsibility of project applicants, who invariably declare a disproportionality between the impacts and study. The danger of such procedures is the same danger of ignorant action, except that in this case it is expressly authorized by regulatory reform.

The *Moss* decision, discussed above, presents the sole reported challenge to an agency’s use of these regulatory reform provisions. The court introduced the issue with a lengthy discussion on the purpose and intent of the Integration Act amendments.¹⁵⁵ However, despite the accurate statutory characterization of regulatory reform by the court,¹⁵⁶ the *Moss* court essentially rewrote

151. See generally WASH. REV. CODE § 36.70A.010-901 (2000).

152. The SEPA HANDBOOK specifically addresses this problem, and offers as an example the permitting of a grocery store within an urban growth area. SEPA HANDBOOK, *supra* note 25, at 90. The *Handbook* states that “the jurisdiction may still need to rely on SEPA substantive authority to address transportation site-specific impacts such as safety, on-site traffic circulation, and direct access to the site if the transportation element and development regulations only dealt with impacts to the transportation system.” *Id.*

153. See generally WASH. REV. CODE § 43.21C.110(1)(f).

154. Concurrency is typically implemented through the adoption of acceptable “levels of service” standards (LOS) for a particular transportation facility. *Montlake Cmty. Club v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 110 Wash. 2d 731, 735, 43 P.3d 57, 59 (2002) (“A level of service standard is a measure of the degree of intersection saturation expressed as the ratio of the peak traffic volume at the intersection to the capacity of the intersection to handle traffic.”). In essence, the adopted LOS signifies that the chosen level of congestion in that corridor is acceptable for transportation purposes. However, the agency is required to comply with SEPA prior to adopting concurrency standards: the probable environmental consequences of the chosen concurrency standards have, at least in theory, been studied and a determination been made as to the significance of that impact.

155. See *Moss v. City of Bellingham*, 109 Wash. App. 6, 15-18, 31 P.3d 703, 708-10 (2001).

156. *Id.* at 17, 31 P.3d at 709 (“Where some (but not all) of a project’s significant adverse environmental impacts have been addressed by existing plans, regulations and laws,

regulatory reform in its application to SEPA. Instead of determining whether the relevant projected impacts were addressed in the comprehensive plan, development regulations, and environmental determinations made pursuant to those documents, the court sought conclusive evidence only of whether the *type* of land use proposed was contemplated in the comprehensive plan and development regulations.¹⁵⁷ The court set a low standard, contrary to the express requirements of the regulatory reform provisions, by changing the relevant SEPA inquiry from an impact-based review of environmental impacts to a police-power-based review of permissible land uses. Finding that the subdivision and development in general were contemplated in the comprehensive plan and development regulations, the *Moss* court found conclusive the lack of challenge to the project's consistency with those documents.¹⁵⁸ In stark contrast, the plaintiffs argued that the regulatory devices cited by the city would not in fact mitigate the project's impacts below the threshold level.¹⁵⁹ The court did not apply the Integration Act requirements to the impacts from the proposed project, or question whether the impacts caused by the project were actually covered in the applicable regulations or environmental studies prepared pursuant to those regulations.¹⁶⁰ In short, the court found that the agency satisfied its SEPA duties because other regulations were applicable to the project.¹⁶¹

The *Moss* court's application of the Integration Act amendments does not bode well for the threshold determination. Contrary to the statutory terms and purpose of those amendments, the court construed impact study out of the Act. Regardless of whether this interpretation of regulatory reform will withstand the test of time, the court's statement is clear: the court currently finds the actual consideration of environmental impacts to be an unwieldy burden and has found means to alleviate this burden from the agency's duties.

C. The "Mitigated" Negative Threshold Determination

The MDNS is a regulatory creation intended to increase the accuracy and effectiveness of agency environmental review, while all but eliminating the costs of completing a comprehensive environmental study.¹⁶² In *Hayden v. City*

WAC 197-11-158 mandates additional review.”).

157. *Id.* at 18-20, 31 P.3d at 710-11.

158. *Id.* at 21, 31 P.3d at 711.

159. *Id.* at 21-22, 31 P.3d at 711-12.

160. *See Moss*, 109 Wash. App. at 10-30, 31 P.3d at 706-16.

161. *Id.* at 30, 31 P.3d at 716.

162. *Anderson v. Pierce County*, 86 Wash. App. 290, 304, 936 P.2d 432, 440 (1997). “The mitigated DNS process is not intended to reduce the amount of environmental review done on a project, but to reduce the amount of paperwork needed to document the process.”

of *Port Townsend*,¹⁶³ the court provided a thorough review of MDNS authority and found the process an “eminently sensible” improvement on threshold environmental review.¹⁶⁴ On the more pessimistic side of the MDNS is the problem that, in fact, the MDNS process does appear eminently sensible to courts, effectively reducing not only the amount of paperwork needed to document the process, but also the amount of judicial review of the process. The MDNS process constitutes a significant shift in regulatory authority, focusing on the close negotiations between the lead agency and (typically) the applicant under development review.

Surprisingly, the first attempt to justify a negative threshold determination based on the imposition of approval conditions was met with misunderstanding and distrust. In *Norway Hill Preservation & Protection Ass’n v. King County Council*,¹⁶⁵ the court reviewed and reversed the issuance of a DNS where the agency alleged that the imposition of conditions would mitigate adverse environmental impacts from the proposal.¹⁶⁶ The court disavowed the county’s negotiated procedure based on the simplicity of SEPA and the fact that, prior to the negotiation between King County and the applicant, King County had publicized its intention to order an EIS.¹⁶⁷ The court recited the basic tenets of SEPA, stating that “the clear mandate of SEPA, and the purpose behind the environmental impact statement requirement, is consideration of environmental values based on full information *before* a decision is made.”¹⁶⁸ In contrast, a negative threshold determination, where impacts are significant and imminent, would serve only as a means to avoid preparing further environmental studies. The court held that compliance with SEPA requires “that full information is available before government action is taken, with or without the imposition of conditions.”¹⁶⁹

The court’s distrust of the negotiated determination is initially confusing. A negotiated process, combined with an incentive for developers to formulate their own mitigation plans, will increase the efficiency of SEPA by protecting the quality of the environment while alleviating the cost of preparing an EIS. However, a negotiated threshold determination could still produce results

Anderson, at 308, 936 P.2d at 440 (citing Richard L. Settle, *DOE Interpretations of Determination of Non-Significant Provisions*, in 1988 SEPA HANDBOOK, G-1 to G-6, app. at 466 (1988)).

163. 93 Wash. 2d 870, 613 P.2d 1164 (1980), *overruled by* *Save a Neighborhood Env’t v. City of Seattle*, 101 Wash. 2d 280, 676 P.2d 1006 (1984).

164. *Id.* at 880-81, 613 P.2d at 1170.

165. 87 Wash. 2d 267, 552 P.2d 674 (1976).

166. *See id.* at 278, 552 P.2d at 680-81.

167. *Id.*

168. *Id.* at 279, 552 P.2d at 681.

169. *Id.*

anomalous to SEPA. The responsible agency official might forego mitigation of one impact in exchange for some other beneficial action: for instance, the agency might consider adequate an open space dedication, where the impacts in need of mitigation concern loss of wooded critical habitat or densely vegetated wetlands. However, the agency might also consider the exchange of less related impacts, such as construction and dedication of a road right of way in exchange for timber sale and harvest approvals, where the road is needed for access. Does such an exchange make sense? Depending on the circumstances, local public needs and the scant level of actual oversight given to mitigation negotiations, agencies, and ambitious development applicants could effectively re-institutionalize pre-SEPA ignorance in development considerations.

From this perspective, the *Norway Hill Preservation & Protection Ass'n* court got it right. Although, the *Norway Hill Preservation & Protection Ass'n* conditions were negotiated and objectively reviewed, signifying a deliberative process and respect for SEPA's goals, the decision is overshadowed by an absence of study regarding whether the negotiated conditions would in fact mitigate the identified adverse environmental impacts. Without aid of a thorough evaluation of projected impacts procured by the preparation of an EIS, the court was in no better position to review the negative threshold determination than had no record been produced. The *Norway Hill Preservation & Protection Ass'n* court was right precisely because it recognized that negotiations do not replace the agency's burden of demonstrating the prima facie case: the agency is required, even after negotiated threshold determinations, to issue a threshold determination and, if significant impacts are still likely, issue a DS and an EIS.¹⁷⁰

Since the *Norway Hill Preservation & Protection Ass'n* decision, courts have provided more deference to negotiated SEPA determinations, recognizing the trend away from the adversarial history of environmental law.¹⁷¹ Indeed, the greatest accomplishment of the MDNS process is the efficiency with which agencies can review applications by providing an incentive to project proponents to identify mitigation measures on their own accord.¹⁷² After *Norway Hill Preservation & Protection Ass'n*, both the judiciary and regulatory inquiries into the MDNS process took a favorable turn and became

170. See WASH. ADMIN. CODE §§ 197-11-330 to -350 (2001).

171. See Dan Tarlock, *The Future of Environmental 'Rule of Law' Litigation*, 17 PACE ENVTL. L. REV. 237, 242-43 (2000).

172. "The legislature created the MDNS process to encourage developers and the government to cooperate in reducing the environmental impact of a project below the threshold level of significance." *Concerned Citizens for Buckley Planning v. City of Buckley*, No. 25587-1-II, 2001 WL 112322, at *7 (Wash. App., Feb. 9, 2001) (citing *Anderson v. Pierce County*, 86 Wash. App. 290, 303, 936 P.2d 432, 440 (1997)).

an “eminently sensible” manner of dealing with environmental impacts.¹⁷³ Rather than arguing incessantly over the relative environmental significance of a particular action, the applicant and agency can face each other and cooperatively determine the feasibility of the proposed project. The agency has authority to condition approvals, and the applicant has the incentive to mitigate environmental damage. The process, as designed, concurrently promotes development and environmental values.

However, just as the *Norway Hill Preservation & Protection Ass’n* court feared, the MDNS process often suffers from the vague question of sufficiency of the agency record.¹⁷⁴ Recall that, at least in theory, the public should be entitled to expect that a mitigated DNS also serves as a determination that the proposal will not cause significant environmental impacts. The purpose of environmental review, after all, is “to obviate the need for such speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action.”¹⁷⁵ Unfortunately, courts have not alleviated the confusion, often resorting to counting mitigating conditions¹⁷⁶ rather than inquiring as to whether the conditions are comprehensive or, at least, are fashioned to mitigate the relevant impacts.¹⁷⁷ Once again, this result reflects poorly on implementation of the simple SEPA scheme.

For instance, in the *STAT* decision, discussed above, the appellate court

173. *Hayden v. City of Port Townsend*, 93 Wash. 2d 870, 880, 613 P.2d 1164, 1170 (1980), *overruled by* *Save a Neighborhood Env’t v. City of Seattle*, 101 Wash. 2d 280, 676 P.2d 1006 (1984).

174. This is despite the rule that even the MDNS must be based on sufficient information to evaluate the potential impacts from a proposal. *Anderson v. Pierce County*, 86 Wash. App. 290, 302, 936 P.2d 432, 439 (1987); *see also* *LaFlamme v. Fed. Energy Regulatory Comm’n*, 852 F.2d 389, 402-03 (9th Cir. 1988) (stating the adoption of mitigation measures, without any analysis of how these measures would diminish the project’s impacts, fails to demonstrate compliance).

175. *Found. for N. Am. Wild Sheep v. United States Dep’t of Agric.*, 681 F.2d 1172, 1179 (9th Cir. 1982).

176. *See, e.g.*, *Concerned Citizens for Buckley Planning v. City of Buckley*, No. 25587-1-II, 2001 WL 112322, at *8 (Wash. App., Feb. 9, 2001) (discussing the facial adequacy of 30 mitigating conditions). The *Concerned Citizens for Buckley Planning* court went even further, finding that “the 30 mitigation measures in the MDNS may provide more effective environmental protection than promulgation of an EIS, since an EIS does not automatically result in substantive mitigation.” *Id.* In this misstatement, the court failed to realize that the goal sought in the threshold determination is information or the need for further study, rather than mitigating conditions.

177. The Department of Ecology states that “[m]itigation is the avoidance, minimization, rectification, compensation, reduction or elimination of adverse impacts to built and natural elements of the environment.” SEPA HANDBOOK, *supra* note 25, at 22. Mitigation that provides a benefit unrelated to the specific impact will not meet this standard. *See also* WASH. ADMIN. CODE § 197-11-330(5) (2001); SEPA HANDBOOK, *supra* note 25, at 23 (stating benefits cannot balance adverse impacts in a threshold determination).

upheld a quasi-judicial determination that, although an essential element of the threshold determination was completely ignored during the environmental review of the project,¹⁷⁸ a hearing examiner serving in an appellate role could study the impacts that were disclosed in the record and make the determination himself.¹⁷⁹ No further review and no disclosure or information gathering on the ignored impact was required.¹⁸⁰ Further, no comment on the hearing examiner's determination was allowed. The *STAT* decision, therefore, fails to implement the policies of the MDNS: the project applicant was not encouraged to initiate mitigation measures or even disclose the cumulative impacts from the proposal; the hearing examiner's ad hoc decision did not require the lead agency to consider or comment on the cumulative effects of the project.¹⁸¹ In addition, the threshold determination did not benefit from public input and comment on the hearing examiner's findings.¹⁸²

In truth, it must have been anticipated that the formal codification of regulatory reform efforts and the MDNS process would equip agencies with the means to abuse the SEPA process simply to alleviate workloads. In the case of the MDNS, agencies might be inclined to rely on an applicant's promise to complete mitigation measures, despite a contrary history.¹⁸³ Agencies might also be inclined to forego actual review in favor of imposing garden variety mitigation requirements: operation of heavy construction machinery only during business hours to mitigate noise pollution to residences; spraying disturbed soils to decrease dust emissions from the construction site; preparation of a stormwater control plan; using best management practices to control erosion during construction; retaining some predetermined percentage of vegetation, planting or transplanting vegetation to the site on any area not planned for impermeable surfaces; and so on. Such "mitigation" measures are considered *standard* for a good reason: they can be applied to virtually any project with some predictable mitigating effect. However, imposing mitigation blindly to avoid an EIS does not incorporate the common sense understanding of environmental impacts: each project, and each parcel, will have an individually significant environment and an individually significant impact. In short, it should be considered luck, and not mitigation, if such measures are

178. *STAT v. Clark County*, No. 26061-1-II, 2001 WL 898758, at *2 (Wash. App., Aug. 10, 2001).

179. *Id.*

180. *Id.*

181. *See id.*

182. *Id.*

183. *See SEPA HANDBOOK*, *supra* note 25, at 22 (stating evidence that a proponent is not likely to complete mitigation should be relevant to this determination).

successful in reducing the impacts from any particular project below the threshold level of significance.

Equipped with both the MDNS and Integration Act amendments, agencies seem to be exempt from performing any actual review of environmental impacts: when faced with a new application, the lead agency would need only to determine which environmental laws will apply to the application and condition the approval on compliance with the relevant regulations. In this circumstance, the mitigated negative threshold determination is an outright failure: determining whether a particular project demands these, other, or more mitigation measures should require a more sincere and searching inquiry, at least as broad as that required to support a DNS.

D. *Speculation Under SEPA*

Another indication of the vanishing SEPA threshold is found in the liberal use of the label “speculative” to foreclose SEPA challenges to negative threshold determinations. SEPA rules excuse agencies from studying every remote and speculative effect from a given proposal.¹⁸⁴ Use of the term “speculative,” particularly in contrast to SEPA’s concentration on impacts that are “probable,”¹⁸⁵ indicates a balance of agency efficiency with accuracy and likely operates to relieve agencies of unwieldy cumulative impacts analysis. Unfortunately, even as science improves and land use regulations become more specific, the “speculation” excuse runs more rampant. SEPA is becoming rhetorical and meaningless.

In *Boehm v. City of Vancouver*,¹⁸⁶ the city approved a gasoline facility as one of the final phases of a planned unit development and phased development.¹⁸⁷ The challengers in *Boehm* rested their argument on the complete absence of cumulative impacts review, focusing their efforts on

184. *City of Des Moines v. Puget Sound Reg'l Council*, 98 Wash. App. 836, 853-54, 988 P.2d 27, 37 (1999) (holding EIS regarding proposal to build third runway at Sea-Tac did not need to go beyond year 2010 because a detailed analysis of the years beyond 2010 would be extremely speculative), *cert. denied*, 140 Wash. 2d 1027 (2000); *San Juan County v. Dep't of Natural Res.*, 28 Wash. App. 796, 802, 626 P.2d 995, 997-98 (1981), *cert. denied*, 95 Wash. 2d 1029 (1981) (finding DNS regarding proposed boat destination site was not clearly erroneous because of possibility of future additional campsites); *Mentor v. Kitsap County*, 22 Wash. App. 285, 290, 588 P.2d 1226, 1229 (1978) (stating an EIS for a proposed beach-front hotel did not need to address the prospects of hotel users trespassing upon resident properties because this effect was remote and speculative).

185. “Probable” specifically excludes “speculative” impacts. WASH. ADMIN. CODE § 197-11-782 (2001).

186. 111 Wash. App. 711, 47 P.3d 137 (2002).

187. *Id.* at 714, 47 P.3d at 139.

obtaining such review from the city.¹⁸⁸ As the basis for their challenge, plaintiffs claimed that SEPA review had been improperly piecemealed.¹⁸⁹ In *Cathcart-Maltby-Clearview Community Council v. Snohomish County*,¹⁹⁰ the court noted that a thorough, comprehensive study of environmental impacts could result in speculation as to the probable cumulative impacts.¹⁹¹ However, the court promised that later development phases would be required to study the hard, certain facts on environmental impacts: “[a]s the data becomes available or, at the latest, when sector plan approval is sought, the secondary and cumulative impacts on the entire affected area . . . must be quantitatively assessed and the costs of mitigating them identified.”¹⁹²

In a decision which will likely prove to be the most substantial divergence from the rules of SEPA and precedent in this area of law, the *Boehm* court dismissed the SEPA challenge on grounds that fundamentally change the SEPA process.¹⁹³ First, the *Boehm* court ruled, without citation or reasoning, that the very notion of cumulative impacts could not involve impacts that accumulate with past actions.¹⁹⁴ The court stated that, “as a general proposition, the nature of cumulative impacts is prospective and not retrospective.”¹⁹⁵ The court’s holding is wrong, besides being contrary to common sense. Rather, cumulative impacts, which “can result from individually minor but collectively significant actions taking place over a period of time,”¹⁹⁶ require the study of “the incremental impact of the actions when added to other past, present and reasonably foreseeable future actions.”¹⁹⁷

Second, the *Boehm* court ruled that, as a matter of law, the cumulative impacts at issue were speculative.¹⁹⁸ The court held that “SEPA review need not address cumulative impacts when speculative, and that when the Boehms can point to no specific impact, those impacts are speculative.”¹⁹⁹ Oddly, the court did not discuss the legal implications of the agency’s refusal to evaluate the cumulative impacts from the final phase, combined with the unchecked but

188. *Id.* at 714-15, 47 P.3d at 139-40.

189. *Id.* at 722, 47 P.3d at 143.

190. 96 Wash. 2d 201, 634 P.2d 853 (1981).

191. *Id.* at 210, 634 P.2d at 859.

192. *Id.* at 211, 634 at 859.

193. *See Boehm*, 111 Wash. App. at 714, 47 P.3d at 139.

194. *See id.* at 714, 47 P.3d at 139.

195. *Id.* at 720, 47 P.3d at 142.

196. *Save the Yaak Comm. v. Block*, 840 F.2d 714, 721 (9th Cir. 1988) (citing 40 C.F.R. 1508.7 (1987)).

197. *Id.* (citing 40 C.F.R. 1508.7 (1987)).

198. *Boehm*, 111 Wash. App. at 714, 47 P.3d at 139.

199. *Id.*

ongoing impacts from the remainder of the completed phases of the project.²⁰⁰ Instead, the court simply held that an agency need not consider cumulative impacts unless those impacts were first proved to be significant by the public;²⁰¹ hence, the court removed cumulative impacts from the *prima facie* case of SEPA compliance by making cumulative impacts *per se* speculative.²⁰² More importantly, however, is the effect of SEPA's "speculation" excuse: under the *Boehm* decision, for whatever undisclosed reason the agency feels is appropriate, an agency can opt against gathering cumulative impacts information to ensure that the reviewing body will not speculate as to the significance of those impacts.

Likewise, in an unpublished appellate court decision, *Erikson v. City of Camas*,²⁰³ Division II of the Appellate Court demonstrated by example the problems raised in analysis of "speculative" environmental impacts under SEPA.²⁰⁴ In *Erikson*, the City of Camas proposed and approved the acquisition and construction of a "regionally significant" boat launch on Lacamas Lake,

200. *See id.* at 720, 47 P.3d at 142.

201. *See id.* at 714, 47 P.3d at 139.

202. The third problematic aspect of the *Boehm* decision was its use of the "phasing rule" of SEPA review to excuse the agency from performing cumulative impacts analysis. In addition to the court's newly-formed exemption from analysis of past actions, the court also exempted the agency from prospective analysis. The court stated that "cumulative impacts analysis need only occur when there is some evidence that the project under review will facilitate future action that will result in additional impacts . . . [and] must fail unless the Boehms can demonstrate that the project is dependent on subsequent proposed development." *Boehm*, at 1. This holding, which clearly misunderstands the phasing rule, also eviscerates the cumulative impacts mandate.

The *Boehm* court's confusion was recently examined in the federal context by the Western District of Washington. In *North Cascades Conservation Council v. United States Forest Service*, 98 F. Supp.2d 1193 (W.D.Wash. 1999), the Forest Service attempted to issue a Finding Of No Significant Impact (FONSI) for a project that would be physically and functionally related to other federal actions. The Forest Service attempted to place the burden of proving cumulative impacts on the concerned public, attempting to circumvent its *prima facie* duties under NEPA, and argued that (as in the *Boehm* case) the project proposal was not dependent on future actions.

The court held that "[t]he Forest Service confuses the important distinction between 'cumulative impacts and actions' and 'connected actions.'" *Id.* at 1198. The court found that the Forest Service's confusion resulted in the failure to recognize that "though the projects are not 'connected actions,' they are physically related They are cumulative actions . . . and subject to an examination of cumulative impacts." *Id.* at 1199; see Keith H. Hirokawa, *The Gap Between Informational Goals and the Duty to Gather Information: Challenging Piecemealed Review Under the Washington State Environmental Policy Act*, 25 SEATTLE U. L. REV. 343, 358-62 (2002) (discussing the confusion between the "connectness" of projects and the interconnection of impacts in cumulative impacts analysis).

203. *Erikson v. City of Camas*, No. 25668-1-II, 2001 WL 567687 (Wash. App. Div. 2, May 25, 2001).

204. *Id.* at *2.

for the purpose of drawing recreational users to the lake.²⁰⁵ Plaintiffs challenged the approval under SEPA, based on the city's reluctance to study the adverse impacts of personal watercraft ("PWC"), particularly jetskis, and the polluting effects therefrom.²⁰⁶ The city refused to engage in such a study because it could not, with certainty, predict the actual number of new PWCs on the lake caused by construction of the boat access.²⁰⁷

The court affirmed the city's negative threshold determination. In typical form, the *Erikson* court opened its analysis by reciting the prima facie case burden.²⁰⁸ The court noted that an environmental checklist had been prepared, after which a threshold determination was documented and circulated to other agencies with jurisdiction over environmental matters.²⁰⁹ At least one other agency commented on the impacts from PWC use and focused on the continued need for a no-wake zone to mitigate impacts to shallow waters.²¹⁰ No mention was made by the agency or court of the polluting effects of PWC emissions into surface water, a common sensical and environmental impact.²¹¹

Like the *Boehm* court, the *Erikson* court rested on the "speculation" of polluting effects, agreeing with the city that a certain quantity of PWC use would be required to model an accurate impact analysis on the lake.²¹² Without having that information on hand, the court would not require the city to speculate. The court found that whether such a speculative increase will have a significant adverse effect on the environment involves additional conjecture without quantifying future PWC use.²¹³ The court concluded that the net polluting effect of PWCs was contingent, perhaps unquantifiable.²¹⁴ However, the court did not conclude that such quantification would be impossible for the *plaintiff*. Because the plaintiff was unable to produce hard data and quantify the likely increase in PWC use, the court excused the agency from further

205. *Id.* at *1.

206. *Id.*

207. *Id.* at *2.

208. The court's recitation appears to separate the prima facie case requirements from the concept of actual consideration of environmental factors. Based on the proximity of these phrases in the opinion, the question of whether the court actually considered the two as distinct is uncertain. *See Erikson*, at *3.

209. *Id.* at *1.

210. *Id.*

211. *See id.*; *see also* 65 Fed. Reg. 15,077 (Mar. 21, 2000) (National Park Service establishes a general prohibition on jetskis and other PWCs from park units, with some exceptions, due to the significant air, water and noise pollution.).

212. *Erikson*, at *5.

213. *Id.*

214. *Id.* at *2-*6.

environmental investigation.²¹⁵ Oddly, the environmental impacts were deemed “speculative” because the city refused to study them; without any information on the record, an assessment of the impacts from PWCs would require some conjecture.

The *Boehm* and *Erikson* decisions prematurely shifted the burden of the prima facie SEPA case to the plaintiff.²¹⁶ In both, the lead agencies deflected their duties by convincing the court that the threshold burden was the plaintiffs’. In addition, neither of these decisions makes a convincing argument about the application of the speculation limitation of environmental review. Indeed, in one of the few hypothetical applications in the rules, presumably presented as such for a clear explanation of a difficult topic, the rules demonstrate an anticipation of the *Erikson* scenario.²¹⁷ Under the rules, a proposal that will “encourage or tend to cause” a particular impact qualifies that impact as a factor of the environment.²¹⁸ An impact is not “speculative” if, “[f]or example, adoption of a zoning ordinance will encourage or tend to cause particular types of projects or extension of sewer lines would tend to encourage development in previously unsewered areas.”²¹⁹ Such an impact is an appropriate subject for an EIS.²²⁰

Like the other misuses of SEPA presented herein, improper use of the speculative defense to comprehensive environmental study erodes the integrity of the SEPA determination. Either the *Boehm* or *Erikson* agency interpretations render meaningless the duty to gather information. Nonetheless, the determinations of these cases were affirmed upon findings that the plaintiffs had failed to satisfy their burden of proving the significance of the probable environmental impacts.

215. *Id.* at *6.

216. The *Erikson* court did recite portions of the agency’s analysis as evidence of prima facie compliance, even though the citations did not evidence any actual consideration of the omitted impacts. For instance, the court found that “[t]he Council considered that prohibiting PWC use of the new boat launch would have little effect on their use on the Lake, because other boat launches and private docks already existed,” a finding of questionable validity in the SEPA process. *Id.* at *3 (emphasis added). In effect, study of environmental impacts from PWC use was erroneously replaced by an inquiry into the potential benefits of banning PWC use from the proposed boat launch, an inquiry having no place in the threshold determination. SEPA rules do not allow a benefit/impact analysis to influence the threshold determination. See WASH. ADMIN. CODE § 197-11-330(5) (2001). However, because the court accepted the city’s query, the court did not review the agency’s record to determine whether the prima facie case had been met. *Erikson*, at *3.

217. WASH. ADMIN. CODE § 197-11-330(1)-(2) (2001).

218. WASH. ADMIN. CODE § 197-11-060(4)(d) (2001).

219. *Id.*

220. *See id.*

E. “Common Sense” SEPA

Although the results have been more loyal to the goals of SEPA, the Growth Management Hearings Board has indicated that it may be interested in the following trends developing in the courts. In *Achen v. City of Battle Ground*, the Western Washington Growth Management Hearings Board reviewed, among other things, the effect of a total absence of environmental study in preparing a comprehensive plan amendment.²²¹ The situation is not unusual: Washington appellate courts seem to have reviewed such SEPA violations since the inception of the Act.²²² However, the *Achen* challenge was not primarily environmental: the challenge in *Achen* was brought by a developer seeking to avoid significant impact fees.²²³ The relevant comprehensive plan amendment challenged, in this case a fire capital facilities plan, did not contain any concrete plans for construction, land acquisition or disposal, or, for the most part, any action that could have a noticeable effect on the environment.²²⁴ The City of Battle Ground simply forgot to issue a threshold determination and was forced to answer to the charge before the Board.²²⁵

Under SEPA, municipalities *must* use the threshold determination process to make the determination of no significant impact.²²⁶ An ad hoc determination of no significance fails to meet the threshold requirement. Oddly, the Board had trouble sorting out the rule from the purpose for the rule. The Board split, in a two-to-one vote, over the efficacy of imposing SEPA duties on the city based on what the “non-lawyer presiding officer” termed a “common sense” reading of SEPA.²²⁷ The Board found that “even though we might agree with the City that requiring SEPA review makes little sense for this particular fire protection amendment . . . we find no exemption in SEPA from the requirement to make a threshold determination for such ordinances.”²²⁸

The Board did not explain or define its “common sense” reading of SEPA.²²⁹ One can assume that the Board was influenced by an alleged absence

221. *Achen v. City of Battle Ground*, No. 99-2-0040 (W. Wash. Growth Mgmt. Hearings Bd., May 16, 2000) (final decision), available at http://www.gmaboard.wa.gov/western/western_decisions/ww1999/99-40_Fdo.htm.

222. *See id.*

223. *Id.*

224. *See id.*

225. *Id.*

226. WASH. REV. CODE § 43.21C.031 (2000) (excluding what has been defined as a planned action).

227. *Achen v. City of Battle Ground*, No. 99-20040 (May 16, 2000).

228. *Id.*

229. *Id.*

of actual, physical impacts resulting from a comprehensive plan amendment and felt that an environmental study would waste agency time and effort. That is, the Board considered exempting the city from the threshold determination requirement based on the absence of a “major action” that would cause “significant” impacts. After all, SEPA is intended neither to bog down agencies in useless procedures nor create a paper-producing mandate inconsistent with the Regulatory Reform Act amendments. However, because the purpose of the threshold determination is to avoid ad hoc decision-making and to involve the public, eliminating the duty to make a threshold determination would thwart the achievement of the goals and promises embodied in SEPA. In this sense the *Achen* case was a narrow miss: the enforcement of SEPA in such circumstances represents a respect for SEPA rules and a defeat of a potential reversion to pre-threshold, ad hoc decision making.

Unfortunately, the reasoning of the *Achen* minority is not uncommon on a local level, perhaps signifying a lack of tolerance for environmental challenges during a decline in the need for “rule of law” litigation.²³⁰ Perhaps the *Achen* minority should be read to suggest merely that the “garden variety” proposals need not demand the agency’s attention and resources.²³¹ Have agencies grown tired with applying SEPA to a particular proposal because the agency has likely reviewed similar applications several times over? Perhaps a case might be made for the proposition that an agency, having reviewed similar applications in the past, is suitably equipped with the expertise to make a threshold determination based on experience alone, without regard for the facts of the particular project at hand. Hence, the Board might be interpreted to suggest that the clearly erroneous standard applies in a different, more lenient manner. Contrary to the above discussion, the Board might have been suggesting that the agency’s prima facie duties were not violated because the result was allegedly consistent with the goals of SEPA: the failure to consider certain impacts, which are subsequently determined insignificant, ought not violate the policy of SEPA.

On the other hand, any defense of that proposition would not be persuasive under SEPA since, at the very least, an agency should always be cognizant that the same project might have an insignificant impact in one location, but a very

230. See generally Tarlock, *supra* note 171, at 237-38.

231. For an example of dismissal of a SEPA appeal on grounds that garden variety impacts are not significant impacts, see the City of Vancouver Hearing Examiner’s Grand Firs Subdivision Case No. AU991131, at 8 (Jan. 12, 2000) (final order) (refusing to reopen a negative threshold determination based on the finding that “[t]he Examiner agrees that the SEPA information provided does not appear to be exceedingly rigorous; however, the project also appears to be a relatively routine subdivision on a site that does not provide exceptional difficulties, except for concurrency and drainage treatment and those have been discussed in some detail”).

significant impact in another.²³² In addition, (to borrow an argument from agency attorneys)²³³ SEPA is not substantive: the procedure of SEPA (actual consideration of environmental factors) is the only enforceable requirement of the Act. Therefore, even the substantive conclusion of the court as to the significance of impacts cannot save the agency from performing as required under SEPA. Unfortunately, despite the implicit contradiction, agencies often review proposals as “garden variety” applications with “garden variety” environmental impacts, indicating the loss of public access to information and awareness.

F. *Is Prima Facie Compliance Still Reviewable?*

What the previous analysis withholds is that the hands of SEPA challengers are full, prior even to challenging the agency’s failure to demonstrate prima facie compliance with SEPA. Plaintiffs must face the statutory and constitutional obstructions to judicial review, including standing, mootness, the problem of new or previously ignored information, and, of course, attorney’s fees. In truth, the additional obstacle of preparing or insuring a complete administrative record may be too much to bear. If it has not already, the prima facie case of SEPA compliance may soon cease to be a reviewable element of the threshold determination.

For instance, under the fundamental requirement of standing, plaintiffs must make the dual showing that their interests fall within the zone of interests protected or regulated by SEPA, and that they will suffer injury in fact.²³⁴ Because economic interests alone are insufficient to satisfy the injury element, plaintiffs must be prepared to demonstrate some actual injury to the environment.²³⁵ Second, where impacts not disclosed in a cursory threshold

232. SEPA regulations support this proposition, and require that the responsible official “shall” consider:

- (a) The same proposal may have a significant adverse impact in one location but not in another location;
- (b) The absolute quantitative effects of a proposal are also important, and may result in a significant adverse impact regardless of the nature of the existing environment;
- (c) Several marginal impacts when considered together may result in a significant adverse impact.

WASH. ADMIN. CODE § 197-11-330 (2001).

233. See Dep’t of Ecology, *State Environmental Policy Act: Frequently Asked Questions About SEPA*, at <http://www.ecy.wa.gov/programs/sea/sepa/faq.htm> (last visited June 6, 2002).

234. *Suquamish Indian Tribe v. Kitsap County*, 92 Wash. App. 816, 828-829, 965 P.2d 636, 642 (1998).

235. See *Harris v. Pierce County*, 84 Wash. App. 222, 231, 928 P.2d 1111, 1116 (1996).

analysis are often exposed once a project is underway,²³⁶ the difficulty faced by SEPA challengers is identifying the proper forum to raise environmental concerns: the forum for SEPA challenges seems to disappear with the completion of a proposal.²³⁷ In addition, if the relevant impacts become known after initiation or even completion of the proposal, the SEPA challenger will be faced with a claim of mootness.²³⁸

In contrast, a savior in the mootness mist is the Ninth Circuit's first footnote in *Columbia Basin Land Protection Ass'n v. Schesinger*,²³⁹ in which the plaintiffs sought to enjoin construction of a power line running across their farmland. Erection of the power lines and 191 support towers had been completed and placed in operation years before the case reached the Ninth Circuit.²⁴⁰ In the first footnote, the *Columbia Basin Land Protection Ass'n* court squarely rejected the mootness defense, since "ultimately [the agency] could be required to remove the line from this route."²⁴¹ Notably, the court

236. Agencies tend to claim deference to their refusal to widen the scope of study, even when the scope of a project has been widened to include new areas and new impacts. Granted, a supplemental study is not required if the probable impacts from the new or changed project were covered in a prior environmental determination. *SEAPC v. Cammack II Orchards*, 49 Wash. App. 609, 614-15, 744 P.2d 1101, 1104 (1987) (holding a SEIS is not required where a previous SEIS covered a broader range of impacts for a more intensive development project on the same site); *West 514, Inc. v. County of Spokane*, 53 Wash. App. 838, 846, 770 P.2d 1065, 1069 (1989) (finding SEIS is not required where the prior EIS evaluated impacts on the same parcel of property).

237. Although SEPA regulations clearly anticipate supplemental review in such circumstances and obligate the agency to withdraw a negative threshold determination and reconsider the impacts to the environment, the application of this principle is fraught with complexity. See WASH. ADMIN. CODE § 197-11-340(3) (2001). Under SEPA, an appeal of the threshold determination must be combined with appeal of the underlying governmental action—permit approval, rezone approval, etc. WASH. REV. CODE § 43.21C.075 (2000). A subsequent SEPA challenge, even if based on newly discovered information or a serious lack of material disclosure, would be forced to stand alone and risk jurisdictional defenses to the action. Of course, where the agency completely failed to perform any SEPA review, courts have consistently retained jurisdiction to review the claims. See, e.g., *Erikson v. City of Camas*, No. 2566-1-II, 2001 WL 567687, at *3 (Wash. App., May 25, 2001). Nonetheless, a permitted or otherwise approved project may be insulated from environmental concerns for failure to exhaust during the appropriate appeals period.

238. Dismissal on mootness grounds has been held not to conflict with the policies of NEPA where "[t]he activities which plaintiffs seek to enjoin are over, and [the court is] not in a position to prevent what has already occurred." *City of Romulus v. County of Wayne*, 634 F.2d 347, 348 (6th Cir. 1980); see *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1978) (finding a NEPA challenge moot where all work on a mining project was complete and operations had ceased, and even a successful NEPA challenge would not inform any action left to be taken).

239. 643 F.2d 585 (9th Cir. 1981).

240. *Id.* at 590-91.

241. *Id.* at 591 n.1.

hypothesized that any project capable of quick construction could effectively “ignore the requirements of NEPA, build its structures before a case gets to court, and then hide behind the mootness doctrine.”²⁴² How the mootness doctrine operates in the SEPA context remains uncertain.²⁴³

Perhaps most importantly, the financial concerns of SEPA challengers often prevent alleged deficiencies in agency review from ever coming to light. In 1995, with the adoption of regulatory reform amendments, came the “three strikes” rule of attorney’s fees in land use cases.²⁴⁴ As a deterrent from public involvement in SEPA determinations, the regulatory reform attorney fee provision has had the effect of a SLAPP²⁴⁵ suit in clearing appellate dockets from public challenges to cursory environmental review. This provision authorizes an award of attorney’s fees to the fully or substantially prevailing party in appeals of local land use decisions.²⁴⁶ This provision only applies to decisions regarding development permit applications, and not rezone, annexations and the like.²⁴⁷ The court’s identification of the substantially prevailing party adheres to the simple criterion of whether the prevailing party improved its position through the various appeals, excluding jurisdictional matters.²⁴⁸

On its face, this attorney’s fees provision does not appear to prejudice SEPA review, since it applies to public and private suits alike. Moreover, the three strikes rule only applies to attorney’s fees incurred in appeals to the appellate courts, not to fees incurred at the trial court level.²⁴⁹ Accordingly, the three strikes rule would not otherwise contribute to deficient environmental review, were it not for the obvious fact that public opposition is typically ill-funded for a thorough SEPA challenge. Nonetheless, the practical effect of the rule is disheartening: essentially, for those whose minds are open to evidence of “home court” advantage by local agencies and judges, the first effective

242. *Id.*

243. *See Currens v. Sleek*, 138 Wash. 2d 858, 868, 983 P.2d 626, 634 (1999) (suggesting that nondisclosure in SEPA documents, or alternatively, variations in projects from the proposal as studied under SEPA, can be the basis for a later action in negligence).

244. WASH. REV. CODE § 4.84.370(1) (2000).

245. “SLAPP” suits were coined in the environmental context, standing for Strategic Lawsuits Against Public Participation. *Baker v. Parsons*, 750 N.E.2d 953, 955 n.2 (2001).

246. *Tugwell v. Kittitas County*, 90 Wash. App. 1, 951 P.2d 272, 279 (1997).

247. *Id.*

248. *Benchmark Land Co. v. City of Battle Ground*, 94 Wash. App. 537, 551, 972 P.2d 944, 952 (1999), *review granted*, 143 Wash. 2d 1018, P.3d, *aff’d by* 49 P.3d 860 (2001); *see Overhulse Neighborhood Ass’n v. Thurston County*, 94 Wash. App. 593, 601, 972 P.2d 470, 474-75 (1999).

249. *Baker v. Tri-Mountain Res., Inc.*, 94 Wash. App. 849, 854, 973 P.2d 1078, 1081 (1999).

forum for review is in fact the appellate court.²⁵⁰ Therefore, at the first instance of objective review on the merits of a SEPA challenge, the public may already risk liability for the attorney's fees to the defending agency.

Most of the above reported SEPA abominations are initiated in lead agencies, affirmed by administrative appellate boards, and overlooked by courts. Each situation also foretells a difficult road ahead for SEPA enforcers. The procedural hurdles, such as standing, mootness and the three strikes rule combine with SEPA confusions to effectively prevent review of the threshold determination. The cumulative effect of such circumstances threatens to defeat SEPA in its entirety: without enforceable threshold duties, SEPA loses even its *de facto* influence on significant decisions that affect the environment.

IV. COUNTERPOINT—AGENCIES IN ACTION

The obvious counterpoint to the thesis presented herein derives from the practical effect of strictly enforcing *prima facie* duties under SEPA. Assuming that most, if not all, DNSs are issued for projects that will not in fact cause significant, adverse environmental impacts, enforcing SEPA procedural duties will only result in expense and delay. The question, then, is whether the above analysis is overly technical and, for lack of a better word, a bit nit-picky. For instance, enforcing environmental and development regulations against a particular application under the regulatory reform amendments could cause some overlap in the analysis. Since all relevant environmental concerns are likely considered at both the promulgation and implementation stages of those regulations, site specific analysis under the regulatory reform amendments could be repetitive. Strict enforcement in the MDNS context may trivialize the thorough negotiations performed in the course of mitigation discussions. The *Achen* Board's "common sense" approach may point to a more lenient, but realistic standard of environmental impact review.²⁵¹ In addition, strict enforcement of the *prima facie* burden may constitute excessive oversight of local agencies. The avoidance of speculative impacts may not be as sinister and

250. Under the "home court" theory, land use and SEPA challengers defy the objectivity in administrative and trial court rulings based on theories of personal agenda and complacency. The "home court" scenario, if persuasive, runs most rampant at the local agency, which sits in judgment of its own determination in land use and SEPA appeals, and the local Superior Court, which generally sits before volumes of traffic and wetland studies without the experience or requisite training to comprehend such information. *See generally e.g.*, Richard C. Fields, *Ramblings of an Old Litigator*, 45 *ADVOCATE* (Idaho) 18, 19 (July 2002).

251. *Achen v. City of Battle Ground*, No. 99-2-0040 (W. Wash. Growth Mgmt. Hearings Bd., May 16, 2000) (final decision), available at http://www.gmaboard.wa.gov/western/western_decisions/ww1999/99-40.Fdo.htm.

complacent as suggested above, particularly in those cases where inquiry into far-reaching effects yields no information interesting to the decision makers. Furthermore, although attorney's fees and amorphous and unappealable "new information" provisions may deter some credible information requests, the net effect is to attain a more efficient, operable, and independent agency review process.

The counterpoint does seem sensible. Under SEPA, agencies are shouldered with the responsibility of carrying out largely unfunded mandates and must do so expediently; courts do well by providing deference to agency determinations and relieving agencies of the burden of demonstrating the wisdom of the difficult decisions they make. In the final analysis, once all relevant information is gathered and all impacts duly considered, *someone* must make the value-laden decision of which aspects of the environment are *significant* (this or that wetland, forest, habitat or watercourse, view, odor, or level of noise).²⁵² Some standards have been predetermined and are encompassed in regulatory threshold levels for safe drinking water, water quality, water flow levels, contaminant levels in air, and many others. However, the decision of whether to permit specific impacts (as a matter of course, often the same as the threshold determination) is a decision that, if left to democratic machinery, might never reach consensus.²⁵³ Agency independence aids the decision making process by partially insulating the responsible agency from frivolous nay-sayers.

252. The suggestion that this justification subjects environmental values to less-than-science-based interpretation is not an oversight and is evidenced in the procedures of SEPA. As the *Norway Hill Preservation & Protection Ass'n* court noted, "a precise and workable definition [of "significance"] is elusive because judgments in this area are particularly subjective – what to one person may constitute a significant adverse effect on the quality of the environment may be of little or no consequence to another." *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wash. 2d 267, 277, 552 P.2d 674, 680 (1976). SEPA places information gathering responsibility on layperson applicants, and then delegates environmental decision making responsibility to agencies and elected officials. The inevitable result is layperson interpretation of environmental values, or otherwise stated, politics and rhetoric.

253. The policy of agency efficiency and independence bolsters support in the line of "new information" challenges to SEPA determinations. Clearly, Washington Administrative Code Sections 197-11-600(4)(d) and 197-11-340(3)(a) require supplemental study for new information. WASH. ADMIN. CODE § 197-11-340(3)(a), -600(4)(d) (2001). However, as stated by the court in *Barrie v. Kitsap Court Boundary Review Board*,

[a]ny project . . . will, undoubtedly, generate 'information' as it progresses. . . . [I]n order for 'new circumstances or information' to attain the status of 'significant' these must reach that level where, reasonably, it becomes necessary to focus attention once more upon the environmental aspects of a project. . . . An otherwise unguarded reading of this subpart could unleash a procedural plague

97 Wash. 2d 232, 235-36, 643 P.2d 433, 435 (1982).

In this sense, SEPA combines the very practical need of agencies to make decisions with the realistic factors that those decisions are often inferred from a deficient record of evidence, and that the significance of impacts alleged by environmental concerns may not be consistent with the economic goals of the government and their constituents on the whole.²⁵⁴ Take, for instance, the expediency illustrated in the regulatory reform amendments and negotiated threshold determination process, discussed above. In addition, SEPA requires consolidated appeals of the SEPA determination with the underlying governmental action²⁵⁵ and abhors repetitive environmental review.²⁵⁶ Expediency in review, by shifting the burden of prima facie compliance to the challenger, might in fact effectuate the goals of efficiency and agency independence.

One criticism against elevating agency needs upon SEPA, or alternatively, in prioritizing the goals of SEPA, is that it pits comparable policies into opposing goals, transforming an admirable enforcement mechanism into a morass of rhetoric. That is, the goals of gathering accurate information and doing so efficiently are not inherently at odds. As discussed above, both the regulatory reform amendments and the MDNS process indicate the legislature's attempt to balance and integrate these goals.²⁵⁷ The threshold determination itself, which enables the lead agency to determine whether an EIS is necessary, relieves applicants of the expense and delay of preparing the "detailed statement" for proposals that do not suggest a probable, significant adverse environmental impact.²⁵⁸ Administrative and judicial separation of agency efficiency and accuracy wrecks havoc on the simple scheme of SEPA, to the detriment of accuracy in SEPA compliance. Law becomes troublesome when courts first separate policies that should be interpreted to conjunctively

254. JOHN STUART MILL, *A SYSTEM OF LOGIC RATIOCINATIVE AND INDUCTIVE* 8 (5th ed. 1862). John Stuart Mill described the practical necessity as follows:

To draw inferences has been said to be the great business of life. Every one has daily, hourly and momentary need of ascertaining facts which he has not directly observed; not from any general purpose of adding to his stock of knowledge, but because the facts themselves are of importance to his interests or to his occupations. The business of the magistrate, [of the lawyer,] of the military commander, of the navigator, of the physician, of the agriculturist, is merely to judge of evidence and to act accordingly. . . . [A]s they do this well or ill, so they discharge well or ill the duties of their several callings. It is the only occupation in which the mind never ceases to be engaged.

Id.

255. WASH. REV. CODE § 43.21C.075(1)-(2) (2000).

256. WASH. ADMIN. CODE § 197-11-060(1)-(3) (2001).

257. *Moss v. City of Bellingham*, 109 Wash. App. 6, 15-16, 31 P.3d 703, 708-09 (2001).

258. *See* WASH. REV. CODE § 43.21C.031(1) (2000).

support the subject law, and then justify a decision on one, but not all, of the policies.²⁵⁹

In any event, if indeed prioritizing is necessary between efficiency and accuracy in the context of the prima facie burden, agency efficiency should yield to the public's need for accurate decisions.²⁶⁰ Premature agency deference does not maintain the integrity of SEPA while advancing agency independence. Excusing agencies from the prima facie burden only avoids challenges in instances of lack of compliance with the prima facie requirements of SEPA, which has embarrassing and contradictory results. A brief philosophical interlude into the "burden of proof" concept illustrates this conclusion. The burden of proof, and its corollary the presumption, are as common to professional sophistry as any rhetorical tool.²⁶¹

The notion of the presumption responds to the necessities of decision making in the face of uncertainty by facilitating the practical need to actually make decisions: the need of expediency and certainty, hopefully without sacrificing accuracy. The answer provided by the presumption and burden of proof, of course, indicates a procedural reliance on a legal logic of probability.²⁶² In this sense, use of presumptive claims and burden shifting arguments are so ingrained in the legal system as to be assumed—presumed—to have some beneficial use and consequence. In American jurisprudence, the presumption is defined as a legal devise which functions, in the void of other proof, to necessitate that certain inferences be drawn from the

259. See Hirokawa, *supra* note 202, at 359-60 (attributing the "piecemealing problem" under SEPA to agency separation of the connectedness of projects from the connectedness of impacts when analyzing cumulative impacts).

260. *Merkel v. Port of Brownsville*, 8 Wash. App. 844, 850-51, 509 P.2d 390, 395 (1973); *City of Bellevue v. King County Boundary Review Bd.*, 90 Wash. 2d 856, 871, 586 P.2d 470, 478-79 (1978).

261. Conceptually, the "burden of proof" contains several operative terms, including the burden of production, burden of persuasion, and the presumption. See Mark D. Rosen, *Defrocking the Courts: Resolving "Cases or Controversies," Not Announcing Transcendental Truths*, 17 HARV. J. L. & PUB. POL'Y 715, 715 (1994). While noting that the terms are often erroneously used interchangeably, this Article attempts to simplify the theoretical difficulties and relations between the terms. See generally *id.* Therefore, this Article employs "burden of proof" only conceptually, but specifically references the argument form and legal machinery known as the "presumption."

262. HUNTINGTON CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* 295 n.1 (4th prt. 1966). The persuasiveness of the presumption argument is based in its adoption of a fundamental principle of logic:

A proposition is either true or false; [and] comprises two true statements; one, that the true and the false are not compatible in the same proposition, or that a proposition cannot be true and false at the same time; the other, that the opposition or the negation of the true and the false are not compatible, or that there is no middle ground between the true and the false, or better, that it is impossible for a proposition to be neither true nor false.

existing evidence.²⁶³ The methodological, procedural implication drawn from the presumption is that contested facts may be inferred without first heeding a more “scientific” method of proof. The burden of proof is a bane, particularly in matters of difficult or complex theories of proof, and is often too much to bear. Consequently, the presumption, the complement to the burden, is a highly sought-after position.²⁶⁴

However, at base, invoking the presumption implies a dual statement: on the one hand, its beneficiary proclaims title to the truth of a proposition, if that proposition cannot be affirmatively disproved; the beneficiary concurrently disclaims the burden of proving her position through demonstration.²⁶⁵ When entitled to the presumption, the holder claims responsibility only to parry objections. Opponents of the presumption argue that the limits of reason and empiricism are terminal against labeling presumptive truths as such. Ignorance, after all, is ignorance:²⁶⁶ once an uncertainty is conceded, uncertainty should be accepted. This objection reflects a practical danger in applied law; that the presumption argument allegedly discriminates between the legal and factual authority of the court, and the influence of the same. The problem is the gap between when the holder of the presumption disclaims the burden of proving her position and when the presumption holder disclaims the burden *because she*

263. *Id.*; see also *Port Terminal & Warehousing Co. v. John S. James Co.*, 92 F.R.D. 100, 106 (S.D. Ga. 1981).

264. The procedural favoritism granted to one party, rather than the other, is not necessarily a *de jure* divorce of judicial neutrality in favor of administrative independence in decision making. Placing the burden on tort plaintiffs keeps dockets clear and, hopefully, keeps a potentially litigious society in check. In criminal jurisprudence, placing the burden on the state and vesting the corresponding presumption of innocence in the defendant protects all citizens from the passions of mob mentality. In short, burden shifting logic plays a vital role in maintaining a functioning legal system, as well as in maintaining a semblance of justice in the judicial process.

265. RICHARD H. GASKINS, *BURDENS OF PROOF IN MODERN DISCOURSE* 1 (1992). The philosopher Leibniz’s infamous proof for the existence of a higher being lays the foundation of an argument based on the presumption argument:

For every being ought to be judged possible until the contrary is proved, until it is shown that it is not possible at all.

This is what is called *presumption*, which is incomparably more than a simple *supposition*, since most suppositions ought not be admitted unless they are proved, but everything that has presumption for it ought to pass for true until it is refuted.

Therefore the existence of God has presumption for it in virtue of this argument, since it needs nothing besides its possibility. And possibility is always presumed and ought to be held for true until the impossibility is proved.

So this argument has the force to shift the burden of proof to the opponent, or to make the opponent responsible for the proof. And as that impossibility will never be proved, the existence of God ought to be held for true.

Id.

266. *Id.* at 1-2.

is unable to prove her position. While the burden of proof is merely a procedural nicety afforded courts to speed the process of litigation and clear dockets of unfounded claims, it is also the type of asserted defense that may mask factual truth in procedural burdens, and ultimately, as legal truths.²⁶⁷ The objection concludes that the presumption is inappropriately applied to questions of truth, moral value, or, in particular, law, due to its propensity to misdirect questions of fact.

Richard Gaskins is eminently precise when he labels the presumption the “argument from ignorance.”²⁶⁸ She who wields the presumption may be victorious on the issue litigated, although completely ignorant of the very question called upon. In the context of the vanishing SEPA threshold, an additional consequent should be clear: Can courts effectuate the goals of SEPA by relieving the agency of the *prima facie* burden and placing it instead on the public? That is, can the anti-ignorance goals of SEPA be effectuated if agencies are prematurely granted rights to the argument-from-ignorance?²⁶⁹ It is in this context that judicial deference to the agency’s declaration of *prima facie* compliance is an anomaly. Because the very purpose of SEPA is to ensure that the decision maker is not ignorant when making an environmental decision, the only available response is to scratch one’s head and hope that agencies are thorough in threshold analyses when such analysis is appropriate.

Accordingly, care must be taken in acknowledging a burden of proof or flaunting the presumption in the case of SEPA. As discussed above, the availability of misuse, and more importantly, the potential for misunderstanding, is carried on the face of the presumption: evasion of environmental review buries the public *awareness* of adverse impacts. The irony of this dilemma reeks of inefficiency: a challenger, alleging an incomplete study of adverse environmental impacts, must prove the need to study adverse environmental impacts by studying such effects. Of course, a deeply concerned and financially secure public *could* simply perform the environmental review for themselves. Unfortunately, such an event would diminish any shred of confidence in the SEPA process and run against the very purpose of the Act. Accordingly, it is necessary to return to SEPA basics: as

267. HERBERT L. PACKER, *THE LIMITS OF CRIMINAL SANCTION* 167 (1968) (arguing that “[b]y opening up a procedural situation that permits the successful assertion of defenses having nothing to do with factual guilt, it vindicates the proposition that the factually guilty may nonetheless be legally innocent”).

268. GASKINS, *supra* note 265, at 1.

269. Hopefully it is noted that I am not suggesting taking the presumption away from agencies shouldered with SEPA responsibilities. However, if my basic thesis is correct, then the burden ought not shift to the concerned public, who generally stand unarmed before an intolerant agency while challenging an absence of environmental study, if the agency cannot at least offer a record that demonstrates some consideration of environmental impacts.

a matter of policy, rule and logic placing the burden on the agency to demonstrate prima facie compliance with SEPA makes good sense. The public should not bear the burden of ensuring that a lead agency at least looked at the probable environmental impacts of a project proposal, a fact recognized in the SEPA regulations on the basis of the public's limited resources.²⁷⁰ Moreover, when an agency assumes responsibility for combating environmentally ignorant action, a concerned public is entitled to benefit²⁷¹ from the assumption that, at least, the minimally required information is gathered and assessed by that agency. In such a setting, the public can rest assured that if some particular proposal goes unchallenged, the agency's approval signifies evaluation of the environmental significance prior to issuing an approval.²⁷²

To restate: should courts deem adequate the administrative record of a negative threshold determination when the record is deficient, but on post hoc judicial review, the court determines that the omitted studies would have revealed no significant impacts? Despite the practical sense for purposes of agency efficiency and independence, this standard effects the same review existing before the judiciary created the threshold requirement: case-by-case, timely and expensive review. In short, what a waste.

V. CONCLUSION

All of the problematic legal issues discussed herein are symptomatic of a basic problem in SEPA implementation: the prima facie burden is losing its thrust in SEPA enforcement and the SEPA threshold is vanishing from the scene. This may be because agencies approach project proposals with hidden agendas and pursue their predetermined goals notwithstanding responsibilities under SEPA. Environmental impacts can become quite significant for locally undesirable proposals, but mysteriously disappear from the record for desirable ones.²⁷³ An easier, and hopefully more accurate interpretation to swallow is that agencies and courts have become confused about which party bears the

270. WASH. ADMIN. CODE § 197-11-550(7) (2001).

271. This claim is based on SEPA's far-reaching "entitlement" provision, which provides, "[t]he legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." WASH. REV. CODE § 43.21C.020(3) (2000).

272. *Anderson v. Pierce County*, 86 Wash. App. 290, 304, 936 P.2d 432, 440 (1997) ("[This] touchstone of the SEPA review process, provides protection from abuse.").

273. See generally Bruce Parly, *Abstraction, Precedent, and Articulate Consistency: Making Environmental Decisions*, 34 CAL. W. L. REV. 427 (1998) (criticizing the practice of placing discretionary decision making authority in the hands of local officials, who inevitably have a personal stake in the outcome of local environmental decisions).

burden of proof in challenges to the SEPA threshold determination. After all, inquiries into the burden of prima facie compliance, like most burden of proof controversies, make SEPA litigation “very much like an obstacle course.”²⁷⁴

To reiterate, the rules for burden shifting under SEPA are simple: the lead agency of a negative threshold determination bears the burden of producing an administrative record that demonstrates actual, contemporaneous consideration of all relevant environmental factors (the prima facie case of compliance);²⁷⁵ then the burden shifts to the challenger to demonstrate that the conclusion of the determination was clearly erroneous, based on the record;²⁷⁶ if, in the end, the court must weigh the evidence of an environmental impact’s significance, the court may defer to the agency’s decision.²⁷⁷ In practice, the burden is often borne by the challenger at a much earlier point in the proceedings. So long as the agency is able to produce an environmental document, perhaps *any* environmental document, the burden is on the challenger to demonstrate, with affirmative evidence, that the document offends some scientific understanding about a particular significant impact. Even if the record is devoid of significant discussion on entire classes of environmental issues, the burden is often imposed upon the challenger to analyze and argue. This reversion to pre-SEPA environmental review is an interesting but unfortunate event.

As originally designed, the judicial creation of the threshold determination process responded to a clear and present shortcoming in the effectiveness of SEPA. Without reviewable documentation of the determination process, the potential for abuse was unchecked. With this in mind, a prematurely borne burden of proof, shouldered by a concerned public, is anathema to the goals of SEPA. The threshold determination injected a balance into environmental review; a balance that, in all likelihood, served both judicial and agency efficiency by shifting burdens but implying a degree of deference to expertise, whatever that expertise may be. However, the same agency call to expediency and ad hoc decision making has found its way back into the threshold process. For those who believe in the balance of goods and values illustrated in the State Environmental Policy Act, the value of knowledge cannot be replaced by a vanishing SEPA threshold. For those obligated to implement SEPA, the same should apply.

274. PACKER, *supra* note 267, at 163.

275. Gardner v. Pierce County Bd. of Comm’rs, 27 Wash. App. 241, 245-46, 617 P.2d 743, 746 (1980).

276. Norway Hill Pres. & Prot. Ass’n v. King County Council, 87 Wash. 2d 267, 274-76, 552 P.2d 674, 678-80 (1976).

277. WASH. REV. CODE § 43.21C.090 (2000).

