

SEPA: A Proposed Standard for Judicial Review of Agency Decisions Not to Require Preparation of a Supplemental Environmental Impact Statement

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I. INTRODUCTION¹

The Washington State Environmental Policy Act² ("SEPA") provides the basic framework for review of all major development proposals³ having a probable significant impact⁴ upon the quality of the environment.⁵ SEPA requires both

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1. The author thanks Jerry Neal, partner, Preston Thorgrimson Shidler Gates & Ellis, Spokane office, for his helpful comments and suggestions on drafts of this Article. Mr. Neal has successfully litigated environmental and land use issues for over twenty years. The opinions expressed herein, however, are solely those of the Author.

2. WASH. REV. CODE ch. 43.21C (1989).

3. "Proposals" include agency actions and applications submitted to agencies for approval. See WASH. ADMIN. CODE § 197-11-784 (1990). "Building permit applications and subdivision plat applications are typical of this latter type of proposal." Roger Pearce, Comment, *Death by SEPA: Substantive Denials Under Washington's State Environmental Policy Act*, 14 U. PUGET SOUND L. REV. 143, 144 (1990).

4. Under SEPA, significant impact means a reasonable likelihood of more than a moderate impact on environmental quality. WASH. ADMIN. CODE § 197-11-794 (1990).

5. The general policies of SEPA are as follows:

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

(a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) Assure for all people of Washington safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) Preserve important historic, cultural, and natural aspects of our national heritage;

(e) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(f) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

public and private projects to comply with its provisions.⁶ Compliance with SEPA may significantly impact the economic feasibility of completing a project if the project proponent is required, by the appropriate government agency, to prepare an Environmental Impact Statement ("EIS")⁷ because the preparation of an EIS causes additional costs and delays to the project.⁸

The costs of complying with SEPA may extend past completion of an EIS. If new information arises after preparation of the EIS, but before completion or upon modification of the project, the new information must also be evaluated by the agency.⁹ After evaluating this new information, the agency may require a Supplemental Environmental Impact Statement ("SEIS"),¹⁰ and this requirement adds further costs to the project in terms of delay and money.

An SEIS must be prepared if substantial changes in the proposal are made or if new information indicates probable significant adverse economic impacts that were not adequately

(g) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

WASH. REV. CODE § 43.21C.020(2) (1989).

6. While SEPA only directly imposes environmental responsibility on governmental actions, it indirectly constrains private land development. Almost all private development requires governmental permits, and SEPA specifically applies to governmental regulatory decisions. Private development proposals are thus indirectly regulated by SEPA. RICHARD L. SETTLE, *THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT: A LEGAL AND POLICY ANALYSIS* 4-2 (2d Supp. 1991).

7. An Environmental Impact Statement is required for "proposals . . . significantly affecting the quality of the environment." WASH. REV. CODE § 43.21C.030(2)(c) (1989); WASH. ADMIN. CODE § 197-11-330 (1990).

Additionally, on the basis of information generated in compliance with SEPA, private development projects that might otherwise have been granted may be denied. *See, e.g.,* Buchsei/Donard, Inc. v. Skagit County, 99 Wash. 2d 577, 663 P.2d 487 (1983); West Main Assoc. v. City of Bellevue, 49 Wash. App. 513, 742 P.2d 1266 (1987), *review denied*, 112 Wash. 2d 1009 (1989).

8. *See* Pleas v. City of Seattle, 112 Wash. 2d 794, 774 P.2d 1158 (1989) (holding that delay incurred because of improperly required EIS, resulting in damages of \$969,000 for lost profits, loss of favorable financing, and increased construction costs because of inflation, cost of first EIS, and attorney's fees). "Perhaps the most significant and controversial consequence of SEPA has been delay of both public and private projects. The delay caused by administrative compliance with SEPA procedures and litigation challenging administrative compliance may render projects economically infeasible SEPA challenges designed solely to delay unpopular projects are impermissible." SETTLE, *supra* note 6, at 37.

9. WASH. ADMIN. CODE §§ 197-11-600(4)(c), -706 (1990).

10. *Id.* §§ 197-11-405(4), -600(4)(d). Preparation of an SEIS follows substantially the same procedure as an EIS. *Id.* § 197-11-620.

covered in the EIS.¹¹ On the other hand, the agency may decide that an SEIS is *not* required because the underlying EIS is adequate in light of this new information. The agency determination not to require the project proponent to prepare an SEIS is essentially the same as a so-called "negative threshold determination" where an agency finds no significant adverse impacts and does not require preparation of an EIS.

Similar to the decision of whether an EIS must be prepared, an agency decision of whether to require preparation of an SEIS has important economic consequences for the project. The success or failure of a project depends, among other things, on the proponent's ability to forecast the project's cost. An agency's decision to require preparation of an SEIS increases the project cost, and therefore, predictability of an agency's decision whether to require an SEIS is a crucial element of a proponent's economic forecast.

Unfortunately, a project proponent's ability to forecast costs is undercut by the unpredictable results of judicial review of agency decisions not to require preparation of an SEIS under Washington law. Under Washington law, judicial review of an agency decision not requiring preparation of a SEIS may produce unpredictable results because different standards of judicial review are applied to EIS adequacy and to the negative threshold determinations.¹² The uncertainty surrounding the standard of judicial review imposes economic costs on the project in terms of increased project cost and delay. Additionally, the uncertain standard increases the risk that a project opponent will bring litigation solely for the purposes of delaying the project and, accordingly, imposes on the project proponent risks associated with defending the litigation.

To enable citizens opposing projects and proponents defending projects to predict more accurately the results of litigation and to discourage spurious litigation, a more definitive standard of judicial review is necessary. This Article proposes

11. WASH. ADMIN. CODE §§ 197-11-405(4), -600(4)(d) (1990).

12. Generally, the court reviews EIS adequacy under a *de novo* standard. *Leschi Improvement Council v. Washington State Highway Comm'n*, 84 Wash. 2d 271, 284-85, 525 P.2d 774, 784 (1974). However, negative threshold determinations are reviewed under either the arbitrary or [sic] capricious or clearly erroneous standard. *Narrowview Preservation Ass'n v. City of Tacoma*, 84 Wash. 2d 416, 423, 526 P.2d 897, 902 (1974) (applying the arbitrary and capricious standard of review), *overruled by* *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wash. 2d 267, 274, 552 P.2d 674, 678 (1976) (applying the clearly erroneous standard of review).

a standard of judicial review that encompasses components of both the adequacy and negative threshold standards of judicial review. The proposed standard of review discourages lawsuits that are brought merely for purposes of delay while ensuring that the agency acted reasonably in making its determination.

Before this new standard can be considered, the context in which it will operate must be reviewed. Part II of this Article discusses the statutory scheme of SEPA. Part III discusses the statutory mandate that requires courts to accord agency decisions substantial weight and discusses three different standards of judicial review that have developed from case law. Next, Part IV proposes the new standard of review. Finally, Part V compares this proposed standard with the holding of the recent Washington Court of Appeals case of *West 514, Inc. v. County of Spokane*¹³ to substantiate the validity of the proposed standard.

II. SEPA STATUTORY SCHEME

Broadly stated, SEPA requires state and local governmental agencies to evaluate proposed projects in order to maintain and improve environmental quality.¹⁴ The principle mechanism for implementing SEPA policy is the EIS. Although SEPA procedure centers around the EIS,¹⁵ the threshold determination is whether an EIS must be prepared.

During the threshold determination process, the government agency¹⁶ or the lead agency¹⁷ must determine whether or not the project is likely to have probable, significant adverse

13. 53 Wash. App. 838, 770 P.2d 1065, *review denied*, 113 Wash. 2d 1005 (1989).

14. See SETTLE, *supra* note 6, at 4-1; see, e.g., ASARCO, Inc. v. Air Quality Coalition, 92 Wash. 2d 685, 707, 601 P.2d 501, 515 (1979); Eastlake Community Council v. Roanoke Assoc., Inc., 82 Wash. 2d 475, 490, 513 P.2d 36, 46 (1973).

WASH. REV. CODE § 43.21C.010 (1989) states that the purposes of SEPA are as follows:

(1) to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) to stimulate the health and welfare of man; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation.

SEPA states "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." William H. Rogers, Jr., *The Washington Environmental Policy Act*, 60 WASH. L. REV. 33, 34 (1984) (quoting WASH. REV. CODE § 43.21C.020(3) (1983)).

15. See WASH. ADMIN. CODE §§ 197-11-400 to -460 (1990).

16. SEPA requirements are applicable to all agencies or units of state and local

impacts on the environment.¹⁸ To make this determination, the lead agency must designate a responsible official to be specifically accountable for complying with SEPA procedural requirements.¹⁹ The responsible official within the lead agency then documents the threshold determination by either a Determination of Significance, a Determination of Non-Significance,²⁰ or a Mitigated Determination of Non-Significance.²¹

A Determination of Significance indicates that the agency found significant adverse impacts (a positive threshold determination), and the project proponent must prepare an EIS.²² A Determination of Non-Significance indicates that the agency found no significant adverse impacts (negative threshold determination), and the project proponent is not required to prepare an EIS.²³ A Mitigated Determination of Non-Significance indicates that the agency found environmentally significant impacts but will allow the project to be modified to avoid a Determination of Significance.²⁴

If the agency requires an EIS, the project proponent must prepare a draft EIS,²⁵ which the agency makes available to the public and sends to agencies with jurisdiction.²⁶ Any person or agency may review and comment on a draft EIS within thirty days from the date of issuance.²⁷ After review and evaluation of any comments, the project proponent prepares a Final Environmental Impact Statement, which is distributed by the lead agency.²⁸

government except the judiciary and state legislature. WASH. REV. CODE § 43.21C.030(2) (1989); WASH. ADMIN. CODE §§ 197-11-714(1), -762, -796 (1990).

17. If more than one governmental agency is involved in an action, a designation of "lead agency" must be made. The lead agency is responsible for compliance with threshold determination and EIS requirements. WASH. ADMIN. CODE §§ 197-11-050, -922 -948 (1990).

18. WASH. ADMIN. CODE § 197-11-330(1) (1990).

19. WASH. ADMIN. CODE § 197-11-788 (1990). The SEPA regulation defines "responsible official" as follows: "officer or officers, committee, department, or section of the lead agency designated by agency SEPA procedures to undertake its procedural responsibilities as lead agency." WASH. ADMIN. CODE § 197-11-910 (1990).

20. *Id.* § 197-11-310(2)-(4).

21. *Id.* § 197-11-350.

22. *Id.* § 197-11-360(1).

23. *Id.* § 197-11-340.

24. *Id.* § 197-11-350.

25. The lead agency may have an EIS prepared by an applicant. WASH. ADMIN. CODE § 197-11-420(2) (1990).

26. *Id.* § 197-11-455.

27. *Id.* § 197-11-455(6)-(7).

28. *Id.* § 197-11-560(4).

After the project proponent prepares the final EIS, the agency may determine that substantial change in a project or new information about adverse environmental impacts requires the project proponent to prepare a Supplemental Environmental Impact Statement ("SEIS").²⁹ This agency determination is essentially a new threshold determination, but involves essentially the same process as the EIS.³⁰

III. STANDARDS OF JUDICIAL REVIEW

A. *SEPA Standards of Judicial Review*

SEPA, as originally enacted in 1971, contained no standards of judicial review.³¹ In 1973, however, the Washington State Legislature amended SEPA to limit judicial scrutiny of SEPA compliance by directing courts to accord "substantial weight" to agency threshold decisions and EIS adequacy determinations.³² In 1983, the legislature reaffirmed this deference by amending SEPA to require that the court accord substantial deference to SEPA rules in the interpretation of SEPA.³³ The legislative history of the 1983 amendment to SEPA indicates that the legislature adopted this second amendment because it was concerned about whether the courts adequately reviewed and considered the state SEPA administrative rules before interpreting SEPA.³⁴ To remedy this concern, the legislature determined that it was "extremely important that the courts should first turn to the administrative rules to see if they interpret a provision involved and should give substantial

29. *Id.* §§ 197-11-405(4), -600(4)(d).

30. *Id.* §§ 197-11-405(4), -600(4)(d), - 620.

31. SETTLE, *supra* note 6, at 4-4.

32. WASH. REV. CODE § 43.21C.090 (1989). The full text of the 1973 amendment is as follows:

In any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a "detailed statement," the decision of the governmental agency shall be accorded substantial weight.

Id., 1973 Wash. Laws ch. 179, § 3.

33. WASH. REV. CODE § 43.21C.095 (1989) states as follows: "The rules promulgated under RCW 43.21C.110 shall be accorded substantial deference in the interpretation of this chapter." *Id.*

34. Kenneth S. Weiner, *SEPA and Recent Legislative Amendments (S.S.B. 3006)*, in THE FIRST ENVIRONMENTAL AND LAND USE LAW SECTION MID-YEAR MEETING AND SEMINARS 192 (Washington State Bar Ass'n ed., May, 1983) (on file with the *University of Puget Sound Law Review*). Kenneth S. Weiner, partner in the Seattle law firm of Preston Thorgrimson Shidler Gates & Ellis, was special counsel to the Commission on Environmental Policy.

weight to such interpretation."³⁵

B. Case Law Standards of Judicial Review

An agency decision not to require a project proponent to prepare a SEIS always involves an underlying EIS. Therefore, on appeal, the reviewing court could consider both the adequacy of the underlying EIS and the negative threshold determination in evaluating the agency decision. The correctness of threshold determinations³⁶ and the adequacy of impact statements³⁷ are the two most frequently litigated issues under SEPA; however, these issues are subject to different standards of judicial review.³⁸

Although the court reviews EIS adequacy under a de novo standard,³⁹ generally negative threshold determinations are reviewed under either the arbitrary or capricious, or clearly erroneous standard.⁴⁰ The de novo standard of review is, by

35. *Id.*

36. The following cases involved decisions about whether or not the threshold determination was correct: *ASARCO, Inc. v. Air Quality Coalition*, 92 Wash. 2d 685, 601 P.2d 501 (1979); *Sisley v. San Juan County*, 89 Wash. 2d 78, 569 P.2d 712 (1977); *Marino Property Co. v. Port of Seattle*, 88 Wash. 2d 822, 567 P.2d 1125 (1977); *Swift v. Island County*, 87 Wash. 2d 348, 552 P.2d 175 (1976); *Byers v. Bd. of Clallam County Comm'rs*, 84 Wash. 2d 796, 529 P.2d 823 (1974); *Narrowsview Preservation Ass'n v. City of Tacoma*, 84 Wash. 2d 416, 526 P.2d 897 (1974), *overruled by* *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wash. 2d 267, 552 P.2d 674 (1976); *West 514, Inc. v. County of Spokane*, 53 Wash. App. 838, 770 P.2d 1065, *review denied*, 113 Wash. 2d 1005 (1989); *San Juan County v. Dep't of Natural Resources*, 28 Wash. App. 796, 626 P.2d 995, *review denied*, 95 Wash. 2d 1029 (1981); *Brown v. City of Tacoma*, 30 Wash. App. 762, 637 P.2d 1005 (1981); *D.E.B.T., Ltd. v. Bd. of Clallam County Comm'rs*, 24 Wash. App. 136, 600 P.2d 628 (1979); *Newaukum Hill Protective Ass'n v. Lewis County*, 19 Wash. App. 162, 574 P.2d 1195 (1978); *Richland Homeowner's Preservation Ass'n v. Young*, 18 Wash. App. 405, 568 P.2d 818 (1977).

37. The following cases involved EIS adequacy determinations: *Citizens for Clean Air v. City of Spokane*, 114 Wash. 2d 20, 785 P.2d 447 (1990); *In re Northwest Pasco Annexation*, 100 Wash. 2d 864, 676 P.2d 425 (1984); *Barrie v. Kitsap County Boundary Review Bd.*, 97 Wash. 2d 232, 643 P.2d 433 (1982); *Cathcart-Maltby-Clearview Community Council v. Snohomish County*, 96 Wash. 2d 201, 634 P.2d 853 (1981); *Barrie v. Kitsap County*, 93 Wash. 2d 843, 613 P.2d 1148 (1980); *Cheney v. City of Mountlake Terrace*, 87 Wash. 2d 338, 552 P.2d 184 (1976); *Leschi Improvement Council v. Washington State Highway Comm'n*, 84 Wash. 2d 271, 525 P.2d 774 (1974); *West 514, Inc. v. County of Spokane*, 53 Wash. App. 838, 770 P.2d 1065, *review denied*, 113 Wash. 2d 1005 (1989); *SEAPC v. Cammack II Orchards*, 49 Wash. App. 609, 744 P.2d 1101 (1987); *Toandos Peninsula Ass'n v. Jefferson County*, 32 Wash. App. 473, 648 P.2d 448 (1982); *Mentor v. Kitsap County*, 22 Wash. App. 285, 588 P.2d 1226 (1978); *Ullock v. City of Bremerton*, 17 Wash. App. 573, 565 P.2d 1179, *review denied*, 89 Wash. 2d 1011 (1989); *Frye Investment Co. v. City of Seattle*, 14 Wash. App. 702, 544 P.2d 125 (1976).

38. *Rogers, supra* note 14, at 35, 50.

39. *Leschi Improvement Council*, 84 Wash. 2d at 284-85, 525 P.2d at 784.

40. Since 1976, the court has consistently applied the clearly erroneous standard of

definition, the most intrusive review and accords the least deference to the agency. The arbitrary or capricious standard is the least intrusive review and accords the most deference to the agency. The clearly erroneous standard falls somewhere between the de novo and the arbitrary or capricious standards. In practice, however, the courts scrutinize EIS threshold determinations more closely than they examine EIS adequacy.⁴¹

Because the agency decision not to require a SEIS could be reviewed under either of three standards and because each standard allows different degrees of judicial scrutiny, it is important to understand why these various standards have been employed by the courts and what components of each are proper in reviewing a negative threshold SEIS decision. Accordingly, this portion of the Article will examine current standards of review for adequacy and negative threshold determinations.

1. EIS Adequacy: The De Novo Standard of Judicial Review

In *Leschi Improvement Council v. Washington State Highway Commission*,⁴² the Washington Supreme Court set forth the rule that EIS adequacy is subject to de novo review.⁴³ De novo review is defined as a new, full consideration of the case in which the court is entitled to form its own independent conclusions from the record.⁴⁴ By definition, this standard of review ignores the statutory directive that courts accord the

review to negative threshold determinations. See *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wash. 2d 267, 274, 552 P.2d 674, 678 (1976). See also *Sisley v. San Juan County*, 89 Wash. 2d 78, 569 P.2d 712 (1977); *Swift v. Island County*, 87 Wash. 2d 348, 552 P.2d 175 (1976). Prior to the *Norway Hill* decision, the court employed the arbitrary or capricious standard of review. See *Narrowsview Preservation Ass'n*, 84 Wash. 2d at 423, 526 P.2d at 902.

41. SETTLE, *supra* note 6, at 161.

42. 84 Wash. 2d 271, 284-85, 525 P.2d 774, 784 (1974).

43. In *Leschi*, the court first set forth a functional test to decide whether the issue on review involved (1) findings of fact, (2) application of law to facts, or (3) determinations of law.

"A finding of fact is the assertion that a phenomenon has happened or will be happening independent of or anterior to any assertion as to its legal effect." *Id.* at 283, 525 P.2d at 783. After defining the test, the court stated that an agency finding of EIS adequacy is not an assertion independent of legal effect because it "necessarily determines the legal rights of the parties as to the disputed project." *Id.* at 285, 525 P.2d at 784.

Because "legal rights" were involved, the court determined that EIS adequacy was an application of law to facts and was equivalent to a determination of law, entitled to de novo review. *Id.* at 282-85, 525 P.2d at 783-84.

44. *Reagan v. Bd. of Directors*, 4 Wash. App. 279, 287, 480 P.2d 807, 811 (1971).

agency decision substantial weight⁴⁵ because the court can substitute its judgment for that of the agency.

Despite the lack of deference required by the *de novo* standard, courts do constrain the intrusiveness of their review by relying on the "rule of reason" to judge the adequacy of environmental documents.⁴⁶ Under the rule of reason, agencies are not required to review "every remote and speculative consequences of an action."⁴⁷ The rule of reason dictates that there be *more than a reasonable probability* that the proposed action will have *more than a moderate effect* on the environment before an EIS must issue.⁴⁸

A recent supreme court opinion clarified that while *de novo* is the appropriate standard of review for EIS adequacy, the court will give the agency's decision "substantial weight" and will apply the "rule of reason."⁴⁹ Whether the court will apply the substantial weight and reasonableness standard separately or as an element of the *de novo* standard is unclear from the opinion. However, requiring the court to accord substantial weight to the agency decision and requiring a rule of reason analysis narrows the broad *de novo* standard of review by constraining the court's ability to form an independent conclusion from the evidence.

45. WASH. REV. CODE § 43.21C.090 (1989) requires that the court accord substantial weight to the agency decision.

46. *Cheney v. Mountlake Terrace*, 87 Wash. 2d 338, 344, 552 P.2d 184, 188-89 (1976); *SEAPC v. Cammack II Orchards*, 49 Wash. App. 609, 614, 744 P.2d 1101, 1104 (1987); *Mentor v. Kitsap County*, 22 Wash. App. 285, 289, 588 P.2d 1226, 1229 (1978).

47. *Mountlake Terrace*, 87 Wash. 2d at 344, 552 P.2d at 189.

48. *Murden Cove v. Kitsap County*, 41 Wash. App. 515, 704 P.2d 1242 (1985). The court held as follows:

An examination of the entire record does not lead to the conclusion that a mistake was committed. Assuming, *arguendo*, that the approval is a "major action," it cannot be said that a reasonable probability exists that the governmental action will have a more than moderate effect on the surrounding environment considering the subject property's location and the approved uses permitted under the UPUP granted to the entire tract of land.

Id. at 525, 704 P.2d at 1249.

See also *Brown v. Tacoma*, 30 Wash. App. 762, 637 P.2d 1005 (1981), in which the court held as follows:

An environmental impact statement is required for "major actions significantly affecting the quality of the environment." (RCW 43.21C.030(2)(c)). Action "significantly" affects the environment " 'whenever more than a moderate effect on the quality of the environment is a reasonable probability.' "

Id. at 768, 637 P.2d at 1008.

49. *Citizens for Clean Air v. City of Spokane*, 114 Wash. 2d 20, 33-34, 785 P.2d 447, 455 (1990).

2. Negative Threshold Determinations: The Arbitrary or Capricious and Clearly Erroneous Standards of Review

The court has reviewed negative threshold determinations under two different standards: the arbitrary or capricious standard and the clearly erroneous standard. Initially, the court utilized the arbitrary or capricious standard to review an agency's negative threshold determination.⁵⁰ This standard has been defined as "willful and unreasonable action, without consideration and [in] disregard of facts or circumstances. Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration though it may be felt that a different conclusion might have been reached."⁵¹

Subsequently, in *Norway Hill Preservation and Protection Association v. King County Council*,⁵² the court rejected the arbitrary and capricious standard of review and held that the broader "clearly erroneous" standard was the proper standard of review for a negative threshold determination. Since *Norway Hill*, the court has consistently applied the clearly erroneous standard when reviewing negative threshold determinations.⁵³

Under the clearly erroneous standard, the court does not substitute its judgment for that of the administrative body.⁵⁴ "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has

50. *Narrowsview Preservation Ass'n v. City of Tacoma*, 84 Wash. 2d 416, 423, 526 P.2d 897, 902 (1974), *overruled by* *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wash. 2d 267, 552 P.2d 674 (1976). The court actually stated the standard as "arbitrary and capricious," rather than the "arbitrary or capricious" standard contained in the Administrative Procedure Act. Compare *Narrowsview Preservation*, 84 Wash. 2d at 423, 526 P.2d at 902 with WASH. REV. CODE § 34.05.570(3)(i) (1989).

51. *Barrie v. Kitsap County*, 93 Wash. 2d 843, 850, 613 P.2d 1148, 1152-53 (1980) (citing *Buell v. Bremerton*, 80 Wash. 2d 518, 495 P.2d 1358 (1972); *Bishop v. Houghton*, 69 Wash. 2d 786, 420 P.2d 368 (1966)).

52. 87 Wash. 2d 267, 274-75, 552 P.2d 674, 678-79 (1976).

53. *SETTLE*, *supra* note 6, at 115; *Nisqually Delta Ass'n v. City of DuPont*, 103 Wash. 2d 720, 725-26, 696 P.2d 1222, 1225 (1985); *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 69, 578 P.2d 1309, 1315 (1978); *Murden Cove Preservation Ass'n v. Kitsap County*, 41 Wash. App. 515, 523, 704 P.2d 1242, 1247-48 (1985).

54. *Victoria Partnership v. Seattle*, 59 Wash. App. 592, 800 P.2d 380 (1990) (articulating clearly erroneous standard in context of review of *substantive* decisions based on SEPA), *review denied*, 116 Wash. 2d 1012 (1991).

been committed."⁵⁵

The *Norway Hill* court indicated that the clearly erroneous standard encompasses the legislative mandate for courts to accord substantial weight to the agency decision.⁵⁶ Moreover, the Washington Court of Appeals has recently emphasized the substantial weight component of the clearly erroneous standard.⁵⁷ The court said that when reviewing negative threshold determinations, it recognizes and defers to the agency's expertise.⁵⁸

C. Summary of Current Case Law Standards of Review

As case law now stands, adequacy of an EIS is reviewed under a broad de novo standard that, by definition, allows the court to form an independent judgment from the evidence. The de novo review, however, is not unlimited because the agency decision must be accorded substantial weight, and the adequacy of the environmental documents must be judged by the rule of reason. In comparison, negative threshold determinations are reviewed under the more narrow clearly erroneous standard that allows reversal of the agency action only when the court is firmly convinced that a mistake has been committed. The clearly erroneous review is additionally constrained by the requirement that the agency decision be accorded substantial weight.

The primary difference between the two standards is that, under the de novo standard of review, the court may substitute its judgment for that of the agency regardless of whether it is firmly convinced that a mistake has been committed. Because SEIS review could apply different standards to review EIS adequacy and negative threshold determinations, the results of litigation become unpredictable unless one standard of judicial review is clearly set forth.

55. *Murden Cove*, 41 Wash. App. at 523, 704 P.2d at 1247-48.

56. *Norway Hill*, 87 Wash. 2d at 275, 552 P.2d at 679.

57. *West 514, Inc. v. County of Spokane*, 53 Wash. App. 838, 844, 770 P.2d 1065, 1068, *review denied*, 113 Wash. 2d 1005 (1989).

58. *West 514*, 53 Wash. App. at 845, 770 P.2d at 1069 (citing *Nisqually Delta Ass'n v. DuPont*, 103 Wash. 2d 720, 725-26, 696 P.2d 1222, 1225 (1985)); WASH. REV. CODE § 43.21C.090 (1989).

Accord Murden Cove, 41 Wash. App. at 524, 704 P.2d at 1248; *Hayden v. Port Townsend*, 93 Wash. 2d 870, 880, 613 P.2d 1164, 1170 (1980), *overruled on other grounds 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).

D. NEPA Standards of Judicial Review

SEPA's language encompasses major portions of its federal counterpart, the National Environmental Policy Act⁵⁹ (NEPA).⁶⁰ Under SEPA and NEPA, similar procedural requirements are set forth to require preparation of a detailed EIS for most major actions that significantly affect the environment.⁶¹ NEPA, however, is essentially a procedural statute, and judicial review is limited to determining whether agencies have conformed with NEPA's procedural requirements.⁶² SEPA, on the other hand, contains a strong substantive policy declaration that "each person has a fundamental and inalienable right to a healthful environment."⁶³

Despite the stronger policy directive of SEPA, Washington courts typically follow leading federal cases interpreting NEPA when construing similar provisions of SEPA.⁶⁴ Because Washington courts will, where applicable, follow NEPA case law, understanding the NEPA judicial standards of review may be helpful in developing the appropriate SEPA standard of judicial review for an agency decision not to require preparation of a SEIS.

Several Courts of Appeals, including that of the Ninth Circuit, have adopted a "reasonableness" standard of review and have held that an agency's decision not to supplement an EIS will be upheld in light of new information if the decision is reasonable.⁶⁵ As part of this reasonableness standard, federal courts have required that agencies take a "hard look" at the

59. 42 U.S.C. §§ 4321-4370a (1982 & Supp. V 1987).

60. Rogers, *supra* note 14, at 34.

61. Peter Eglick & Henryk Hiller, *The Myth of Mitigation Under NEPA and SEPA*, 20 ENVTL. L. 773, 774 (1990).

62. *Id.* at 775. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

63. WASH. REV. CODE § 43.21C.020(3) (1989).

64. *Barrie v. Boundary Review Bd.*, 97 Wash. 2d 232, 235, 643 P.2d 433, 435 (1982); *Eastlake Community Council v. Roanoke Ass'n*, 82 Wash. 2d 475, 488, 513 P.2d 36, 45 (1973). See also *West 514, Inc. v. County of Spokane*, 53 Wash. App. 838, 845, 770 P.2d 1065, 1069 (relying on federal cases construing "significant new information" under NEPA to determine what constitutes significant new information under SEPA), *review denied*, 113 Wash. 2d 1005 (1989).

65. See, e.g., *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987); *Enos v. Marsh*, 769 F.2d 1363, 1373 (9th Cir. 1985); *Nat'l Wildlife Fed'n v. Marsh*, 721 F.2d 767, 782 (9th Cir. 1983), *reh'g denied*, 747 F.2d 616 (11th Cir. 1984); *Massachusetts v. Watt*, 716 F.2d 946, 948 (1st Cir. 1983); *Monarch Chemical Works, Inc. v. Thone*, 604 F.2d 1083, 1087-88 (8th Cir. 1979).

environmental aspects of the project in light of new information.⁶⁶ While a "hard look" must be taken based on new information that comes to light regarding a project, no blind obligation exists to supplement an EIS merely because new information develops.⁶⁷

The U.S. Supreme Court recently held that a decision not to supplement an EIS should be reviewed under the narrow arbitrary or capricious standard set forth in the Administrative Procedures Act.⁶⁸ The court held that the agency's decision was entitled to deference because the question presented for review was a factual dispute requiring the agency's expertise⁶⁹ and deference to "the informed discretion of the responsible federal agencies."⁷⁰ Under the arbitrary or capricious standard, the reviewing court "must consider whether the decision

66. *Nat'l Indian Youth Council v. Andrus*, 501 F. Supp. 649 (D.N.M. 1980), *aff'd*, 664 F.2d 220 (10th Cir. 1981).

An important difference between an agency's decision to file an initial EIS and its decision to supplement an EIS is that the decision to supplement is made in light of an already existing, in-depth review of the likely environmental consequences of the proposed action. Thus, it seems clear that the principal factor that an agency should consider in exercising its discretion to supplement an existing EIS because of new information is the extent to which the new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS. As one court has stated, "[t]here is no benefit in taking another 'hard look' at an action if that view is taken from the same vantage point and overlooks the same environmental panorama." *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984).

67. "When new information comes to light, the agency must consider it, and make a reasoned determination whether it is of such significance to require implementation of NEPA filing requirements." *Oregon Natural Resources Council v. Marsh*, 820 F.2d 1051, 1056 (9th Cir. 1987). *Accord* *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980): "This does not mean, however, that supplementation is required whenever new information becomes available." *Id.* at 1024. "[C]ongress intended that the 'hard look' be incorporated as part of the agency's process of deciding whether to pursue a particular federal action." *Baltimore Gas & Electric v. Natural Resources Defense Council*, 462 U.S. 87, 100 (1983).

68. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375-76 (1989).

69. *Id.* at 376-77. In determining that the issue was a factual dispute, the court noted the following:

Respondents' claim that the Corps' decision not to file a second supplemental EIS should be set aside primarily rests on the contention that the new information undermines conclusions contained in the FEIS, that the conclusions contained in the ODFW memorandum and the SCS survey are accurate, and that the Corps' expert review of the new information was incomplete, inconclusive, or inaccurate. The dispute thus does not turn on the meaning of the term "significant" or on an application of this legal standard to settled facts. Rather, resolution of this dispute involves primarily issues of fact.

Id.

70. *Id.* at 377 (citing *Kleppe v. Sierra Club*, 427 U.S. 380, 412 (1976)).

was based on a consideration of the relevant factors and whether there has been a clear error of judgment."⁷¹

The Court recognized that several Courts of Appeals had adopted the "reasonableness" standard (including the Ninth Circuit) but found that the differences between the standards was not of great consequence.⁷² The Court stated that its decision would not require a substantial reworking of long-established NEPA law.⁷³

The NEPA standard of judicial review encompasses portions of the SEPA standard of review because reasonableness plays an important role under both SEPA and NEPA review. Because of the stronger policy directives of SEPA, courts reviewing SEPA agency determinations will not likely adopt the arbitrary or capricious standard of review. Instead, courts will probably look toward the Ninth Circuit's emphasis on "reasonableness" as strong evidence that SEPA judicial review should continue to incorporate reasonableness into the review process.

IV. THE NECESSITY FOR A PROPOSED NEW STANDARD OF JUDICIAL REVIEW

In assessing and determining a standard of judicial review for agency decisions not to require a SEIS, a core issue is to what extent the court must defer to the agency decision. In ordinary administrative law, this concept of deference is complex.⁷⁴ Under SEPA, however, deference is a less complicated matter because statutory language requires the court to give deference to the agency's decision.⁷⁵

The legislature, by two separate amendments ten years apart, has mandated that the agency determination must be accorded *substantial weight*.⁷⁶ It is significant that these were *amendments* to SEPA, the first occurring approximately two years after SEPA had been enacted. Because the legislature

71. *Id.* at 378 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

72. *Id.* at 377 n.23.

73. *Id.*

74. Tim J. Filer, Comment, *The Scope of Judicial Review of Agency Actions in Washington Revisited — Doctrine, Analysis, and Proposed Revisions*, 60 WASH. L. REV. 653 (1985); Harlan S. Abrahams, *Scope of Review of Administrative Action in Washington: A Proposal*, 14 GONZ. L. REV. 75 (1978).

75. WASH. REV. CODE § 43.21C.090 (1989).

76. *Id.* §§ 43.21C.090, -.21(C).095.

had time to see how courts were interpreting SEPA and then imposed the substantial weight requirement upon the courts, an argument can be made that the legislative intent was to set some limit on judicial discretion to interpret SEPA.

SEPA is a complex set of specific rules, drafted and revised over almost twenty years. Within this intricate set of rules, if the legislature had intended to give the courts unlimited judicial scrutiny for EIS adequacy determinations, such as *de novo* review, it could have mandated that the court take a new look at all of the evidence and make its own independent conclusions from the evidence. The legislature has not done this. Significantly, the SEPA amendments *require* the court to accord the agency decision substantial weight. This legislative mandate is strong evidence of the legislature's intent to guard against overly intrusive judicial scrutiny.

Safeguards against agency abuse of discretion are inherent within the structure of SEPA. First, the court is required only to accord *substantial weight* to the agency decision.⁷⁷ This is not total deference but a *weighted* deference in favor of the agency determination. Second, the agency decision is made by a *responsible official*⁷⁸ of the lead agency. Third, the lead agency must make the draft EIS available to the public and must send copies to the Department of Ecology and other agencies with jurisdiction.⁷⁹ Fourth, the consulted agencies have a period of time within which to comment and/or object to the draft EIS. Fifth, public hearings regarding the draft EIS are required if requested within thirty days of issuance by fifty or more people who either reside within the lead agency's jurisdiction or are adversely affected by the proposal's environmental impact.⁸⁰

Critics of the substantial weight requirement argue that SEPA agencies are not experts and that, therefore, agency decisions should not be accorded substantial weight.⁸¹ These critics argue that judges are experts who are best suited to bal-

77. *Id.* § 43.21C.090.

78. WASH ADMIN. CODE § 197-11-788 (1990).

79. *Id.* § 197-11-455. Agencies with jurisdiction are those agencies with special expertise on the environmental impacts in a proposal or alternative proposal significantly affecting the environment. *Id.* § 197-11-714(2).

80. *Id.* § 197-11-535(2). Public hearings are also required when requested by two agencies who have jurisdiction over the proposal. *Id.*

81. Michael W. Elsass, Note, *A Standard for Judicial Review of Administrative Decisionmaking Under SEPA—Polygon Corp. v. City of Seattle*, 54 WASH. L. REV. 693, 703-04 (1979).

ance economic, social, and policy interests.⁸² This argument overlooks the fact that the lead agency's decision is made by a responsible official after all agencies with jurisdiction are consulted and after a period of time for comment has passed. The consulted agencies possess expertise in relevant environmental matters that concern the project.⁸³ Accordingly, lead agencies, through the responsible official and the other agencies with jurisdiction, may be viewed as experts in the implementation of the Act, and therefore, their decision should be accorded substantial weight.⁸⁴

Judges, on the other hand, are not experts in environmental law. They lack the institutional competence to adequately review every phase of the agency's decision. While judges may be experts at policy formulation, SEPA already contains a specific, detailed policy mandate.⁸⁵ Accordingly, judges are not required to formulate policy while undertaking SEPA review. What is required on review is that judges defer to the agency's institutional competence and accord the agency determination substantial weight.⁸⁶

Even under a *de novo* standard of review, the Washington Supreme Court has recognized that courts must accord the agency decision substantial weight and apply the rule of reason.⁸⁷ By incorporating the substantial weight and rule of reason requirements into the *de novo* standard, the court makes much less than an independent conclusion on the evidence. Accordingly, the label "*de novo*" is an improper characterization of the court's review of EIS adequacy.

In Washington, the clearly erroneous standard is the current standard of review for negative threshold determinations.⁸⁸ A finding is clearly erroneous when evidence supports it, but the reviewing court is firmly convinced that a mistake

82. *Id.* at 704.

83. For example, the Department of Health and the Department of Ecology are agencies with expertise in matters pertaining to water quality standards. *See, e.g.*, WASH. ADMIN. CODE §§ 246-282-0920, 173-201-101 (1990).

84. *But see* Elsass, *supra* note 81, at 703-04 (contending that agencies have limited expertise and, that, accordingly, the court should exercise broad review under SEPA).

85. WASH. REV. CODE §§ 43.21C.010 -.21(C).020 (1989).

86. *Id.* §§ 43.21C.090, -.21(C).095.

87. *Citizens for Clean Air v. City of Spokane*, 114 Wash. 2d 20, 34, 785 P.2d 447, 455 (1990).

88. *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wash. 2d 267, 275, 552 P.2d 674, 679 (1976).

has been made.⁸⁹ Washington courts have recognized that they must accord the agency determination substantial weight when reviewing negative threshold determinations.⁹⁰

When construing NEPA, the Ninth Circuit utilizes a "reasonableness" standard on negative threshold review. An agency decision will not be overturned so long as it is "reasonable."⁹¹ Reasonableness is an important component of negative threshold review because it adds an additional safeguard against agency abuse of SEPA by allowing the court to engage in a flexible balancing test.

Accordingly, to avoid fortuitous results in the judicial review process and to conform the review standard to statutory law, case law, and directives, judicial review of agency decisions not to require supplementation of an EIS should be as follows. The court should employ the clearly erroneous standard *after* first reasonably examining the adequacy of environmental documents and according the agency determination and the applicable SEPA rules substantial weight. Thus, the court's analysis should be a two-step process. First, the court should reasonably examine the adequacy of environmental documents in light of new information and should accord the agency determination substantial weight. Then, if the court is firmly convinced that a mistake has been committed, the agency decision should be overturned.

V. *WEST 514, INC. v. COUNTY OF SPOKANE*: APPLICATION OF THE NEW STANDARD

In a recent case, *West 514, Inc. v. County of Spokane*,⁹² an agency decision not to require preparation of an SEIS was affirmed. The appellate court affirmed a decision of the Spokane County Board of County Commissioners ("Board") approving a site development plan for a proposed retail shopping mall.

In evaluating the effect of the mall on the environment, the Board did not require a SEIS but instead adopted a prior

89. *West 514, Inc. v. County of Spokane*, 53 Wash. App. 838, 844, 770 P.2d 1065, 1068, *review denied*, 113 Wash. 2d 1005 (1989).

90. *West 514*, 53 Wash. App. at 845, 770 P.2d at 1069.

91. *Enos v. Marsh*, 769 F.2d 1363, 1373 (9th Cir. 1985).

92. 53 Wash. App. 838, 770 P.2d 1065, *review denied*, 113 Wash. 2d 1005 (1989). *West 514* has recently been cited with approval in *Pease Hill Community Group v. County of Spokane*, 62 Wash. App. 800, 809, 816 P.2d 37, 42 (1991) (affirming the use of a MDNS and not requiring the preparation of an SEIS).

EIS prepared for a different project on the same site and upheld the issuance of a Mitigated Determination of Non-Significance ("MDNS") by the Spokane County Hearing Examiner Committee.⁹³ The primary issue before the court of appeals was whether the Board should have required a SEIS.⁹⁴ *West 514* is relevant to this Comment because the case involved an underlying EIS and agency decision not to require preparation of an SEIS, enabling observation of the new standard of review.⁹⁵

A. Significant Facts

In 1978, an EIS was completed for a mixed use development proposal that was never constructed on the property involved in the suit.⁹⁶ However, in 1986, a new site development plan was submitted for approval. The proposed plan was for a ninety-seven acre regional shopping mall on a portion of the acreage previously zoned for office/industrial/shopping center use.⁹⁷ The mall was a permitted use under the 1981

93. The case involved both an EIS and an MDNS because the EIS was adopted from a different project on the same site. The MDNS was issued in connection with the defendant's project.

94. WASH. ADMIN. CODE § 197-11-600 (1990) (promulgated pursuant to WASH. REV. CODE ch. 43.21C (1989) (SEPA)) provides:

(4) Existing documents may be used for a proposal by employing one or more of the following methods: . . .

(d) Preparation of a SEIS [supplemental EIS] if there are

(i) Substantial changes so that the proposal is likely to have significant adverse environmental impacts; or

(ii) New information indicating a proposal's probable significant adverse environmental impacts.

95. While *Norway Hill* set forth the rule that negative threshold determinations were reviewed under the clearly erroneous standard, *Norway Hill* did not involve an underlying EIS. *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wash. 2d 267, 275, 552 P.2d 674, 679 (1976).

96. Stanley R. Schultz, *SEPA Omnibus, Using Existing Environmental Documents and Handling Economic Impact Issues: The Effect of the West 514 Case*, in ENVIRONMENTAL & LAND USE SECTION MIDYEAR MEETING & SEMINAR ch. 1 (Washington State Bar Ass'n ed., 1990) (on file with *University of Puget Sound Law Review*).

The proposed development involved 800 acres and included plans for a 700 acre residential development, a 29 acre community shopping center with a building area of 128,000 square feet, a 20 acre office park, and an 80 acre business park. *West 514, Inc. v. County of Spokane*, 53 Wash. App. 838, 840, 770 P.2d 1065, 1066, review denied, 113 Wash. 2d 1005 (1989).

97. The plans included widening Liberty Lake Road, constructing a new four-lane road along the southern perimeter of the property, and improving two road interchanges. *Id.*

zoning regulations. The 1978 EIS evaluated a smaller shopping center and a business and office park.

In evaluating the mall project, the Planning Department of Spokane County ("Planning Department") identified four potential areas of concern: (1) traffic circulation, (2) air quality, (3) floodwater runoff, and (4) possible flooding in a 100-year flood.⁹⁸ The Planning Department adopted a MDNS and required the mall proponent to submit detailed information on these four areas.⁹⁹

The applicant, Liberty Lake Investments,¹⁰⁰ prepared a revised traffic study, conducted additional air quality monitoring, and submitted drainage and runoff plans. These documents were circulated to the agencies responsible for regulating their respective areas of the environment.¹⁰¹ The Planning Department concluded that the MDNS could be issued with the available information and augmented with some "fine tuning," which was to be provided.¹⁰² The MDNS was mailed to twenty-two agencies with jurisdiction.¹⁰³ Notice of the hearing before the Spokane County Hearing Examiner was mailed to 113 other private and public groups and agencies.¹⁰⁴

On December 23, 1986, the Planning Department, in con-

98. Memorandum of Respondent Liberty Lake Investments, Inc. in Support of Decision to Approve at 3, *West 514, Inc. v. County of Spokane* (Wash. Super. Court, Spokane County 1987) (No. 87-2-01106-7) [hereinafter Respondent's Trial Brief] (citing Spokane County Commissioners' Transcript at 26).

99. *Id.*

100. The project proponent and applicant, Liberty Lake Investments, Inc., was a defendant/respondent in this action. *Id.*

101. *Id.*

102. *Id.* at 3 (citing Spokane County Commissioners' Transcript at 27).

103. These 22 agencies included *inter alia* the Department of Ecology in Spokane and Olympia, the Department of Social and Health Services, the Spokane County Health District, the City of Spokane, the City Planning Department, all appropriate water districts, the Department of Natural Resources, the Spokane County Air Pollution Control Authority, and the Washington State Department of Transportation. *Id.* Thereafter, each agency comment recommending a mitigating measure was made a condition of approval. *Id.* at 3 (citing Spokane County Commissioners' Transcript at 28).

Consulted agencies have a responsibility to respond in a timely and specific manner to requests for comments. WASH. ADMIN. CODE § 197-11-502(2) (1990). If a consulted agency does not respond with written comments, the lead agency may assume that the consulted agency has no information relating to the potential impact of the proposal as it relates to the consulted agency's jurisdiction or special expertise. *Id.* § 197-11-545(1).

104. Respondent's Trial Brief at 3 (citing Spokane County Commissioners' Transcript at 29).

sidering the mall project, adopted both the EIS prepared in 1978 for the original project and also entered a MDNS.¹⁰⁵ At a public hearing on January 8, 1987, the Spokane County Hearing Examiner affirmed the Planning Department's decision and approved the site development plan¹⁰⁶. No agencies or private citizens appeared in opposition before the Hearing Examiner. West 514 appealed the Hearing Examiner Decision to the Spokane County Board of Commissioners, which held a *de novo* hearing on February 19, 1987.¹⁰⁷

At the hearing, West 514 presented the testimony of Larry Esvelt, an environmental engineer, concerning his opinion of the impact of the proposed mall on water quality. He testified that although the 1978 EIS acknowledged that a closed landfill located immediately southwest of the project was a "potential aquifer water quality factor," the landfill had been placed on the National Priorities List of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund).¹⁰⁸

Dr. Esvelt expressed two concerns. First, "the injection of water at this site is going to increase . . . the water flow through the area we know is already contaminated by the Greenacres Landfill."¹⁰⁹ Second "this project *could affect* . . . methods for cleanup [of the landfill] and *we don't know* what

105. *West 514, Inc. v. County of Spokane*, 53 Wash. App. 838, 840, 770 P.2d 1065, 1066, *review denied*, 113 Wash. 2d 1005 (1989). The MDNS stated as follows:

The lead agency [Spokane County Planning Department] for this proposal has determined that it does not have a probable significant adverse impact on the environment if mitigated as stipulated below. An Environmental Impact Statement (EIS) is *not* required under RCW 43.21C.030(2)(c). This decision was made after review of a completed environmental checklist and other information on file with the lead agency There are four areas of concern in the development of the Liberty Lake site . . .

(1) A background and continued air quality monitoring program

(2) A detailed traffic and circulation plan

(3) A drainage plan dealing with "208" design concepts on-site and off-site drainage disposal for flood waters as identified by the 100-year Flood Hazard Area ["208" refers to the report of the Spokane County Water Quality Management Program on its investigation of the Spokane-Rathdrum Prairie Aquifer.]

(4) Development in substantial conformance with the submitted site plan except as may be modified by the above studies

Id. at 840-41, 770 P.2d at 1066-67.

106. *Id.* at 841, 770 P.2d at 1067.

107. *Id.*

108. *Id.*

109. *Id.* at 841-42, 770 P.2d at 1067. Dr. Esvelt was referring to the Jeffers well, a water source downgradient from the landfill, that had been identified as containing

they're going to be, but it *could* impact them by spreading the contaminant beyond where they are now. . . ." ¹¹⁰ Although he discussed the location of the Greenacres Landfill, he did not testify that those public water supply systems were contaminated or would ever be contaminated in the future. ¹¹¹

leachate (liquid that percolates through soil or other medium) from the landfill. *Id.* at 842, 770 P.2d at 1067.

110. *Id.* (emphasis added).

111. Respondent's Trial Brief at 28.

At the hearing, Commissioner McBride asked Dr. Esvelt whether he was saying that, if the groundwater was allowed to percolate, it could possibly pick up chemicals from the landfill "... and pull it into the aquifer." Esvelt responded:

Well, no, I was not attempting to imply that. I was implying, though, that increasing the water injection here. There's, there's two impacts: One, the contaminates in the urban runoff itself from this site, which are going to be considerably greater than in a housing development or something like that, need to be considered because this is going to be a high-use site. Secondly that the injection of the water at this site is going to increase perhaps or it appears from the mitigating alternatives that I see, increase the water flow into groundwater through the area we know is already contaminated by the Greenacres Landfill.

Respondent's Trial Brief at 29 (citing Spokane County Commissioners' Transcript at 61).

When pressed further, Esvelt testified:

I don't know that it's, whether it's an increase, it certainly would not be a reduction in the amount of water, and what I'm saying is that we really don't know very much about that Greenacres Landfill and the area of contamination now and need a lot more information.

Respondent's Trial Brief at 29 (citing Spokane County Commissioner's Transcript at 61).

When questioned further by Commissioner Mummey, Esvelt admitted that he did not know if the Greenacres Landfill contamination and the aquifer were "linked."

Commissioner Mummey: Well, Larry, what you are really saying is that this project is not going to have an impact on the Greenacres Landfill. What you're saying is, is that the Greenacres Landfill is a potential for contamination to the aquifer and we don't know all about it yet and we have another 30 years to find out because the life, usually of an old — is probably 50 years, we think. But what you're saying, and tell me if I'm wrong, is that this, your thinking that this shopping center will just be an added source of pollution when you're coupling the two together. That you have one here, and you've got one here? Is that what you're saying?

Larry Esvelt: One, that the, okay, and let's make them separable, *because I don't know that they're linked.* The first is that the Greenacres Landfill is a source of leachate into the aquifer and this project will not have an impact on that as I can. . .

Commissioner Mummey: Yeah, that is what I wanted to have cleared up.

Respondent's Trial Brief at 30 (citing Spokane County Commissioners' Transcript at 62-63).

Later, Mr. Esvelt equivocated further and testified that:

My feeling is that this project could affect those methods for clean-up and we don't know what they're going to be, but it could impact them by spreading the contaminant beyond where they are now, if they're somehow confined, and we don't know that, we only have only one real sample well that's ever

In response, Michael Kennedy, consulting engineer to the mall proponent, testified that the project met the drainage treatment requirements of Spokane County's Water Quality Management Plan and that any landfill leachate would not flow toward the mall.¹¹²

Furthermore, West 514 presented the testimony of an economist, Greg Easton, who reviewed the experiences of Tacoma, Everett, Olympia, and Seattle. Mr. Easton concluded that regional shopping malls had caused a decline in retail sales in the central business districts of those cities. He admitted, however, that Spokane's downtown area was more viable than those in the other cities.¹¹³ Mr. Easton predicted that the region could not generate sufficient retail dollars to support the new mall and the existing retail shopping sites in the near future. This raised the issue of whether "economic competition" must be evaluated by SEPA decision makers.¹¹⁴

been tested that we know the pollutants are there. And no one has gone and looked in all places around.

Respondent's Trial Brief at 30 (citing Spokane County Commissioners' Transcript at 62-63).

Other speakers challenged the ambivalence of Mr. Esvelt's testimony.

[He] didn't say that this project was going to create a groundwater problem. That it would create one he doesn't even say that it could, other than a very remote sense that we could all be hit by an airplane while we're sitting here. He didn't predict that the Greenacres Landfill would create a problem similar to the Colbert Landfill, and I don't think he would say that. So what he doesn't say is what's important and he's, he has given you information, all the information that he can give you. He can't go to the next step and he won't.

Respondent's Trial Brief at 30-31 (citing Spokane County Commissioners' Transcript at 89-90).

After Mr. Esvelt's testimony was challenged, the appellants did not recall him to establish clearly the "probable" impact of the project on any public drinking water supply. Respondent's Trial Brief at 31.

112. *West 514, Inc. v. County of Spokane*, 53 Wash. App. 838, 842, 770 P.2d 1065, 1067, *review denied*, 113 Wash. 2d 1005 (1989).

113. *Id.*

114. SEPA does not require evaluation of economic competition factors. WASH. ADMIN. CODE § 197-11-448(3) (1990). Appellants, *West 514*, contended that the project would have an adverse, indirect impact on the Spokane Central Business District and that these "socio-economic" impacts required preparation of an EIS. Appellants relied primarily on *Barrie v. Kitsap County*, 93 Wash. 2d 843, 613 P.2d 1148 (1980) ("*Barrie II*").

The history of *Barrie II* and the legislative amendment to SEPA following *Barrie II* demonstrate that the appellant's arguments lack merit. *Barrie II* was decided in 1980, and the court's decision relied on the general policy statement contained in WASH. REV. CODE § 43.21C.030(2)(c)(i)-(ii) (1989). The policy statement indicates the state's policy to fulfill the social, economic, and other requirements of its citizens. The court also acknowledged that the Washington Administrative Code regulations in effect in 1980 did not "expressly require a discussion of economic and social effects."

The Board found that the Greenacres Landfill was adequately discussed in the 1978 EIS, that economic or socioeconomic consequences could not be the basis for requiring an EIS, and that no new information was sufficient to require a SEIS.¹¹⁵

It is noteworthy that the court's opinion fails to mention that two of the appellants, far from being citizen participants, may have been directly associated with a competing shopping

Barrie, 93 Wash. 2d at 859, 613 P.2d at 1157. Accordingly, the court required environmental documents to evaluate "socio-economic issues." *Id.* at 861, 613 P.2d at 1158.

Additionally, in response to an argument that socio-economic effects were remote or speculative, the court stated that "possible" socio-economic impacts might exist and that those "possible impacts" were not remote or speculative. *Id.* at 859, 613 P.2d at 1157. Therefore, the court concluded that the county's EIS was inadequate because it did not discuss "socio-economic effects." *Id.* at 860, 613 P.2d at 1158.

In arguably a direct response to *Barrie II*, the legislature amended certain provisions of SEPA in 1983. See 1983 Wash. Laws ch. 117. Section 1 of Chapter 117 amended WASH. REV. CODE § 43.21C.031 and specifically provided that an EIS was required only for projects having a "probable significant adverse environmental impact" (emphasis added).

In response to the 1983 amendment to SEPA, the Washington Administrative Code was also amended. WASH. ADMIN. CODE § 197-11-444 (1990). With these amendments, the code rejects any requirement to evaluate impacts based on "economic competition" or "socio-economic impacts." WASH. ADMIN. CODE § 197-11-448(1)-(3) (1990).

Barrie II's holding, therefore, has been substantially eroded by the 1983 legislative amendments to SEPA and the subsequent amendments to the Washington Administrative Code. See also *SEAPC v. Commack II Orchards*, 49 Wash. App. 609, 744 P.2d 1101 (1987), where the court rejected an argument that SEPA requires evaluation of economic factors. *Id.* at 613-14, 744 P.2d at 1104. Specifically, the court held that an environmental analysis was not required to evaluate "socio-economic" impacts. *Id.* at 615-16, 744 P.2d at 1105 (quoting WASH. ADMIN. CODE § 197-11-448). Furthermore, the court held that adverse impacts on surrounding property values were more related to profits, personal income, and wages and that these items were expressly "exempted" from SEPA. *Id.* at 616, 744 P.2d 1105-06. See also *Concerned Olympia Residents v. Olympia*, 33 Wash. App. 677, 682, 657 P.2d 790, 793 (1983) (holding that lost profit because of increased competition resulting from construction of additional hospitals in Olympia was "not even arguably within the zone of interests protected or regulated by SEPA." But see *SETTLE*, *supra* note 6, at 178-79 (arguing that probable degeneration of a central business district as a socio-economic impact in *Barrie* would be included in an EIS because "an 'existing land use plan and population,' 'aesthetics,' 'historic and cultural preservation,' 'transportation,' and 'public services and utilities' probably would be implicated").

115. *West 514*, 53 Wash. App. at 846-47; 770 P.2d at 1069. The Board's findings may be more specifically summarized as follows:

1. The Greenacres Landfill was adequately discussed in the 1978 EIS. With respect to Dr. Esvelt's comments that it is difficult to predict what will happen at the landfill as a result of its placement on the federal Superfund toxic waste cleanup list, the Board noted that placement on the list requires responsible parties to take appropriate action in light of surrounding land uses, including the proposal. The Board also cited Engineer Kennedy's

center in the Spokane Valley called "University City Shopping Center."¹¹⁶ The trial court and the court of appeals were apprised of this in the Respondent's Brief and in oral argument.¹¹⁷

B. Issues on Appeal and Standard of Judicial Review

West 514 appealed the Board's decision, assigning error to the Board's findings.¹¹⁸ West 514 contended that (1) the West

testimony that drainage from the landfill will not be affected by the proposed storm water drainage basin for the project.

2. Economic or socioeconomic consequences of a shopping center cannot be the basis for the requirement of an EIS.

3. Allegations of toxic substances in storm water runoff and allegations of the limited success of "208 storm water methods" are not "new information" under WAC § 179-11-600 so as to require a supplemental SEIS. The new project is subject to 208 water quality management provisions which requires more stringent standards than the 1978 project.

4. The impacts due to road construction and air quality are less than those predicted in the prior EIS. The condition of approval requiring air quality monitoring and modeling is a mitigating condition which when met will confirm that the project will not have a significant adverse environmental impact.

West 514 at 844-49, 770 P.2d at 1069-71.

116. Brief of Respondent at 4, *West 514, Inc. v. County of Spokane*, 53 Wash. App. 838, 770 P.2d 1065 (1980) (No. 9314-0-III) [hereinafter Respondent's Appellate Brief] (citing Spokane County Commissioners' Transcript, at 87).

Respondent Liberty Lake Investments, Inc. contended that appellants Antone and Sundena Plese were part owners of University City, Inc., a competing shopping center also located in the Spokane Valley.

117. In his argument, counsel for respondent, Liberty Lake, stated:

[I] simply think the court has to look at who are those that are crying for this environmental protection, and who are here before this court today. It isn't the group of citizens that are back here, that have taken the time to come to see you; it is two people that have a vested interest in this project and who have an ownership in a competitor.

And I think that is a factor that the court must consider in evaluating this cry for the environmental protection that is being made by the appellants here today. I think that they stand alone . . . They are alone in their cries for environmental protection.

Verbatim Transcript of Proceedings at 75-76, *West 514, Inc. v. County of Spokane* (Wash. Super. Ct., Spokane County 1988) (No. 87-2-01106-7) (Oral Argument of Jerry R. Neal).

While the appellants consistently characterized themselves as citizen participants, "[i]t stretches the imagination to contend that a competitor falls under the rubric of a citizen participant." Respondent's Appellate Brief at 4.

Critics of the *West 514* opinion may not be aware that two of the appellants may have been competitors rather than citizen participants. Arguably, competitors must be viewed somewhat differently from citizen participants because competitors may not be concerned merely with their fundamental right to a healthful environment.

118. Respondents raised the issue of *West 514*'s standing in an order to show cause hearing in the Superior Court of Spokane County. The court found that *West 514* had standing under SEPA based on *West 514*'s allegations contained in affidavits submitted

514 expert testimony constituted “new information indicating a proposal’s probable significant adverse environmental impacts;”¹¹⁹ (2) the expanded project was a “significant change so that the proposal is likely to have significant environmental impacts;”¹²⁰ and (3) the Planning Department erred in issuing the MDNS.¹²¹

In upholding the Board’s decision, the appellate court reviewed the decision under the clearly erroneous standard,¹²² stating that “agency action may be reversed when the reviewing court is firmly convinced in light of the record and the public policy contained in RCW 43.21C.010 that a mistake has been committed.”¹²³ Additionally, the court stated that “[i]n such reviews the court recognizes and defers to the expertise of the administrative agency.”¹²⁴ As discussed below, the court also implicitly applied a reasonableness standard in evaluating the new information in light of the underlying EIS already in place.

C. Application of the Standard to the Facts

West 514 contended that Mr. Esvelt’s testimony about the impact of the project on water quality constituted “new information” under Wash. Admin. Code § 197-11-600. As such, West 514 asserted that a SEIS was required.¹²⁵

for the *standing hearing only* that run-off from the development would contaminate the aquifer. These affidavits did not become part of the record. *West 514, Inc. v. County of Spokane*, No. 87-2-01106-7, slip. op. (Wash. Super. Ct., Spokane County June 3, 1987).

119. WASH. ADMIN. CODE § 197-16-600(4)(d)(ii) (1990).

120. *Id.* § 197-11-600(4)(d)(i).

121. *West 514*, 53 Wash. App. at 844, 770 P.2d at 1068.

122. *Id.* (citing *ASARCO, Inc. v. Air Quality Coalition*, 92 Wash. 2d 685, 700, 601 P.2d 501, 512 (1979) and *Norway Hill Preservation & Protection Ass’n v. King County Council*, 87 Wash. 2d 267, 275, 552 P.2d 674, 678 (1976)).

123. *Id.* at 845-46, 770 P.2d at 1069 (citing *Nisqually Delta Ass’n v. DuPont*, 103 Wash. 2d 720, 725-26, 696 P.2d 1222, 1225 (1985) and *ASARCO*, 92 Wash. 2d at 700, 601 P.2d at 512). The court noted that WASH. REV. CODE § 43.21C.010 states:

The purposes of this chapter are: (1) to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and stimulate the health and welfare of man; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation.

West 514, 53 Wash. App. at 844 n.4, 770 P.2d at 1068 n.4 (quoting WASH. REV. CODE § 43.21C.010).

124. *Id.* at 845, 770 P.2d at 1069 (citing *Nisqually Delta Ass’n*, 103 Wash. 2d at 725-26, 696 P.2d at 1225).

125. *Id.* at 845, 770 P.2d at 1069.

In analyzing the issue, the court correctly accorded substantial deference to SEPA administrative rule, Wash. Admin. Code § 197-11-600(4)(d)(ii), which states that a SEIS should be prepared if there is "[n]ew information indicating a proposal's *probable significant* adverse environmental impacts."¹²⁶ The court noted that while "probable" is used to distinguish likely impacts from those that are remote or speculative, it "is not meant as a strict statistical probability test."¹²⁷ The court stated that "[a]n impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred."¹²⁸

Additionally, the court noted that the passage of time alone is not "significant new information" and that the *lead agency* must determine whether the new information is significant.¹²⁹ The court reasoned as follows:

Any 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 plague¹³⁰

The court required that the underlying environmental documents be reasonably examined, thus incorporating a "reasonableness" component into the standard of review. Rather than requiring supplementation for any new information, the court instead required supplementation only when the new information became "significant" after a reasonable determination. The court's analysis is consistent with the tendency of Washington courts to adopt a rule of reason when reviewing the adequacy of environmental documents.¹³¹

126. WASH. ADMIN. CODE § 197-11-600(4)(d)(ii) (1990).

127. *West 514*, 53 Wash. App. at 845, 770 P.2d at 1069 (citing WASH. ADMIN. CODE § 197-11-782).

128. *Id.* at 845, 770 P.2d at 1069 (citing WASH. ADMIN. CODE § 197-11-794(2) (1990)).

129. *Id.* at 845, 770 P.2d at 1069 (citing *Barrie v. Kitsap Cy. Boundary Review Bd. (Barrie III)*, 97 Wash. 2d 232, 235, 643 P.2d 433, 435 (1982)).

130. *Id.* at 846, 770 P.2d at 1069 (citing *Barrie III*, 97 Wash. 2d at 235-36, 643 P.2d at 435, which quotes from *Nat'l Indian Youth Council v. Andrus*, 501 F. Supp. 649, 663-64 (D.N.M. 1980), *aff'd sub nom. Nat'l Indian Youth Council v. Watt*, 664 F.2d 220 (10th Cir. 1981) (emphasis added)).

131. See *Citizens for Clean Air v. City of Spokane*, 114 Wash. 2d 20, 33-34, 785 P.2d 447, 455 (1990); *Cheney v. City of Mountlake Terrace*, 87 Wash. 2d 338, 344, 552 P.2d 184, 189 (1976); *SEAPC v. Cammack II Orchards*, 49 Wash. App. 609, 614, 744 P.2d 1101,

According substantial weight to the SEPA administrative rule and applying the reasonableness standard to the evidence, the court found that the testimony of Mr. Esvelt did not constitute significant new information for three reasons.¹³² First, the landfill's potential for contaminating water existed in 1978,¹³³ and accordingly, the placement of the landfill on the National Priorities List was a development that could be expected to occur with the passage of time.¹³⁴ Second, Mr. Esvelt's testimony that runoff "could" affect methods of cleanup of the landfill was too speculative to require a SEIS.¹³⁵ Third, while Mr. Esvelt expressed doubts regarding the use of grass percolation areas to dispose of storm water runoff effectively, the 1978 EIS recognized that runoff water contains contaminants and considered the effective removal of those contaminants. The original project proposed to inject runoff directly into dry wells, and Mr. Esvelt did not suggest that the grass percolation areas as proposed by the current project presented a greater impact.¹³⁶ Because the evidence did not constitute significant new information, the Board's decision was not "clearly erroneous." As such, the court affirmed "the Board's determination that the 1978 EIS was adequate for reviewing the impact of the proposed mall on water quality."¹³⁷

West 514 next argued that Mr. Easton's testimony about the effect of regional malls on central business districts constituted evidence that the proposed mall was a substantial change that was likely to have significant adverse impacts on the environment of downtown Spokane.¹³⁸ By statute, such a change, if proved, requires preparation of a SEIS.¹³⁹

In analyzing the issue, the court accorded substantial deference to the relevant SEPA administrative rule stating that

1104 (1987); *Mentor v. Kitsap County*, 22 Wash. App. 285, 289, 588 P.2d 1226, 1229 (1978).

132. *West 514*, 53 Wash. App. at 846, 770 P.2d at 1069.

133. *Id.* The court noted that "[i]n the prior EIS, W.R. Dobratz of the county engineering department commented that '[t]he old landfill area should not be used for subsurface waste water or storm water disposal . . . because of possible leachate problems.'" *Id.* at 846, 770 P.2d at 1069.

134. *Id.*

135. *Id.* at 846-47, 770 P.2d at 1069.

136. *Id.*

137. *Id.* at 847, 770 P.2d at 1069.

138. *Id.* at 847, 770 P.2d at 1069-70.

139. WASH. ADMIN. CODE § 197-11-600(4)(d)(i) (1990). See also *Save a Neighborhood Env't v. City of Seattle*, 101 Wash. 2d 280, 284, 676 P.2d 1006, 1009 (1987); *SEAPC v. Cammack II Orchards*, 49 Wash. App. 609, 613, 744 P.2d 1101, 1104 (1987).

"economic competition, in and of itself, is not an environmental effect and need not be discussed in an EIS."¹⁴⁰ In this regard, the court found that Mr. Easton's general testimony failed to establish the probability or likelihood that the proposed mall would have a significant adverse impact on the physical environment of downtown Spokane and found that the Board, as the finder of fact, was entitled to disregard Mr. Easton's general predictions as not relevant to the issue.¹⁴¹ In making this finding, the court implicitly relied on the reasonableness standard. Because the SEPA administrative rule and the testimony failed to establish the probability or likelihood of significant adverse impacts on the physical environment, the Board's decision was not clearly erroneous. Therefore, the court affirmed the Board's determination not to require a SEIS on this issue.¹⁴²

Finally, West 514 asserted that the Spokane County Planning Department erred in issuing the MDNS. West 514 argued that the MDNS was conditioned on future environmental studies that had no mitigating effect and that, therefore, the County made a DNS before the full impact of the mall was understood.¹⁴³

In analyzing the issue, the court once again accorded substantial weight to the SEPA administrative rule,¹⁴⁴ which states as follows:

The purpose of this section is to allow clarifications or changes to a proposal prior to making the threshold determination.

(1) In making threshold determinations, an agency may consider mitigation measures that the agency or applicant will implement.

...

(3) [I]f the lead agency specifies mitigation measures on an applicant's proposal that would allow it to issue a DNS, and the proposal is clarified, changed, or *conditioned* to include

140. *West 514*, 53 Wash. App. at 847, 770 P.2d at 1070 (citing WASH. ADMIN. CODE § 197-11-448(3)).

141. *Id.*

142. *Id.* The court noted that if the *probable* effect of competition is downtown blight affecting the built environment, then discussion of the effect in an EIS is necessary. *Id.* at 847-48, 770 P.2d at 1070 (citing WASH. REV. CODE § 43.21C.030(2) and WASH. ADMIN. CODE § 197-11-444(2)).

143. *West 514*, 53 Wash. App. at 848, 770 P.2d at 1070.

144. *Id.* (citing WASH. ADMIN. CODE § 197-11-350).

the measures, the lead agency shall issue a DNS. (emphasis added)

Case law requires that when a governmental agency makes a negative threshold determination, it must show that environmental facts were considered "in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA."¹⁴⁵

The court found that the MDNS was issued only after the Planning Department adopted relevant parts of the 1978 EIS, reviewed the new environmental checklist, and conditioned approval of the project in conformance with the site plan, except as modified by the studies specified in the MDNS.¹⁴⁶ Because the Planning Department complied with SEPA directives by adequately considering environmental factors before it issued the MDNS, the court held that it was not clearly erroneous for the Planning Department to issue the MDNS.

D. Evaluation of the New Standard as Applied in West 514

Because the court applied a clearly erroneous standard of review after reasonably evaluating the underlying environmental documents and according substantial weight to the SEPA rules and the agency decision, the proper result was reached in *West 514*. Unfortunately, after nearly two and one half years in the appellate process, the project was abandoned.

Two of the *West 514* appellants may not have been citizen participants but may have been competitors seeking to delay a project that the citizens of Spokane Valley supported.¹⁴⁷ Because the court reviewed the agency decision under the clearly erroneous standard, after first reasonably examining the underlying environmental documents and according the agency decision substantial weight, the appellants were unable to force the mall proponents to file a SEIS and further delay the project. If a de novo standard of review were employed, the

145. *Id.* at 848-49, 770 P.2d at 1070 (citing *Sisley v. San Juan County*, 89 Wash. 2d 78, 84, 569 P.2d 712, 716 (1977) and quoting *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wash. App. 59, 510 P.2d 1140, *review denied*, 83 Wash. 2d 1002 (1973)).

146. *Id.* at 849, 770 P.2d at 1071.

147. The fact that the citizens of Spokane Valley supported the Liberty Lake Mall is evidenced by petitions containing over 20,000 signatures of Spokane Valley citizens and customers that supported the mall. Deposition of J. Phillip Richley taken on January 31, 1990 and February 1, 1991, *Liberty Lake Investments, Inc. v. Magnuson*, No. C-89-823-RJM (E.D. Wash. 1989).

court could have reached a different result. Similarly, if the court had employed a clearly erroneous standard of review without first reasonably determining whether the underlying environmental documents were adequate, the appellants might have prevailed.

The new standard of review should discourage lawsuits that are brought merely for the purposes of delay and should also enhance the ability of project proponents to forecast their economic costs. Under this standard, SEPA plaintiffs must do more than just persuade the court to substitute its judgment for that of the finder of fact. Instead, to overturn the agency decision, the plaintiffs must firmly convince the court that a mistake has been committed. While the court must accord substantial weight to the agency decision, the court must also employ a "reasonableness" analysis. Thus, if the agency has not acted reasonably in relying on the underlying environmental documents and has made a mistake, then the court may overturn the agency decision.

If this standard of judicial review had been in place prior to the filing of the *West 514* lawsuit, appellants may not have brought the action because much of their case consisted of trying to persuade the court to substitute its judgment for that of the Board.

VI. CONCLUSION

Under Washington law, judicial review of an agency decision not to require preparation of a SEIS may produce fortuitous results because the court may review both EIS adequacy and the negative threshold determination. EIS adequacy is reviewed under a *de novo* standard of review with or without deference to the agency decision. However, negative threshold determinations are reviewed under the clearly erroneous standard of review with deference to the agency decision. The Ninth Circuit reviews negative threshold determinations under a reasonableness standard.

To enable litigants to predict the outcome of SEPA litigation, a more definitive standard of review is necessary. The new standard must effect the clear legislative mandate that agency decisions and relevant SEPA rules be accorded substantial weight. Additionally, to avoid overreaching by agencies, the court should ensure that environmental documents are reasonable.

To fulfill these objectives, the court should initially apply a reasonableness test to judge the adequacy of environmental documents and accord the agency decision and applicable SEPA rules substantial weight and then apply a clearly erroneous standard of review. This standard serves three objectives. First, it allows litigants to predict more accurately the result of challenges to agency determinations not to require a SEIS. Second, it discourages spurious litigation brought merely for the purpose of delay. Finally, it ensures that agencies do not overreach their authority.