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Channeling Development Through Environmental Law in Washington State

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CHANNELING DEVELOPMENT
THROUGH
ENVIRONMENTAL LAW
IN
WASHINGTON STATE

BY

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RESEARCH PROJECT ABSTRACT

Problems of population settlement, urbanization, industrial development, technology advancement, and the depletion and dissipation of the natural resources of Washington state have initiated a variety of responses from the legislature in the form of three major environmental statutes. These are: the State Environmental Policy Act, the Shoreline Management Act, and the Environmental Coordination Procedures Act. Together, these acts constitute a unique legislative response among the states in their attempt to channel development through environmental law.

It is the thesis of this case study that the legal ambit of environmental management is the continuing interaction involving the legislative intent, administrative implementation, and judicial interpretation of environmental law.

The purpose of this case study is to describe this legal ambit by examining the acts themselves, their administrative guidelines, and a corpus of case arising from their implementation; and to suggest a coordinated administrative scheme whereby the intent of these three unique statutes can be more fully realized.

The environmental impact statement was selected as the coordinating vehicle. The master application procedures under the Environmental Coordination Procedures Act was selected as the coordinating framework to process required impact state-

ments and permits.

The conclusion of the study is that environmental management is lacking a theoretical base for its decisions. The evolution of administrative functions has progressed from regulation, to allocation, and finally, to planning.

Who should receive the benefits of development and order? Who should pay the costs of development and order? A theory of planning law needs to be related to the distribution of environmental amenities.

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PREFACE

"Some people have stated our supply program is now inadequate, but I don't think that's true," said the board president. "It's still adequate, only for a shorter time."

You see? Nothing to worry about.

TABLE OF CONTENTS

INTRODUCTION

The abundant natural resources of Washington are responsible for both the success of its economy and the quality of life of its residents. The state of Washington in the Pacific Northwest is a leader, economically, in many ways. Washington's agricultural sector, with its large production of fruits, berries, and other crops places it first among the states in apples, blueberries, red raspberries and hops, to mention but a few. The state is among the top producers of potatoes, winter wheat--it ranks third--pears, grapes, filberts, and strawberries.

More than half of the state is in forests; one sixth of the nation's standing sawtimber is in Washington. Towering Doublas firs and Ponderosa pines, western hemlocks, and red cedar are among the commercially important trees. Forests also have a social value, they are useful as places of recreation, watershed protection, and scenery.

Mineral and mineral related production is a major industry in the state. Sand and gravel, silver, cement, zinc, and lead are the most important products. Large aluminum reduction plants, using refined ore from out-of-state and hydroelectric power have expanded. Aluminum output is 25% of the United States total. Washington is the headquarters for the world's largest producers of aircraft, the Boeing Airplane

Company.

The waters and shorelines of Washington are also important economic resources. The commercial fishing catch--of which salmon account for half the total, followed by halibut and bottomfish--contributes significantly to the state's overall economy. The Port of Seattle is the nation's fourth largest containerized shipping seaport. Seattle is also a major import-export center for the far east.[1]

Water as a resource is abundant, but competing, or potentially competing claims, are placed on it for irrigational, industrial, and recreational purposes, and energy production. Washington has been noted for its abundant supplies of low-cost hydroelectric power. Yet concern is growing over the increased demand for energy within the region and from other regions. Agriculture, aluminum reduction, aircraft production--key industries in Washington--are highly energy-intensive. With few suitable sites for hydroelectric dams remaining, utilities are turning their attention to thermal power plants, including both coal-powered and nuclear-powered ones. The environmental and social costs and benefits associated with coal and nuclear powered plants appear more difficult to assess and accept than those accompanying hydro-electric power.[2]

Thus, the natural resources of the state are essential to its economy. But Washington's natural resources are equally important as places of recreation, capable of rejuvenating the body, and spirit--as its citizens, and visitors to the state, will attest. The diversity and splendor of Washington is

arguably, unequalled anywhere else in the world.

These differing, and often conflicting perspectives concerning the use of land are important. Land development and economic growth, historically, has been based on resource exploitation. Land was perceived as a commodity, its use usually determined by the economic laws of the free market, supply and demand. Indeed, it was the federal government's policy in the nineteenth century to dispose of land in promoting westward expansion.[3]

A new sense of scarcity arose in this country with the settling of the West. This new perspective provided fertile ground for the seeds of the conservation movement. The perception of land underwent a transformation, from land as a commodity to land as a basic natural resource--its use to be determined and managed by the government, for present and future citizens.[4] The task of reconciling these perspectives concerning the use of land, and other basic natural resources, can be termed "environmental management."

The Washington state legislature has responded to these conflicting perspective's over the use of the state's natural resources with a unique set of environmental statutes. This paper is a case study of the three "major" environmental statutes of Washington: the State Environmental Policy Act (SEPA),[5] the Shoreline Management Act (SMA),[6] and the Environmental Coordination Procedures Act (ECPA).[7] The criteria of "major" is used here to denote those environmental statutes which have broad (or possess the potential for broad) applicability--over develop-

ment in the state, and in governmental decision making involving actions which affect the environment. These three statutes were selected because they are the most expansive acts in terms of legislative policy and administrative application. As such, they represent a substantial effort by the legislature to establish the consideration of environmental values as part of governmental decision making in Washington. When considered together, SEPA, SMA, and ECPA are singularly unique among the states, in their attempt to channel development through environmental law.[8]

The concept of environmental management has been given credence by these statutes of Washington which address the problems of population settlement, urbanization, industrial development, technology advancement, and degradation to the environment and dissipation of natural resources.

The intent of this case study is twofold: (1) Describe the legal ambit of environmental management in Washington as it pertains to the three selected environmental statutes; and, (2) Suggest how these statutes might be coordinated in order to provide the participants in land development--the developers, the public, and the administrative decision making body--with a better process of gathering, analyzing, and evaluating environmental information. The processing of environmental information and the administration of a regulatory scheme are the major functions of environmental management.

This case study can also contribute to the growing public awareness regarding land development by indicating how citizens are able to gain access to the decision making process, and how

they may gain standing before the courts for the purpose of reviewing "environmental" decisions.

The legislature sets forth its decisions on basic policy issues, the legislative intent. The duty of carrying out the legislative intent is delegated to the administrative body. The administrative body is authorized to implement the legislative intent--as expressed in the three environmental statutes. The judiciary reviews conflicts arising out of the implementation of the statutes in order to determine: the ascertainment of pertinent facts, the application of proper legal doctrines and rules, compliance with the law, and an appropriate remedy in the case at hand. The judicial review provides us with an interpretation of the law as enacted by the legislature and carried out by the administrative body.

It is the thesis of this case study that the legal ambit of environmental management is the continuing interaction involving the legislative intent, administrative implementation, and judicial interpretation, of environmental law.

The scope of this study is generally confined to the statutes themselves, their guidelines, and the corpus of case law involving these statutes (as of this writing, ECPA does not have a corpus of case law). Telephone conservations with the appropriate state agencies have been conducted in order to ensure the reliability of some of the secondary resource materials used in this study. An analysis and evaluation of the political considerations accompanying the implementation of these statutes is considered to lie beyond the purview of this case study.[9]

The organization of the case study is as follows. Chapter One will discuss the legislative policies as expressed in SEPA, SMA, and ECPA. Primary attention will be given to those sections which are vital to the implementation of the acts (as clearly indicated by their inclusion in numerous court cases or in the coordinative scheme). Those sections containing ambiguous or conflicting language, which is given greater clarity by judicial review, are also included.

Chapter Two presents a discussion of pertinent administrative guidelines established in order to implement the legislative intent of the three environmental statutes. Again, sections that are emphasized are done so because they have proven essential to a vigorous application of the acts or are included in the proposed coordinative scheme.

Chapter Three includes a corpus of case law--Washington Superior Court, Court of Appeals, and the Supreme Court--for 1973-1976. These cases are presented chronologically so as to allow us to discern how the legal ambit of environment management has evolved. Two basic issues are particularly relevant to environmental management which should be kept in mind: (1) What evidence should be considered, and when, by the administrative agency in making its decision? and, (2) Is that decision, and subsequent administrative action, a proper exercise of its legal authority?

Chapter Four presents an outline of the coordinative scheme, with ECPA providing the legal structure for political participation, and the Environmental Impact Statement (EIS) as

required under SEPA, and SMA, in certain cases,[10] functioning as the coordinative vehicle. A hypothetical proposal for development will be posited and followed through the suggested coordinative scheme in order to examine how the system works.

In Chapter Five recommendations for further study regarding environmental law will be presented. This chapter will conclude with a brief discussion on economic growth, environmental law, and the changing role of government in contemporary society.

Note: In all cases where the underline is used, it is for the author's purpose of emphasis, except where otherwise indicated.

CHAPTER ONE

LEGISLATIVE INTENT

The legislative intent of the three selected environmental statutes represents a unique response to resource use, allocation, and preservation (particularly land and water) at the state level. In our democratic system of government, the legislative intent of environmental policy is the implicit policy of the residents of the state. As it will be seen in chapter three, the legislative policy is especially important in judicial review proceedings applying the "clearly erroneous" standard. When the court applies this review standard, the intent of the legislature becomes part of the record by which the court, using the policy as a guide, determines if the administrative body has carried out its duties in the public's interest.

State Environmental Policy Act of 1971 (SEPA)

SEPA is an expression of the legislature's recognition of the interrelationship between man and his environment. It especially notes the profound impact of man's activity on his environment due to the influences of population growth, high-density urbanization, industrial expansion, resource utilization and exploitation, and new and expanding technological advances.[1] One of the primary purposes of SEPA is to promote efforts which will prevent or eliminate damage to the environment.[2] The legislature in SEPA declares that it is the continuing policy

of the state of Washington, in cooperation with federal and local governments, and other concerned public and private organizations "to use all practicable means and measures . . . in a manner calculated to:

> (a) Foster and promote the general welfare; (b) to create and maintain conditions under which man and nature can exist in productive harmony; and (c) fulfill the social, economic, and other requirements of present and future generations of Washington citizens.[3]

Not only is it the policy of the state to merely maintain conditions of harmony, but those involved are to create conditions of productive harmony, this appears to be an action oriented mandate. The responsibility of maintaining and creating this productive harmony, is to those of future generations as well as the present one. The environmental management framework established takes on increasing importance as it is to continue in perpetuity.

The section designating what agencies are to be responsible for carrying out SEPA is all encompassing. RCW 43.21C.020-(2) states this, and also what they are responsible for:

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

All agencies of the state are included as being responsible for carrying out the lofty environmental policy. "Undesirable and unintended consequences" are to be avoided; in other words, environmental values are to be considered to ensure the creation and maintenance of healthful surroundings through deliberation, not degradation by default.

Of particular interest in the legislative declarations is the apparent creation of an "environmental right" which is extended to all people of the state:[4]

> The legislature recognizes that each person has a fundamental and <u>inalienable right to a healthful environment</u> and that each person has a responsibility to contribute to the preservation and enhancement of the environment.[5]

This is a statutorily granted right, not a constitutional one. However the scope of substantive legal rights has been given an expansive ambit by the Supreme Court in <u>Leschi Improvement Council v. State Highway Commission</u>[6] where the court held that the procedural process of SEPA was created by the legislature to protect each person's "fundamental and inalienable right to a healthful environment." (This case is discussed in more detail in chapter three, "Judicial Interpretation".)

The means by which the administrative body is to implement the legislative intent is outlined in 43.21C030, the proce-

dural process. Most of this section is presented below due to its significance as an indication of how the government is to protect the "environmental rights" of the people. This section is used by the court in order to determine the procedural correctness of administrative decision making. It reads as follows.

> The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:
>
> (a) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;
>
> (b) Identify and develop methods and procedures, in consultation with the department of ecology and the ecological commission, which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations;
>
> (c) 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;
>
> (d) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any public agency which has jurisdiction by law or special expertise with respect to any environmental impact involved . . .
>
> (e) Study, develop, and descrive appropriate alternative uses of available resources;
>
> . . .

SEPA is patterned very closely upon the National Environ-

mental Policy Act of 1969 (NEPA), 42 U.S.C.A. Sec. 4321 et seq. A noteworthy difference is that while NEPA applies only to the Federal government and its various departments and agencies, SEPA applies to the state government plus all municipal and public corporations and counties. (SEPA, as originally proposed, would only have included state agencies, but House amendments extended coverage to local governments. See Senate Journal, 1971 Ex. Sess., pp. 1808-1909.)

One of the major questions concerning the implementation of environmental policy occurs in 43.21C.030(2)(c): What constitutes "major actions significantly affecting the quality of the environment?", which require the preparation and submission of an environmental impact statement (EIS). Relevant EIS issues are: When should the EIS be prepared, that is, at what stage in the development process should the EIS be before the administrative agency?; What constitutes an "adequately" prepared EIS?; and, What evidence must be submitted by an administrative agency in order to determine whether or not the major action has no significant impact on the quality of the environment? The court cases involving the implementation of SEPA, which is the subject of chapter three provide a response to these questions.

According to 43.21C090 the decision of the governmental agency is to be accorded substantial weight in EIS matters:

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

The legislature apparently intended to defer judgement to the branch with "expertise" in EIS matters. Also, as a practical consideration, such a deferment would reduce the number of "administrative" cases appearing before the judiciary.

The time limitation for commencing a challenge to governmental action on grounds of noncompliance with the provisions of SEPA must be commenced within sixty days for private party projects, or ninety days for projects to be performed by a governmental agency or to be performed under government contract. Date of commencement begins with the filing of the notice with the department of ecology (DOE), the date of final newspaper publication, or date of mailing, whichever is later. It should be noted that:

> Any subsequent action of the acting governmental agency for which the regulations of the acting governmental agency permit the same detailed statement to be utilized and as long as there is no substantial change in the project between the time of the action and any such subsequent action, shall not be set aside, enjoined, reviewed, or thereafter challenged on the grounds of noncompliance with RCW 43.21c.030(2)(c).[7]

The legislative intent appears to be a desire to avoid, or at least, mitigate, bureaucratic redundancy in the preparation of EISs. Determinations of whether or not a "substantial change" in the project has occured as those involving whether or not a "major action significantly affects the quality of the environment" are usually made by the administrative agency. Of course if the determination is contested and brought before the court, the judiciary has the final work on the matter.

In brief, SEPA is an environmental full disclosure sta-

tute, requiring all agencies of the state to consider environmental values in their decision making and subsequenct actions.

SEPA created a Council on Environmental Policy (CEP) whose primary responsibility was to "adopt initially and amend thereafter rules of interpretation and implementation" of the Act.[8] CEP was given rule making powers for the purpose of providing guidelines to all branches of government. Those guidelines are discussed in the next chapter.

Shoreline Management Act of 1971 (SMA)

SMA is the legislature's recognition that the shorelines of the state are among its most valuable and fragile of natural resources. Mounting pressures of competing uses for the shorelines has necessitated a concomitant increase in the coordination of management and development of the shorelines of the state.

The legislature further finds:

> [T]hat much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefor, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.[9]

SMA established statutory support for coordinated planning and management between the state and local governments in order to protect the public interest associated with the shorelines of

the state. Unlike the provisions in SEPA, SMA expresses legislative acknowledgement of the potential conflict between private property interests and the public interest. The resolution of this possible conflict in the use of shorelines, is to come about through coordinated governmental planning.

While SEPA emphasizes the consequences of governmental decision making on the environment, SMA focuses attention on the management and development aspects of planning. SMA is a more "use" oriented statute than SEPA. Development in SMA means "a use consisting of the construction or alteration of sturctures . . . or any project of a permanent nature which materially interferes with the normal public use of the water or shorelines of the state."[10]

The legislative intent expressed in SMA is to provide for the management of the shorelines ". . . by planning for and fostering all reasonable and appropriate uses. . . and [by] protecting against adverse effects to the public health, the land and its vegetation and wildlife."[11]

The legislature provides an ordering of preferential uses which DOE is to adopt in establishing "shorelines of statewide significance)designated by the legislature and by statutory procedural requirement), and which the local government is to adopt in developing its master program. The master program is the comprehensive use plan for a described area. The ordering of preferential uses which are to be reflected in the implementation programs of DOE and local government indicate that environmental consideration are given priority over economic ones.

Preferential uses are those which:

> (1) Recognize and protect the state-wide interest over local interest;
> (2) Preserve the natural character of the shoreline;
> (3) Result in long term over short term benefits;
> (4) Protect the resource and ecology of the shoreline;
> (5) Increase public access to publicly owned areas of the shorelines;
> (6) Increase recreational opportunities for the public in the shoreline;
> . . .[12]

The legislative intent of land use planning is to encourage those uses which are not dependent upon the shorelines of the state to move inland. In this way, SMA policy seeks to mitigate the intensive demand for the shorelines of the state, pertaining to development, so as to allow maximum access to shorelines by the people of the state. The legislature is explicit in promoting a regulatory system which attempts to keep the shorelines free of non-dependent uses:

> In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon the use of the state's shoreline. . . Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.[13]

The public's interest in the access to, and use of, the shorelines, is the subject of legislative intent in SMA. Even in the provisions of the master program which allow for the varying of the application of use regulations of the program, the

consideration of the public interest is promoted: "Any such varying shall be allowed only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect."[14] The question of what constitutes a substantial detrimental effect is not further defined. In light of SEPA, it may be assumed that a "varying action" which did not have a substantial detrimental effect would require a negative delcaration of significance (Washington Administrative Code (WAC) 197-10-340 "Threshold Determination Procedures", discussed in chapter two in more detail).

The administration of the development permit system to manage shoreline use, "shall be performed exclusively by local government."[15] Sec. 90.58.180(1) provides that a person aggrieved by an order of the local government concerning the granting or denying of a development permit may obtain a review in the superior court. The DOE or the attorney general may obtain review of any final order granting a permit, or granting or denying an application for a permit issued by a local government.[16] Whereas SEPA made no provision for court review, SMA makes it explicit that all aspects of the regulatory system shall be reviewable by the court: "Rules, regulations, designations, master programs, and guidelines shall be subject to review in superior court."[17]

A vigorous application of SMA is intended by the legislature in its direction to the courts to give the Act a liberal construal: "This chapter is exempted from the rule of strict construction, and it shall be liberally construed to give full

effect to the objectives and purposes for which it was enacted."[18]

The overall intent of SMA is to recognize that coordinated, rational planning can prevent the "inherent harm in an uncoordinated and piecemeal development " of the state's shorelines.

Environmental Coordination Procedures Act of 1973 (ECPA)

The primary legislative intent of ECPA is twofold: (1) Reduce the numerous permits and related documents required for project approval from state and local agencies; and (2) Provide the public with a better access in expressing its views in relation to applications to state and local agencies. The legislative purposes of ECPA are provided below and they are to be considered the criteria for evaluating the effectivness of the suggested coordinative scheme posited in chapter four. The purposes of ECPA are to:

> (a) Provide for an optional procedure to assist those who, in the course of satisfying the requirements of state government prior to undertaking a project which contemplates the use of the state's air, land, or water resources, must obtain a number of permits, from the department of ecology and one or more state or local agencies by establishing a mechanism in state government which will coordinate administrative decision-making procedures. . . pertaining to such documents.
> (b) Provide to members of the public a better and easier opportunity to present their views comprehensively on proposed uses of natural resource and related environmental matters prior to the making of decisions. . .
> (c) Provide to members of the public who desire to carry out . . . projects within the state of Washington a greater degree of certainty in terms of permit requirements of state and local government.
> (d) Provide better coordination and understanding between state and local agencies in the administration of the various programs relating to air, water, and land resources.
> . . .[19]

It must be under scored that ECPA is an optional procedure, and as such, lacks the force as contained in SEPA and SMA.

The optional nature of ECPA is again indicated in 90.62-.404(1): "Any person proposing a project may submit a master application to the department [DOE] requesting the issuance of all permits necessary prior to the construction and operation of the project in the state of Washington."

ECPA is a state permit system, where permit is "any license, permit, certificate, certification, approval, commpliance schedule, or other similar document pertaining to any regulatory or management program"[20] which contemplates the use of the state's resources, that is required to be obtained prior to constructing or operating a project. SMA has a bearing on ECPA as permit also means a substantial development permit under SMA, and "any permit, required by a local government for a project, that the local government has chosen to process pursuant to SMA."[21] Project under ECPA is "any new activity or any expansion of or addition to an existing activity, fixed in location."[22]

ECPA has provisions for apublic hearing where the applicant may submit "any relevant information and material in support of his applications, and members of the public may present relevant views and supporting materials in relation to any or all of the applications being considered."[23]

As of this writing, there is no corpus of case law under ECPA but the act does provide that the "pollution control hearings board" is authorized to review decisions issued by DOE except when a substantial development permit is under con

sideration, where the shorelines hearings board created under SMA, RCW 90.58.170, has authority for review. Administrative review under ECPA is confined to the restrictive standards for judicial review as set out by the Administrative Procedures Act (APA) RCW 34.04.130(5), and neither Board has power to review the facts de novo because APA sec. 130(5) limits review to the record below, except in cases of procedural irregularity. Judicial review under ECPA is governed by APA in contested cases and limits the reviewing body's discretion to the reversal of the administrative decision if, inter alia, it is "unsupported by material and substantial evidence in view of the entire record as submitted; or . . . arbitrary and capricious."[24]

The guidelines governing the master application procedure will be presented in the next chapter. But the optional nature of ECPA is the biggest obstacle in the act actually functioning as a coordinative mechanism. The potential for an effective permit process system has been established by the legislature.

Considered together, SEPA, SMA, and ECPA provide the necessary statutory framework in which the proposals for development can be channeled through a structure of environmental law. The administrative implementation aspect of environmental management is the subject of the next chapter.

CHAPTER TWO

ADMINISTRATIVE IMPLEMENTATION

The purpose of administrative implementation is to carry out the intent of the legislature as the administrative agency has been so authorized to do. In providing the legal means of carrying out the intent of the legislative branch of government, it becomes necessary for the administrative branch to establish a system of guidelines interpreting and implementing the legislative act.

Guidelines Interpreting and Implementing SEPA

In 1974, the Washington State Legislature established a new agency, the Council on Environmental Policy (CEP), and charged it with the responsibility for adopting "rules of interpretation and implementation" of SEPA. After extensive drafting and public hearings, CEP adopted final SEPA guidelines on December 12, 1975. These guidelines became effective January 15, 1976.

As directed by the Legislature, CEP ceased to exist and its duties were transferred to the Department of Ecology (DOE) on July 1, 1976. After many petitions for change and several meetings and public hearings, DOE adopted guidelines amendments in December, 1977. These became effective on January 21,1978.[1]

The pertinent issues concerning the implementation of SEPA and the guidelines are: authority to establish guidelines,

purpose, scope and coverage, definitions of action where the preparation of an EIS might be involved, timing of the EIS process, scope of a proposal and relation to EIS, threshold determination, EIS preparation responsibility, and the major elements of a draft EIS. This section will end with a discussion of the rules of judicial review applicable to the implementation of SEPA.

The authority to promulgate SEPA guidelines was granted in RCW 43.21C.110, in which the legislature stated that it would be the duty of the Council "To adopt initially and amend thereafter rules of interpretation and implementation."

The purpose of the guidelines is twofold. (1) To establish guidelines interpreting and impoementing SEPA. Each state and local agency of government must adopt its own rules, ordinances or resolutions consistent with Chapter 197-10 Washington Administrative Code (WAC), "Guidelines Interpreting and Implementing the State Environmental Policy Act". And (2) To establish methods and means of implementing SEPA in a manner which reduces duplicative and wasteful practices, establishes effective and uniform procedures, encourages public involvement, and promotes certainty with respect to the requirements of the act.[2] (Note the similarity in language with the purpose of ECPA.)

The guidelines are important in a legal sense in that compliance with the guidelines of Chapter 197-10 WAC and agency guidelines consistent therewith, "shall constitute complete procedural compliance with SEPA for any 'action' as defined in WAC 197-10-040(2)." Thus, the guidelines are used by the court in

the judicial review of actions relating to the implementation of SEPA.

According to WAC 197-10-040(2), "action" means:

> (2) [A]n activity potentially subject to the environmental impact statement requirements of RCW 43.21C.030-(2)(c) and (2)(d). . . All actions fall within one of the following categories:
> (a) Governmental licensing of activities involving modification of the physical environment.
> (b) Governmental action of a project nature. This includes and is limited to:
> (i) the decision by an agency to undertake any activity which will directly modify the physical environment, whether such activity will be undertaken directly by the agency or through contract with another, and
> (ii) the decision to purchase, sell, lease, transfer or exchange natural resources, including publicly owned land, whether or not the environment is directly modified.
> (c) Governmental action of a nonproject nature. This includes and is limited to:
> (i) the adoption or amendment of legislation, ordinances, rules or regulations which contain standards contolling use or modification of the physical environment;
> (ii) the adoption or amendment of comprehensive land use plans or zoning ordinances;
> (iii) the adoption of any policy, plan or program which will govern the development of a series of functionally related major actions, but not including any policy, plan or program for which approval must be obtained from any federal agency prior to implementation;
> (iv) creation of, or annexations to, any city, town, or district;
> (v) adoptions or approval of utility, transportation and solid waste disposal rates;
> (vi) capital budgets; and
> (vii) road, street and highway plans.

As is evident, the extent of governmental activity which is subject to the provisions of SEPA is indeed expansive. While the listing of "categorical exemptions" in WAC 197-10-170 are too numerous to mention, it should be noted that (6) under said section exempts the "activities of the legislature. All action of the state legislature are hereby exempted: Provided, That this

subsection shall not be construed to exempt the proposing of legislation by any agency."

The guidelines defining "action", it should be emphasized, became effective subsequent to the court cases discussed in chapter three. As is clear in that discussion, many of the questions concerning what constitutes an "action" have been resolved in the most recent set of guidelines. This is in keeping with the purpose of the guidelines, promoting "certainty with respect to the requirements of the act."

The timing of the EIS process is an essential element of the guidelines. The vigorous application of SEPA is dependent upon the consideration of environmental values, and the EIS represents the principal means of identifying and examining those values. WAC 197-10-055 states:

> (1) The primary purpose of the EIS process is to provide environmental information to governmental decision-makers to be considered prior to making their decision. The process should thus be completed before the decisions of an agency commit it to a particular course of action. The actual decision to proceed with many actions may involve a series of individual approvals or decisions. The threshold determination and the EIS, if required, should ideally be completed at the beginning of the process. In many cases, however preliminary decisions must be made upon a proposal before the proposal is sufficiently definite to permit meaningful environmental analysis. All agencies shall identify the times at which the EIS process must be completed either in their guidelines or on a case by case basis. The lead agency should require completion of the threshold determination and EIS, if required, at the earliest point in the planning and decision-making process when the principal features of a proposal and its impacts upon the environment can be reliably identified.
>
> (2) At a minimum, the threshold determination and any required EIS shall be completed prior to undertaking any proposed major action.

The difficulty in the EIS process is that numerous decisions must be made upon a proposal before there is available, adequate boundaries of the impact of the project. The notion of when an impact upon the environment can be "reliably" identified is a judgement by the administrative agency, which is open to potentially conflicting interpretations by the developer, the public, and the court, if the decision is contested and brought before the court for review. (The court has held that an administrative decison on the impact of a rezoning action--no EIS required--could be changed once, at a later time, additional information was made available which would define the proposal with more clarity, see Narrowsview v. Tacoma, chapter three.)

The scope of a proposal and how extensive an EIS must be in its assessment of impact is a recurring question. Often, projects have been divided up, "segmented" by those hoping to avoid EIS requirements. Future governmental approvals are often required, and thus, might require an EIS, by one agency, but not by the lead agency. WAC 197-10-060 addresses these problems:

> (2) The total proposal is the proposed action, together with all proposed activity functionally related to it. Future activities are functionally related to the present proposal if;
> (a) The future activity is an expansion of the present proposal, facilitates or is necessary to operation of the present proposal; or
> (b) The present proposal facilitates or is a necessary prerequisite to future activities.
> The scope of the proposal is not limited by the jurisdiction of the lead agency. The fact that future parts of a proposal will require future governmental approvals shall not be a bar to their present consideration, so long as the plans for those future parts are specific enough to allow some evaluation of their potential environmental impacts. Acting agencies and lead agencies should be alert to the possibility that a pro-

> posal may involve other agencies with jurisdiction which may not be taking any action until sometime in the future.

(For example, in a proposal for a plat approval, another agency with jurisdiction may be the appropriate sewer district, even though the sewers may not be installed until several years later.)

Subsections 197-10-060(3) and (4) address the extent of EIS assessment and "segmentation" respectively:

> (3) The impacts of proposal include its direct impacts as well as its reasonably anticipated indirect impacts. Indirect impacts are those which result from any activity which is induced by a proposal. These include, but are not limited to impacts resulting from growth induced by the proposal, or the likelihood that the present action will serve as a precedent for future actions. Contemporaneous or subsequent development of a similar nature, however, need not be considered in the threshold determination unless there will be some causal connection between this development and one or more of the governmental decisions necessary for the proposal in question.
>
> (4) The lead agency may divide proposals involving extensive future actions into segments, with an EIS prepared for each segment. In such event, the earlier EIS shall describe the later segments of the proposal and note that future environmental analysis will be required for these future segments. The segmentation allowed by this subsection shall not be used at the threshold determination stage to determine that any segment of a more extensive significant is insignificant. . .

A lead agency cannot segment a proposed project in order to reduce its significance. A proposal is to be considered holistically. Indirect impacts which should be included in an EIS are those which may be growth-inducing, such as the adoption of a zoning ordinance which will encourage or tend to cause particular types of projects. A project, such as the construction of a condominium, to be located in an area of single family dwel-

ling, would constitute a significant change in the area. Thus, the adoption of a zoning ordinance allowing the project to proceed would be within the guidelines requiring the preparation of an EIS.

The reamining EIS issue to be considered before a brief listing of the contents of the EIS is given, is the critical one: whether or not the proposal will result in a significant adverse impact upon the quality of the environment. The guidelines recognize that when several marginal impacts are taken together, this could result in a significant adverse environmental impact.[3] The guidelines make it explicit that the determination of whether or not an EIS is required, is not merely a matter of weighing the benefits and detriments of the proposal. They are more expansive in their language. WAC 197-10-360(3) read:

> It should also be remembered that proposal designed to improve the environment (such as sewage treatment plants or pollution control requirements) may also have adverse environmental impacts. The question at the threshold determination level is not, whether the beneficial aspects of a proposal outweigh its adverse impacts, but rather if the proposal involves any significant adverse impacts upon the quality of the environment. If it does, an EIS is required. No test of balance shall be applied at the threshold determination level.

It is interesting to compare the above language with that of the act itself, in which no mention is made of "adverse" impacts. Only if a major action significantly affected the quality of the environment, would an EIS be required. However, according to the guidelines, any significant adverse impact requires an EIS. It seems in determining whether or not a proposal would have an adverse, rather than merely a significant, impact,

some weighing of benefits and detriments is necessary.

The preparation of the EIS may be done by a private applicant or his agent, or by an outside consultant retained by either a private applicant or the lean agency. Nevertheless, the assurance that the EIS is prepared in a responsible manner and with appropriate methodology is the responsibility of the official within the lead agency. "The responsible official shall direct the areas of research and examination to be undertaken, as well as the organization of the resulting document."[4]

The two principal elements in the EIS are the summary of the contents and eight subelements which constitute the major part of the text. The summary if often used by agencies other than the lead agency as an aid in decision making. If the impacts cannot be predicted with certainty, the reason for uncertainty together with the more likely possibilities are to be concisely stated.[5] The summary is to include a brief description of the following:

> (a) The proposal, including the purpose or objectives which are sought to be achieved by the sponsor.
> (b) The direct and indirect impacts upon the environment which may result from the proposal.
> (c) The alternatvies considered, together with any variation in impacts which may result from each alternative.
> (d) Measures which may be effected by the applicant, lead agency, or other agency with jurisdiction to mitigate or eliminate adverse impacts which may result from the proposal.
> (e) Any remaining adverse impacts which cannot or will not be mitigated.[6]

The eight sections which comprise the major part of the EIS are to describe: the name and location of the proposal; existing environmental conditions; the impact of the proposal on the

environment; the relationship between local short-term uses of man's environment and maintenance and enhancement of long-term productivity; irreversible or irretrievable commitments of resources; adverse environmental impacts which may be mitigated; alternatives to the proposal; and, unavoidable adverse impacts.[7] Generally, these sections reflect the legislative intent expressed in SEPA regarding how the policies of SEPA are to be implemented.[8]

Rules and guidelines adopted pursuant to SEPA are to be in accordance to, and subject to, the scope of judicial review, as expressed in the Administrative Procedure Act, (APA)(RCW 34.-04.120 and 34.130. Sec. 120 reads: "Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusion of law."

Sec. 130 of the APA describes the scope of judicial review which the court applies in examining administrative decisions:

> (6) The court may affirm the decision of the agency or remand the case for further proceeding; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (a) in violation of constitutional provisions; or
> (b) in excess of statutory authority or jurisdiction of the agency; or
> (c) made upon unlawful procedure; or
> (d) affected by other error of law; or
> (e) clearly erroneous in view of the <u>entire record</u> as submitted <u>and the public policy</u> contained in the act of the legislature authorizing the decision or order; or
> (f) arbitrary or capricious.

The "clearly erroneous" standard of review entitles the court to

review with the most expansive latitude, the decision of the agency involved in a contested case. The "clearly erroneous" standard can be applied when it is necessary to determine the consistency between the legislative intent of the act and the means of implementing that intent as performed by the administrative agency in question.

Guidelines Implementing SMA

The legislature has recognized that the shorelines of the state are a valuable and fragile resource. Moreoever, they are a limited asset. They cannot be increased but there exists the possibility that their value will diminish without a sound and comprehensive management program.

There are three chapters of the Washington Administrative Code providing guidelines to carry out the intent of SMA which is to provide for the management of Washington's shorelines by planning for and fostering all reasonable and appropriate uses. These are: "Final Guidelines" implementing SMA, WAC 173-16; "Permits for Substantial Development on Shorelines of the State", WAC 173-14; and, "Adoption of Designations of Wetlands Associated with Shorelines of the State:, WAC 173-22.

As required by SMA[9] the final guidelines are to: "Serve as standards for implementation of the policy of chapter 90.58 RCW for regulation of uses of the shorelines; and, Provide criteria to local governments and the department of ecology in developing master programs."[10] The three parts of the SMA guidelines to be discussed are: the Master Program, the Natural Sy-

stems, and, the Use Activities.

The local government is to develop the master program in order to provide an objective guide for regulating the use of shorelines. The master program should indicate the local policies for the development of shorelands and state how these policies relate to the goals of the local citizens and to specific regulations of uses affecting the physical development of land and water resources throughout the local government's jurisdiction. The master program is general, comprehensive, and long range in nature. The policies, proposals, and guidelines are not directed toward any specific sites and are to include all land and water uses, their impact on the environment, and logical estimates of future growth.[11]

The local governments submit a master program to DOE; it must contain a clearly expressed policy statement. The policy statement must reflect the intent of the act, the goals of the local citizens, and specifically relate the shoreline management goals to the master program use regulations. The methodology for developing policy statements require local government to:

> (a) Obtain a broad citizen input in developing policy by involving interested citizens and all private and public entities having interest or responsibilities relating to shorelines. . .
> (b) Analyze existing policies to identify those policies that may be incorporated into the master program and those which conflict with the intent of the act. . .
> (c) Formulate goals for the use of shoreline areas and develop policies to guide shoreland activities to achieve these goals.[12]

Although the local governments provide their own specific

guidelines to reflect the varying differences of shorelines throughout the state, the master program guidelines require the inclusion of several plan elements. These are:

> (a) "Economic development element" for the location and design of industries, transportation facilities, port facilities, tourist facilities, commercial and other developments that are particularly dependent on shoreland locations.
> (b) "Public access elements" for assessing the need for providing public access to shoreline areas.
> (c) "Circulation element" for assessing to location and extent of existing and proposed. . . transportation routes and other public facilities and correlating those facilities with the shoreline use elements.
> (d) "Recreational element" for the preservation and expansion of recreational opportunities through programs of acquisition, development and various means of less-than-fee acquisition.
> (e) "Shoreline use element" for considering:
> (i) The pattern of distribution and location requirements of land uses on shorelines and adjacent areas, including, but not limited to, housing, commerce, industry, transportation, public buildings and utilities, agriculture, education and natural resources.
> (ii) The pattern of distribution and location requirements of water uses including, but not limited to, aquaculture, recreation and transportation.
> (f) "Conservation element" for the preservation of the natural shoreline resources, considering such characteristics as scenic vistas, parkways, estuarine areas for fish and wildlife protection, beaches and other valuable natural or aesthetic features.
> (g) "Historical /cultural element" for protection and restoration of buildings, sites and areas having historic, cultural, education or scientific values.[13]

Of interest is the provision in the "economic development element" requiring the location of developments on shoreland locations to be "particularly dependent" on shoreland locations. This is consistent with the intent of SMA of allowing "alterations of the natural condition of the shorelines. . . when authorized, shall be given priority for. . . industrial and commercial developments which are particularly dependent on their location

on or use of the shorelines."[14]

The Natural Systems part of the guidelines is intended to provide criteria to local governments in the development of their master program. The natural systems categories include marine beaches, spits and bars, islands, estuaries, marshes, bogs and swamps, lakes rivers, streams and creeks, flood plains, Puget Sound , and the Pacific Ocean. Perhaps the natural system subject to the most intensive of competing demands is the Puget Sound.

Essentially the criteria provide a description of the natural system along with the reaons why it must be managed properly. An example of the guidelines description of "estuaries" is as follows:

> An estuary is that portion of a coastal stream influenced by the tide of the marine waters into which it flows and within which the sea water is measurably diluted with freshwater derived from land drainage.
>
> Estuaries are zones of ecological transition between fresh and saltwater. The coastal brackes water areas are rich in aquatic life. . . Because of their importance in the food protection chain and their natural beauty, the limited estuarial areas require careful attention in the planning function. Close scruting should be given to all plans for development in estuaries which reduce the area of the estuary and interfere with water flow. (See WAC 173-16-060(14)) Special attention should be given to plans for upstream projects which could deplete the freshwater supply of the estuary.[15]

The holistic systems approach to shoreland planning is evident here. The other section referred to, deals with "landfill" uses on the shorelines. In keeping with the policy of SMA, it is noted that most landfills destroy the natural character of the land, and therefore "Priority should be given to landfills for

water-dependent uses and for public uses."

The economic development of the central Puget Sound Basin has been stimulated by the fact that the Sound is one of the few areas in the world which provides several deepwater inland harbors (Everett, Seattle, Tacoma, Bellingham). The use of the Puget Sound waters by deep-draft vessels is on the increase due to its proximity to the developing Asian countries. Too, the northern Puget Sound is the site of the oil docking facilities receiving oil from the Alaskan North Slope (along with southern California). This increased trade and docking will attract more industry and more people which will place more use pressure on the Sound in terms of recreation and the requirements for increased food supply. A vigorous application of of guidelines is essential so as to allow the shorelines of the state to be enjoyed by future generations.

The Use Activities sections contains guidelines which represent the criteria upon which judgements for proposed shoreline developments are to be based until the master programs have been completed; and, these guidelines are intended "to provide the basis for the development of that portion of the master program concerned with the regulation of such uses."[16] Since all of the master programs have been completed the use acticities have been incorporated into the local government's regulatory system. The categories of use activities are: agricultural practices, aquaculture, forest management practices, commercial development, marinas, mining, outdoor advertising, signs, and billboards, residential development, utilities, ports and water-related indus-

try, bulkheads, breadwaters, jetties and groins, landfill, solid waste disposal, dredging, shoreline protection, road and railroad design and construction, piers, archeological areas and historic areas, and recreation. In general, the use categories encourage protection of the shorelines where possible, promote public access to shorelands, restrict where possible, development which is particularly dependent on the shoreline for its location and operation, and to reduce where practicable, the adverse impact to the environment due to development.[17]

And lastly, the guidelines mentions the variances and conditional use consideration that are to be included in the local master program. Any permit for a variance or a conditional use granted by the local government under an approved master program must be submitted to the DOE for approval or disapproval. The guidelines state that the granting of variances and conditional uses "should be utilized in a manner which, while protecting the environment, will assure that a person will be able to utilize his property in a fair and equitable manner."[18] This is an attempt by the administrative body to avoid the "taking issue" in the regulation of uses on the state's shorelands.

The permit system for "substantial developments" on the shorelines is administered the local government with the DOE acting primarily in a supportive and review capacity with "primary emphasis on insuring compliance with the policies and provisions of the shoreline management act."[19] A substantial development is any "development which the total cost or fair market value exceeds one thousand dollars, or any development

which materially interferes with the normal public use of the water or shorelines of the state. . . "[20]

In the regulation pertaining to "Permits for Substantial Developments on Shorelines of the State", Sec. 173-14-100 WAC, states SEPA has been determined to be applicable to government permit programs. Thus, all the SEPA guidelines previously mentioned in this chapter pertain to the granting or denying of permits for substantial development. This is an important fact to bear in mind as the suggest coordinative scheme posited in chapter four uses SEPA's procedural process where the EIS is required as the coordinating vehicle. However, an unresolved question is whether the Shorelines Hearings Board, in reviewing a SMA permit, has the authority to invalidate the permit on grounds of noncompliance with SEPA.[21]

In the "Adoption of Designations of Wetlands Associated with Shorelines of the State" the designations are in the form of three volumes of maps incorporated in an appendix. Relevant to the section in SMA authorizing the DOE to designate 'wetlands"[22] is the definition of "wetlands" in the Designation guideline, 173-22-030 WAC:

> (1) "Wetlands" or "wetland areas" means those land extending landward for two hundred feet in all directions as measured on a horizaontal plane from the ordinary high-water mark; and all marshes, bogs, swamps, floodways, river deltas and flood plains associated with the streams, lakes and tidal waters which are subject to the provisions of chapter 90.58 RCW.
>
> (2) "Associated wetlands" means those wetlands which are strongly influenced by and in close proximity to any stream, river, lake, or tidal water, or combination thereof, subject to chapter 90.58 RCW.

If the map designations conflict with the criteria, the latter

control (WAC 173-22-055(1973). Generally the court will defer to the judgement of DOE in interpretative matters, as it is the administrative agency with the technical expertise needed to designate wetlands and associated wetlands.

Master Application Procedures (ECPA)

All ECPA master applications are processed through the administrative headquarters located at DOE in Olympia, the state capitol. The master application center is operated by DOE independently of the department's other programs and administrative offices, pursuant to Chapter 173-08 WAC.

When the center receives a completed master application form, the center forwards copies to all participating agencies (those involved in processing permits pursuant to the procedures of EPCA). At the same time, the center sends a certification form to the local government where the proposed activity is to occur. The certification form is to indicate one of the following:

> (i) The proposal complies with all zoning ordinances and associated comprehensive plans and relevant policies administered by the local government relating to the location of the proposal. Therefore, certification is issued;
> (ii) Local government has no applicable zoning ordinances or comprehensive plans and relevant policies in effect for the subject area. Therefore, certification is issued;
> (iii) The proposal does not comply with either local governments zoning ordinances, associated comprehensive plans or relenat policies in effect for the subject area. Local government elects to process according to this chapter the necessary to certify this proposal;
> (iv) The proposal does not comply with either local governments zoning ordinances, associated comprehensive plans or relevant policies in effect for the subject area. Local government does not elect to process according to this chapter the permits necessary to certify this proposal. Therefore, certification is not issued.[22]

As indicated in (iii) above, the local government becomes a participating agency in the permit process only if the proposal does not comply with the required stipulations. No environmental assessment (under SEPA) is required by ECPA before the local government makes a determination on the proposal. This is important, since the local government's decision not to issue the certification will terminate the application procedure.[23]

A participating state agency is required to send the center a statement indicating whether or not it has an interest in the proposal, pertaining to:

> permits, jurisdictions, or interests including any information and data needed in addition to that provided in the application;
> (b) Whether or not a public hearing would be of value in considering the overall public interest.[24]

A participating state agency would have a better opportunity of assessing the public interest, as well as jurisdiction boundaries, if an environmental assessment of the project were available.

During this time the center is also to "carefully evaluate the project's scope and all interests involved, including overall public interest, to determine if a public hearing is needed."[25]

Once the center receives the requested information from participating agencies, it sends this to the applicant and verifies compliance with SEPA. If this is not already accomplished, the center sends an environmental checklist to the applicant for completion. After receiving the applications, and, if needed, the environmental checklist, the center forwards these to the

participating agencies and identifies the SEPA lead agency (pursuant to WAC 197-10-230(6)) and notifies the agencies of this.[26]

Timing considerations of SEPA--predraft consulation requests (if requested by the applicant), preparing the draft environmental impact statement (if required), and scheduling requirements of local boards, commission and councils--are required to be coordinated with the publication of notice of the master application.[27]

The need for a public hearing is determined by the center, or any agency reviewing a given master application, after considering overall public interest. An agency under the ECPA application process can be "any local government when said government is acting in its capacity as a decision maker on an application for a substantial development permit pursuant to RCW 90.-58.140."[28] If the permit application did not involve a substantial development permit (under SMA), it appears the local government does not have a voice in determining whether or not consideration of the overall public interest warrants the need for a public hearing.

If a public hearing is to be held, it is to coincide with the draft EIS review period when an affirmative threshold determination is made by the lead agency. At the public hearing the applicant may submit additional information to support his application. "Members of the public may present relevant views and supporting materials in relation to any or all of the applications being considered and any SEPA related documents including

a draft EIS."[29] Also representatives of the participating agencies "may present agency views, information, and supporting materials which are relevant to the application under their jurisdictions."[30] The public hearing may be divided into two parts if the hearings officer determines that the project is of a large and complex nature. The initial public hearing would be held to inform the public of the general "intent and impact of the project"[31]; and after written comments had been submitted to the hearings officer, a second public hearing would "inform the public of the tentative decisions of the participating agencies."[32]

After the public hearing(s) the center sends copies of the complete record to the participating agencies and requests a final decision as determined by consultation between the center and the agency representatives. If a public hearing is not held, the center waits twenty days "from the date of last publication of the notice for public comment, and then forward[s] the record to participating agencies."[33]

Final decisions by the participating agencies must include the basis for the conclusion reached, as well as whether they approve or deny the permit, and any conditions of approval.

A party desiring to review a final decision of a substantial development permit must file the request with the shorelines hearings board, within thirty days. A review of a final decision other than the substantial development permit must be filed by the requesting party with the pollution control hearings board within the same time limit. A request to review final decisions

involving both a substantial development permit and any other state permit(s) will result in a single staged hearing held by the joint boards.[34] Any hearing held under ECPA by the "shorelines hearings board or the pollution control hearings board or by the boards jointly, shall be a de novo quasi-judicial hearing."[35] This means that the judgement given in the original hearing is suspended and the de novo hearing proceeds as if the case originated before the board. No attention to the findings and judgement rendered in the initial hearing is considered except as it may be helpful in the reasoning.[36]

In summary, ECPA does provide a legal framework to coordinate and channel proposals for development through an administrative permit system. However, there are some major defects in the master application procedure. The developer, not the public nor the administrative agencies, has the option of using ECPA. Local government should be accorded equal status with state agencies in <u>all</u> proposals for development. Thus, it would have a voice in deciding whether or not a public hearing should be held. Local government seems best suited for assessing the overall public interest concerning the specific proposal for development under consideration in the master application procedure. With the current timing requirements of ECPA, the applicant could proceed with the development after receiving an approval in the final decision and still be subject to litigation on grounds that he did not fully comply with SEPA. If after the public hearing, or if one was not held, after proper notice, a waiting period of sixty days was initiated, a party

could not begin an action to "set aside, enjoin, review, or otherwise challenge"[37] the decision on the grounds that the provisions of SEPA were fully complied with.

We will return to ECPA in chapter four when developing the coordinative scheme. But due to the optional nature of ECPA, there is no corpus of case law associated with this act.

CHAPTER THREE

JUDICIAL INTERPRETATION

The corpus of case law which has evolved from the implementation of SEPA and SMA provides a description of the legal parameter of environmental management in Washington. A desciption and analysis of the legal parameter will also serve to establish a guide in developing the coordinative scheme undertakenin the next chapter. Essentially the corpus of caselaw represents the resolution of conflicts encompassing the actions and claims of the major parties affected when development is channeled through environmental law: the developer, the public, and the administrative body.

In the process of judicial interpretation, the legislative intent and the administrative guidelines formulated to carry out that intent, are given substance through the compelling force of law. This corpus of case law is the foundation upon which the legal system of environmental management is built. In order to discern the evoluation of judicial thought, and thus, examine how the legal system of environmental law has been constructed, it is useful to present the cases chronologically. Generally, the facts of the case at hand are presented first, followed by a discussion of the pertinent issues, and finally, the opinions of the court are presented.

In a management context, two issues should be kept in

mind relating to the administration of environmental law: (1) What evidence should be considered, and when, by the administrative agency in making its decision? and, (2) Is that decision and subsequent administrative action, a proper exercise of its authority--is it in fact, legal?

In describing the legal ambit of environmental management issues (such as, when is a major action "significant"?), it is necessary (besides discussing the holding of the court and subsequent action) to discuss questions of law and questions of fact. The distinction between the two is not always clear, however the Supreme Court of Washington perspective on these questions was expressed by the Federal Supreme Court in NLRB v. Marcus Trucking Co.[1] in which Judge Friendly quoted Professor Jaffe's definition of a finding of fact: "'A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion to its legal effect.'" The Supreme Court of Washington in referring to this distinction in the Leschi[2] cases stated: "This view has long been a part of the common law of this state."

A comprehensive description of the legal ambit thus includes a consideration of: findings of fact, environmental management issues, questions of law and questions of fact, and, the court opinion and remedy rendered by the court.

The case of Stempel v. Department of Water Resources[3] is the first one to be brought before the Supreme Court under SEPA.

A water appropriation application was filed by the Loon Lake Park Company, the intervenor-respondent. When a notice of application was published, objections were received by the DOE including those of the respondents Stempel (and Luiten). The protesters were concerned with numerous pollution and health problems they foresaw as imminent if further water was withdrawn from the lake. (D. of Wat. Res. replaced by DOE, SEPA)

Regarding the application of SEPA, the DOE asserted that whatever pollution, sanitation, sewage, or health difficulties which may arise because of the water use permit issuance, there exist other departments with legislative authority to respond to the problems.

Is a state agency required to comply with the provisions of SEPA, if it has begun deliberation on a proposal but has not yet reached a final decision? Is an administrative agency exempt from the procedural requirements of SEPA if other agencies could respond to the problems involved?

The court concluded that the department's action of approving a water appropriation application, was not finalized prior to the effective date of SEPA and that the department is obligated to incorporate certain provisions of SEPA into its determination in this case. The court found that the enactment of SEPA declares a legislative mandate of the ecological ethic. The court finds that "environmental protection has thus become a mandate to every state and local agency and department. Consideration of environmental values is advanced under SEPA."[4] The court also states:

> We recognize SEPA does not demand any particular substantive result in governmental decision making for it indicates "other considerations of state policy" continue to be the responsibility of the agencies. "Environmental amenities" will undoubtedly often conflict with economic and technical considerations. In essence, what SEPA requires, is that the presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations. It is an attempt by the people to shape their future environment by deliberation, not default.[5]

The court remanded the matter to the DOE for further action in accordance with the decision.

The Stempel case underscores the intent of the legisature by ensuring that the consideration of environmental values is the responsibility of all state and local agencies and departments. The judicial interpretation of SEPA's philosophy, "deliberation not default" provides a framework in which the court views administrative deicsion making regarding environmental management issues.

Both SEPA and SMA are involved in Merkel v. Port of Brownsville.[6] The Port, the defendant, was engaged in the redevelopment of a small boat marina along Burke Bay. The project consists of constructing protected moorage facilities for recreational boasts at Brownsville on Puget Sound. The cutting and clearing of timber in an adjacent upland area was being carried out by the Port. The plaintiff, Merkel, commenced action to enjoin any further cutting and clearing of timber by the Port until it had obtained a substantial development permit as required by SMA. The plaintiff further alleged the provisions of SEPA applied because the project was a "major action sig-

nificantly affecting the quality of the environment."

The Superior Court, the trial court, found the impact statement filed by the Port was deficient in that the Port had failed to consult with and obtain comments from local, state, and federal agencies having jurisdiction over any portion of the project. The court also found that the uplands development constituted a "major action significantly affecting the quality of the environment". The court modified an existing restraining order by limiting its application to the wetlands only, and by removing the upland portion of the project from further restraint. At this point, the petitioners in the case, DOE and the attorney general, instituted the action for a writ of review and stay of proceedings. At issue, was whether or not the development by the Port was so interrelated and interdependent, that both SEPA and SMA had to fully complied with.

The Court of Appeals found that the local government is responsible for the permit system of SMA which controls development on the shorelines of the state. The court states:

> At the very least, the legislative scheme of SMA contemplates a systematic and intelligent management of the shorelines. Emphasis is placed upon a cooperative and unified effort by all government agencies to achieve a use policy consistent with the provisions of the act. It is also clear that lands adjacent to shorelines must also be taken into consideration if the consistency stressed in the act is to be achieved.[7]

It was the Port's contention that references in SMA to lands adjacent to the shoreline constitute nothing more than an admonition to the local government to adhere to the policies of the act in drafting guidelines for shorelines within their juris-

diction. The court did not accept the Port's argument finding that there was nothing in the record to indicate that the proposed construction was ever anything but one project. The Port could not disassociate the uplands from the shorelines in order to frustrate the intent of SMA. At issue was whether the Port could take a single project and divide it into segments for purposes of SEPA and SMA approval. Separating the uplands from the shorelines would not only frustrate the intent of SMA, but such a segmenting would reduce the "significance" of the environmental impacts. The court states: "The frustrating effect of such piecemeal administrative approvals upon the vitality of these acts compels us to move in the negative."[8] To permit piecemeal development, noted the court, would result in "frustration rather than fulfillment" of the legislative intent inherent in the acts.

The Court of Appeals held that in light of the interrelationship of effects of the proposed redevelopment upon wetlands and upon adjacent uplands areas, the Port, once having complied with provisions of SEPA by filing a revised EIS, was not free to proceed cutting trees and clearing the uplands areas without regard to whether or not permits required by SMA had been issued. The writ of review was granted and the Superior Court, hence was directed to reinstate the restraints previously imposed upon the clearing of the uplands area portion of the project. This is important in the recognition that it is the function of the courts to ensure compliance with the procedures specified in SEPA and SMA. Also, the courts will not allow a development to

be segmented in order to frustrate the full implementation of the acts.

In Juanita Bay Vally Community Assoc. v. City of Kirkland,[9] the Kirkland City Council approved the issuance of a grading permit to the Kirkland Sand & Gravel Company, which planned to convert the gravel pit, which it owned, to an industrial park. There is a stream, 35-45 feet above the elevation of Lake Washington (shoreline of state-wide significance), which flows across the property in question. The property is located 3/4 to 1 mile east of the high water mark of the surface of Lake Washington.

The Association, the plaintiff, sought to halt grading, excavating, and filling activity pursuant to the grading permit. The Superior Court denied their writ of mandamus and ancillary relief and the Association appealed.

Major issues of the case concerned both SEPA and SMA: Are the procedural requirements of SEPA applicable to a municipal corporation, City of Kirkland?; Is an EIS required in the issuance of a grading permit, and if so when?; Is the marshland adjacent to the stream an "associated wetland" within the meaning of SMA, such that a permit from the proper governmental authority must be obtained before any activity can be initiated?

Kirkland Sand & Gravel, and the City, the defendant argued that: (1) the strict procedural requirements of SEPA do not apply to the issuance of the grading permit; or (2) if they do, the facts as determined by the trial court make it clear an EIS was not necessary. The Court of Appeals notes that the EIS is

particularly important because:

> It documents the extent to which the particular agency has complied with other procedural and substantive provisions of SEPA; it reflects the administrative record; and it is 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 on the environment.[10]

Kirkland Sand & Gravel and the City contend that the act of issuing a grading permit cannot constitute a "major action" unless it is a legislative action involving the exercise of discretion. The action taken by the City, the maintain, was administrative only, involving no discretion. They argue that the preparation of an EIS prior to the issuance of the grading permit would serve no useful purpose because the city council had no discretion to deny the application for the grading permit once the requirements established by the building department had been met. The court notes that the building code requires the City building official to make numerous judgements as to the type and extent of data to be prepared by the application. The grading plan, argues the Association, itself lists 11 conditions, each of which represents an administrative judgement by the City pertaining to environmental factors.

The court noted that, although the trial court determined that the issuance of the grading permit did not constitute a "major action significantly affecting the quality of the environment", there was no showing that the responsible branch of state government, the City, made such a determination. The court agrees with the Association, in that regardless of whether

the City characterizes its action in issuing the grading permit as ministerial or discretionary, such characterization cannot defeat the express mandate of the legislature requiring the City to carry out the procedural steps of SEPA. Thus, with the enactment of SEPA, all formerely considered ministerial actions become discretionary. The court also agrees with the Association's assertion that the grading permit and excavating project authorized by the issuance of the permit constitutes a threshold act in the implementation of the Company's plan for an industrial park development. The court held SEPA requires that an EIS be prepared prior to the first government authorization of any part of a project or series of project, which, when consider cumulatively, constitute a major action significantly affecting the environment. The court also held that SEPA is an "action forcing" enactment. SEPA, in requiring the consideration of environmental values before a decision is made whether or not an EIS must be prepared, also requires that a decision not to prepare an EIS be based upon a determination that the proposed project is not a major action. As the court states it:

> Before the court may uphold a decision of whether or not a branch of State government decides to prepare an EIS, 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.[11]

The court remanded the cases to the City for its determination of whether it is necessary to prepare an EIS before making a decision on the question of whether or not to issue the Gravel Company a grading permit.

Regarding the Association's assertion that the marshland area adjacent to the stream is an "associated wetland" within the meaning of SMA, the court found the DOE had adopted WAC Chapter 173-22, which includes a series of maps designating "associated wetland" throughout the state and which does not include the marshland in question. The court concluded that the trial court had correctly determined the property in question to be outside the scope of SMA.

In the case of Eastlake Community Council v. Roanoke Associates, Inc., Roanoke, the defendants, purchased lots in Roanoke Bay of Lake Union, which already contained a boat marina comprising 60 covered boat moorages and a boat sales and repair shop. The Roanoke applied to the City of Seattle for a building permit to construct a condominium in 1967. This building permit and another one were granted before SEPA became effective. The third building permit was granted after SEPA became effective. The plaintiffs, Eastlake, upon the granting of the third building permit, brought action against the developer--Roanoke--the City, and the City superintendent of buildings, to enjoin construction of the condominium apartment on the lakeshore.

The case involves: Whether or not the granting of a third renewal of a building permit required the preparation of an EIS? and, Whether Roanoke was required to obtain a permit required by SMA prior to undertaking their substantial development?

Governmental agencies essentially affect the environment in two ways. They grant permission, a part of their regulatory

functions, to private parties who, in turn develop projects affecting the environment. The governmental agencies may initiate and develop projects of their own. The court notes that either function may involve more than one "major action" although there is only one project. Each stage in a series of decision making, if "major", would require an EIS. The court states that the third renewal of the building permit was a "'major action' because it involved a discretionary and nonduplicative stage of the building department's approval proceedings relative to an ongoing major project."[13] The court notes "The fact that the private sector undertakes the project, but only with the approval of the government does not diminish the 'major' impact of the government participation."[14] The court reiterates conclusions reached in Stempel. The granting of the renewal was nonduplicative because environmental issues were not considered in the granting of the original building permit or at any subsequent "major action". The intervention of new information or developments since an earlier "major action" that did not consider environmental factors would make the action nonduplicative.

The EIS also provides for the consideration of the extent to which resources are "irreversably and irretrievably" committed. SEPA is not applicable to a project which has reached that "critical stage" of completion foreclosing the consideration of environmental protection desired by the act. The project, notes the court, prior to the third permit renewal, had not reached that critical stage because the possibility of modification or abandonment remained viable under the substantive

options available in SEPA. "The building department should have begun their review at SEPA's effective date or at such a time after SEPA's effective date that they could anticipate an application for a permit renewal would be made"[15] stated the court. (The question could be posited: How is one to anticipate an application?) The court held that the city should have commenced environmental evaluation of the project's impact prior to the third renewal, an EIS was required.

There is no indication in the Eastlake that a factual determination had ever been made to ascertain whether or not the project was a "major action significantly affecting the quality of the environment". Apparently when the court noted that "other undisputed facts of the case are, no EIS has ever been prepared on the project at any stage of governmental action relating to the project"[16] they were substituting their judgement for that of the administrative in question. When the court found that an EIS was required, it was treating the matter, not as a question of fact, but as a question of law. Yet no factual determination had been made by the appropriate administrative upon which the court could rule.

On the question of whether or not SMA applied in this case, the court held that construction of Roanoke Reef condominium had begun before the effective date of SMA, therefore the project was exempt from the permit requirements of SMA.

Loveless v. Yantis[17] involves an appeal from an order of county commissioners denying application for preliminary approval of a plat for a multifamily condominium on a penisula at

the southern extremity of Puget Sound.

The respondant, Loveless, filed an application with the County Planning Department for preliminary approval of his plat. He was denied, but no reasons were given concerning his denial. Loveless appealed this order to Superior Court. The Coopers Point Association and Water Company, requested permission to intervene. They were denied, but were allowed to submit briefs and argue the merits of the case as amicus curiae. The court then found the failure of the commissioners to provide any reason for refusing to grant preliminary approval to the plan constituted an "arbitrary and capricious" decision (under Administrative Procedures Act) and granted the preliminary approval. Yantis, the appellant, et al, petitioned the Supreme Court for a writ of certiorari authorizing them to intervene.

There are two issues raised in this: (1) Whether or not an EIS is a necessary prerequisite for preliminary approval of the plat? and (2) Whether the intervenor-appellants are entitled as a matter of right to intervene? (administrative procedures issue).

The court held that the decision to grant preliminary approval of the plat for the proposed project constitutes a "major action" citing Eastlake and Stempel, while noting that "no party to the appeal asserts that the project will not significantly affect the environment."[18] Again, there had been no factual determination of whether the proposed project would have a significant effect on the environment. The court seems to be transversing its traditional role in law, in substituting its

judgement for that of the administrative body. The court also noted: "Nor is there any question but that the preliminary approval of a plat involves discreation and in this case is non duplicative."[19]

It was claimed by Yantis in this case that the "intervention of right" is applicable. The court Civil Rule of Superior Court applicable CR 24(a) which states:

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The court found that each of the intervenors has the necessary interest in the property. The Cooper Point Association are all residents of the area affected, and the association has a direct enough interest to challenge the administrative actions.

The court ruled, the nature of a preliminary plat establishes that it is not merely an insignificant stage of the proceeding without real consequence. Decision made by the county, that may have a permanent impact on the intervenors, such as the approval of a preliminary plat, demands that they consider environmental factors.

The Supreme Court cases of Leschi Improvement Council v. Washington State Highway Commission[20] is an appeal from a judgement of the Superior Court dismissing an action to review a state highway commission hearing relating to issues of a limited access and design of a limited access highway. The purpose of the hearing was to establish that a segment of Interstate

Highway 90 which extends from the west shore of Mercer Island to the point where the highway will intersect Interstate 5 in Seattle, would be designated as a limited access facility.

Issues raised in the case included: (1) grounds for standing under SEPA's "right to a healthful environment" clause; (2) standards of judicial review applicable under SEPA; (3) relationship between EIS and each person's "right to a healthful environment; (4) application of SEPA in conjunction with other state statutes; (5) what questions of law are subject to review under SEPA; and, (6) the application of the doctrine of laches.

The Leschi Improvement Council, petitioners/appellants, challenged the findings and order of the Highway Commission, as it relates to the overall design of the highway(not related to the limited access questions)through a petition for a writ of certiorari. They admit they are not abutting property owners entitled to review under RCW 47.52 (Limited Access Facilities Act), but allege they are directly affected by noise and noxious fumes emanating from the motor vehicles which use the highway. They seek to invoke standing under SEPA.

SEPA is interpreted by the courts as having broad applicability. Even though the proceedings in this case were initiated under the Limited Access Facilities Act, the court found the petitioners had standing to raise SEPA issues because "the provisions of SEPA are engrafted on the existing statutory authorizations."[21]

This is the first case in which the Supreme Court has interpreted environmental rights. The grant of standing on the

"right to a healthful environment" was made clear by the court:

> The right of petitioners affected to a "healthful environment" is expressly recognized as a "fundamental and inalienable" right by the language of SEPA. The choice of this language in SEPA indicates the strongest possible terms the basic importance of environmental concerns to the people of this state.[22]

How expansive this grant of standing becomes in future years remains a question. The court in Leschi has granted a substantial right based on the language inherent in "fundamental and inalienable right to a healthful environment". In granting such a legal right the court has granted standing to anyone claiming they are an "aggrieved" party under SEPA. A person "aggrieved" by an administrative action whose legal right is invaded has the right to review that action under the Washington Administrative Procedures Act (APA). A person aggrieved is one whose legal right is invaded by an act complained of, . . ." (Blacks Law Dictionary, 4th ed. rev. 1968) The court has interpreted the legislative grant to the people to a right to a healthful environment as the grant of a legal right. Whenever a branch of state government makes a determination whether or not a proposal may "significantly affect the qualtiy of the environment" , a citizen's legal right is thus at issue. The court reasons:

> The court has the inherent power to adjudicate the adequacy of an EIS as a question of law. . . A determination of adequacy necessarily determines the legal rights of the parties as to the disputed project. . . Under SEPA an agency's decision to approve a project impliedly, if not expressly, determines that the project is consistent with the citizen's fundamental right to a healthful environment. . . These agency conclusions, either expressly or impliedly, are questions of law because they are not 'independent of or anterior to any assertion as to their legal effect'"[23]

How all-encompassing the citizen's legal right to a healthful environment is, pertaining to governmental actions remains to be further clarified by the evolution of case law. However, it is apparent, the Supreme Court is not reticent in its opinions concerning the people and their environment.

The decision in Leschi contains a thoughtful presentation in response to two questions regarding judicial review: (1) What standards of review are appropriate to a trial court examining the record of an administrative agency before it on a writ of certiorari? and, (2) What standards the Supreme Court shall use to review the findings of the trial court?

The Supreme Court has said that judicial review of findings of fact made by administrative agencies is limited to a determination of whether the administrative findings are supported by substantial evidence and have a rational basis.[24] In this case, the highway commission made no finding as to whether the EIS before it was adequate. Such a finding if it had been made, notes the court, would have been an application of law to the facts before it and as such would have been reviewable by the trial court as a question of law.(a new sense of restraint?). "A determination of adequacy" found the court, "necessarily determines the legal rights of the parties as to the disputed project. Courts have inherent power to adjudicate the adequacy of an EIS as a question of law, reviewable on appeal."[25] The Administrative Procedures Act describes the scope of judicial review. The two standards most applied by the court are 34.07.130(6)(e) and (f) which states that the court may remand

the case for further proceedings because the administrative findings, inferences, conclusions, or decisions are:

> (e) clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; or
> (f) arbitrary or capricious.

The trial court may conduct additional fact finding in order to rule on the adequacy of an EIS or they may remand a case holding the administrative agency to a high standard of articulation.[26] The court ruled that "either procedure may be employed by the reviewing court in its discretion."[27] The court also expressed its view in reviewing the findings of the trial court's examination of an administrative agency's action on a writ of certiorari, they would not be disturbed on appeal "if they are supported by substantial evidence."[28]

The relationship between EIS and the citizen's right to a healthful environment is important. The EIS is the principal means by which the administrative agency can evaluate environmental factors in determining whether or not to approve a project. The court ruled:

> Under SEPA an agency's decision to approve a project impliedly, if not expressly, determines that the project is consistent with the citizen's fundamental right to a healthful environment and with the legislatively mandated policy that an agency action allow to citizens the widest practicable range of beneficial uses of the environment without degradation.[29]

As has been mentioned, since the court has held that the adequacy of an EIS is a question of law, it is reviewable by the court.

Regarding the doctrine of laches (making application for redress of negligence in the performance of a legal duty), the

court held that the failure to timely proceed on grounds of violation of the provisions of the SEPA against government projects can be a bar to such suits by its application. The court also held that the application of the doctrine of laches is on a case-by-case basis.

The major issue raised in the minority opinion involved the question of standing and the subsequent grant of a legal right to a "healthful environment" under SEPA. If the majority opinion holds, contends the minority, then any citizen may obtain judicial review of any administrative proceeding involving a decision which affects him, however indirectly. Interesting questions are raised in the Leschi case: What is the legal ambit of a citizen's (environmental) standing under Washington law? How directly must a citizen be affected to gain standing before the court?

A SMA case, State DOE v. City of Kirkland[30] involves the issuance, by the City, of a substantial development permit authorizing the construction of an all-weather moorage facility on Lake Washington by the Biltman, Sanders, Hasson Corporation. The DOE and attorney, plaintiffs, sought a review of this matter by the Shoreline Hearings Board. After a review of the record made before the Board, three members voted to uphold the permit, and three members voted to modify the permit. SMA requires that four members votes are needed to approve the permit, or the decision of the local government holds. The Supreme Court held that the three to three vote, which had the effect of affirming the City's (defendant) position, was a final order reviewable by the Superior Court, even though the statute required four

votes for adoption of a Board decision.

The court's criteria which it applied in order to determine if the administrative orders were reviewable is when: "They impose an obligation, deny a right, or fix some legal relationship as consummation of the administrative process."[31] The tie-vote Board determination resulted in the decision of the City standing affirmed. As such, found the court, it met the previously mentioned criteria and thus, rendered that decision ripe for review.

The Supreme Court affirmed the grant of the writ of mandamus issued by the Court of Appeals. The Superior Court was directed to assume jurisdiction of the case and to review the City's position, as SMA requires four votes for adoption of a Board decision.

The Supreme Court case of Narrowsview Preservation Association v. City of Tacoma[32] arises on an appeal from a judgement of the Superior Court, upholding the validity of a zoning ordinance rezoning an 89 acre tract from single family dwelling to planned residential development. A portion of the 89 acres, sloping down toward the Tacoma Narrows, is within 200 feet of the Puget Sound. Selden, one of the respondents, filed an application to have the property rezoned to planned residential development to allow the construction of approximately 1,100 apartment units in 3-story structures.

The Narrowsview Preservation Association, the plaintiff, brought a writ of certiorari before the Superior Court. They sought to review the actions of the planning commission of city

council of the City of Tacoma, the defendent, who adopted an ordinance which rezoned the 89 acre tract. The Superior Court upheld the validity of the amendment to the zoning ordinance of the City of Tacoma.

Two issues are raised in this case: (1) Whether the City had failed to comply with the requirements of SEPA requiring an EIS in major actions significantly affecting the quality of the environment--in particular, what constitutes "significant"? and (2) Whether the City improperly failed to require a shoreline development permit from the developer?

A question of law pertains to the interpretation of the term "significantly" in SEPA requiring cities and other public agencies to include an EIS in every major action "significantly" affecting the environment. Use of the term, found the court includes examination of the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in an area, and absolute quantitative adverse environmental effects of the action itself, including cumulative harm that results from contribution to existing adverse conditions or uses in affected areas. This represents a change in emphasis, from significant actions to adverse actions.

The planning commission had obtained comments from various affected local and state agencies concerning environmental impact of the proposed rezoning, and held full public hearings. Based upon evidence collected, the commission decided that the rezoning would not have a substantially greater impact on the area than the development of the property under its present

zoning. The court found that the decision was neither arbitrary or capricious. Therefore, an EIS was not required. The court found that it would not be inconsistent however, if at a later time, when additional information was made available, the commission decided to require an EIS for any further approval for "action": such as when application is made for approval of a preliminary plat or building permit. At such times, reasoned the court, more details of the specific structures would be forthcoming and use of the property more clearly defined. This would represent, in fact, a nonduplicative and discretionary decision.

The court held that the reclassification of an area to a planned residential development does not have the effect of authorizing construction upon the property involved: "The act of rezoning does not involve any physical alteration of the land or irrevocable commitment to allow such a physical alteration."[33] Thus, rezoning is not within the meaning of "development" under SMA, and a shoreline development permit is not required. It should be mentioned here that SEPA is primarily concerned with governmental actions that may significantly and adversely affect the quality of the environment; whereas, SMA focuses on the management and development of the state's shorelines. Within the context of SMA, "development" means: "a use consisting of the construction or exterior alteration of structures. . .or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level."[34]

The case of Byers v. Board of Clallam County Commissioners[35] arose when the County Commissioners, the defendant, passed an interim zoning ordinance for a portion of the county. Byers, (citizens, taxpayers) plaintiff and respondent, challenged the ordinance by a writ of certiorari. A subsequent hearing before the Superior Court resulted in the ordinance being held invalid. The Board (and Planning Commission) appealed.

The respondents were granted the writ of certiorari by the Supreme Court as the court recognized it as an appropriate remedy to test the reasonableness and validity of a zoning ordinance; and, to determine if the initial adoption of a zoning code is a major action, requiring an EIS under SEPA, if the adoption of such a code significantly affects the environment.

The Board did not contend that the zoning ordinance was not a "major action" (the ordinance involved, included 30 pages of detailed zoning regulations). Rather, they submitted that the word "action" as used in SEPA is synonymous with the word "project". The court disagreed, citing relevant section of SEPA which states than an EIS is required in every "recommendation or report on proposals for legislation and other major action significantly affecting the quality of the environment."[36] The court held that the adoption of a zoning ordinance is a "major action" in that it is discretionary and nonduplicative. The order of the Superior Court holding Clallam County's interim zoning ordinance invalid, was affirmed.

Hama Hama Company v. Shorelines Hearings Board[37] is a statutory interpretation case. It involves provisions of SMA

relating to standing and time limits for appellate review of the granting of a substantial development permit to Hama Hama, the plaintiff, by Mason County. The granting of the permit was appealed to the Board by DOE and the attorney general. The Board, the defendant, denied motions made by Hama Hama to dismiss the appeal. Thereafter the Superior Court for Thurston County issued a writ of certiorari and, subsequently, entered an order directing the Board to dismiss the appeal because: (1) the attorney general lacked standing to appeal; and (2) the DOE's appeal was untimely. The attorney general and DOE appealed.

The pertinent facts are as follows (dates given since they are at issue). On October 15, 1973, Mason County granted a substantial development permit to the Hama Hama Company to construct a pier on Hood Canal. The DOE received a copy of the permit on October 19, 1973. In response, DOE and the attorney general file "Request for Review" with the Board on November 29, 1973. A copy of this request was in the possession of Mason County officials on December 3, 1973. At the time of issuance of the permit, Mason County had not yet adopted a master program which is to serve as a guideline for the issuance of such permits.

Essentially, the issues in question in this case are: Whether the attorney general is a party to the appeal of the court? Whether the attorney general or only DOE has standing to appeal to the Board, and what is the time limit as to the DOE and/or the attorney general for perfecting such an appeal? And, What is the commencement date of the period for appealing

to the Board?

The Supreme Court held that where a section of a statute deals with an issue in a general manner and where a section of the statute deals with the same issue in a more detailed manner, the latter will be accorded preeminence. Thus, while RCW 90.58-.140 (SMA) essentially deals with the issuance of permits and only incidentally mentions appeals procedures, RCW 90.58.180 (SMA) "is essentially dedicated to describing the appropriate procedures for appeals."[38] This section grants both DOE and the attorney general standing to appeal to the Board, and the time limit is 45 days. The court's opinion here is in keeping with the legislative intent of SMA which states it be "liberally construed to give full effect to the objectives and purposes for which it was enacted."[39]

Regarding when a document is "filed", the Court applied the general rule that a document is "filed when it is actually received by the proper authority . . . in the instant case."[40] DOE and the attorney general are within the time limits for perfecting the appeal.

The decision of the Superior Court was reversed and the case remanded to the Superior Court for Thurston County for further proceedings consistent herewith, so held the court.

In Johnston v. Grays Harbor County[41] Johnston, the plaintiff, sought a writ to review the issuance of a conditional use permit by the County, the defendant, for the construction of a mobile home park. A Mr. Utheim had applied for a conditional use permit to construct and operate a mobile home park of approximately

23 units. The subject property consists of 8 acres in an area zoned for general development in which mobile home parks may be permitted as a conditonal sue. The Board of County Adjustment had conducted hearings, attended by the plaintiff, who opposed the permit. The permit was granted for 13 units, but the Board failed to make a final finding of the potential environmental impact of the proposed project.

The Superior Court denied the writ to review, but remanded the matter to the Board. It found substantial evidence to support the order but had found an environmental assessment to be lacking. Following the remand, an assessment of the environmental impact was prepared, filed, and available for public inspection at the planning office. The Board in a subsequent hearing decided the action may be "major" under SEPA, and yet be deemed not to significantly affect the quality of the environment. Johnston's petition for a writ of certiorari was denied and the appeal followed.

The Court of Appeals held that, while the Superior Court found there had not been compliance with SEPA, the County Board of Adjustment did not err in limiting discussion at the hearing following the remand to "something new", rather than re-duscussing previous matters. It must be emphasized, the remand was for the limited purpose of bringing the action into compliance with SEPA.

The denial of the petition for writ of certiorari was affirmed.

The Supreme Court case Norway Hill Preservation & Protection Association v. King County Council[42] involves the ap-

proving of a preliminary plat for Norway Vista, a proposed housing development, by the King County Council, the defendant. The Association, the plaintiff, petitioned the Superior Court for a writ of certiorari to review the decision. The Assoication specifically challenges the Council's determination that an EIS was not required. The Superior Court denied the writ and the Association appealed from the judgement.

Norway Vista, subject of the preliminary plat, consists of 523 heavily wooded acres, located just south of the city of Bothel. The proposed plat plan for Norway Vista provides for the creation of 198 lots, each with a single family dwelling. Adjoining properties to the east and south have been developed to an urban residential density (approx. 4 dw. units/acre). To the North the land had been cleared and there are scattered residences on ½ to 3 acre parcels.

The Director of the Land Use Management Division of the County Department of Planning had determined that an EIS was not necessary. The County zoning and subdivision examiner recommended approval of the preliminary plat application and concurred with earlier determination that an EIS was not necessary.

After subsequent appeals by the Association and additional hearings the King County Council approved the preliminary plat. Following this decision, the Association petitioned the Superior Court for a writ of certiorari, asserting the Council had acted unlawfully in approving the preliminary plat without requiring an EIS. The Superior Court determined that the Norway Vista Plat was not a major action significantly affecting the environ-

ment. The court further found that King County had acted reasonably and not arbitrarily or capriciously.

The Supreme Court rules that determinations of no significant impact under SEPA, i.e. "negative threshold determinations", require a reasonably broad standard of review: "We believe that in addition to the 'arbitrary or capricious' standard, the broader 'clearly erroneous' standard of review is appropriate."[43] The court determined it was necessary, under the proper scope of judicial review applicable to "negative threshold determinations" made pursuant to SEPA to "consider the broad public policy promoted by that act. Briefly stated:

> the procedural provisions of SEPA constitute an environmental full disclosure law. The act's procedures promote the policy of fully informed decision making by government bodies when undertaking 'major action significantly affecting the quality of the environment.'"[44]

The "clearly erroneous" standard provides the court with a broader review than the "arbitrary or capricious" standard because it mandates a review of the entire record and all of the evidence to support the administrative finding or decision.

The Supreme Court held that the Council's determination that approval of the Norway Vista Plat did not require an EIS was "clearly erroneous". In so holding the court found: Generally, the procedural requirements of SEPA, which are designed to provide full environmental information, should be invoked whenever more than a moderate effect on the quality of the environment is a reasonable probability; In addition to its magnitude, the project will constitute a complete change in the use of the existing areas"(which further defines the judicial interpretation

of "significant").

The appeal to the Supreme Court in Swift v. Island County[45] involves a challenge to a determination made by the planning director of Island County, the defendant, that no EIS under SEPA was required for the approval of three plats and building permits for a development known as "Seabreeze" in Keystone Harbor, Whidbey Island. Action was brought seeking to enjoin work on a subdivision development and an order directing Island County to comply with the provisions of SEPA. The Superior Court entered a judgement of dismissal. Plaintiffs, Swift appealed.

Issues raised in the case are (1) What standard of review is appropriate when a court reviews an agency's "threshold" determination under SEPA and was that standard met? (2) Did the county take a "piecemeal" approach to SMA and SEPA questions presented by a single project? (3) Can agencies issue approvals for a development without seeking assurances that SEPA has been complied with.

The area involved is separated from the waters of Puget Sound by a narrow strip of land, and it is an area of historical significance as it is included in the Central Whidbey Island Historical District, which has been placed in the National Register of Historic Sites. The county planning commission rejected the plat submitted by the Dillingham Development Company. The county commissioners overruled the planning commission and granted preliminary approval.

Shortly after work had begun, appellant, Swift, made a

refuted the findings of the planning director. Thus, the court held that: "in light of numerous agency reports expressing concern as to the effect of development of subdivision on the environment, the county planning director's finding of 'no substantial impact', thereby bypassing a preparation of an EIS, together with various subsidiary findings, were clearly erroneous."[46] As to the standards of judicial review, the writ held as it did in Norway: "The review standards of 'clearly erroneous' . . . best promote that policy of disclosure [of SEPA] by not insulating agency determination from court review by too strict a standard of review."[47]

The final case in chapter three, is Hayes v. Yount[48], a Supreme Court case, coming under SMA (and to a very limited extent, SEPA). The respondent Hayes owns approximately 90 acres of unimproved land, which is a saltwater marsh habitat. The entire site is part of the area designated by the legislature as "shorelines of state wide signigicance". Surrounding land use include three lumber mills, a boat marina and a sewage settlement basin across the slough to the north.

Hayes filed with Snohomish County his application for a substantial development permit. The application sought a permit to operate a solid waste landfill and to continue to expand trans-shipping capabilities and heavy industrial use. Hayes' publication of notice of hearing on the application described the proposed development as a "marine industrial area".

The County determined that the project constituted a "major action significantly affecting the qualtiy of the environ-

ment". An EIS was prepared pursuant to SEPA. The planning staff and planning commission of the County recommended denial of the permit by Hayes. These findings were considered and rejected by the County Commissioners who granted a permit for operation of a solid waste landfilland marine industrial area.

Yount (et al., appellants) filed a formal request for review by the Shoreline Hearings Board. The Board found that the ecological impact of the proposed fill would be insignificant. The Board concluded that the permit was too vague to ascertain the extent to which the proposed use was consistent with the policy set forth in SMA.

Hayes filed in Superior Court petition for review of the the Hearings Board's decision. The court granted Hayes' motion for summary judgement, holding "certain actions of the Shoreline Hearings Board arbitrary and capricious and concluding that as applied to this particular set of facts the order and regulation constitute an unconstitutional taking of property."[49]

Agency action is determined "arbitrary or capricious" if there is no support in the record for the action which is therefore "willful and unreasoning action, in disregard of facts and circumstances."[50]

A question of law is the essential issue in this case: By relying in part on "Use Activity Guidelines for SMA: Landfill Activities", was the Shoreline Hearings Board's decision to vacate the permit a proper exercise of its authority? The Landfill Use Guideline, WAC 173-16-060(14)(c) states that landfills should be located away from water bodies because leachates

from the landfill might reach the water body, having a deleterious effect on the quality of the adjacent water.

The Board vacated the County grant of approval: the court held (even though the Board had not shown proof of harm to adjacent waters from leachates) "We decline to reverse the administrative conclusion of law with respect to WAC 173-16-060(14)(c)."[51]

In commenting on the intent of SMA, when applying the policy of SMA in its holding, the court found that the permit was so vague it rendered virtually impossible, the court's ability to review the consistency of the proposed project with SMA policy. The court noted:

> The policy of preference for water-dependent use reflects the legislative's careful attention to an important concept of environmentally sound based land use planning. Encouraging uses not dependent on the shoreline to locate in inland areas is an effective aid in the resolution of competing demands on our limited shorelines resources.[53]

This concept of encouragement is more than that, encouragement with the compelling force of law, is close to coercion. While the court held the taking issue did not apply in this case, the line between encouragement and unreasonable coercion should be continuously monitored to ensure the rights of private property remain in balance with the public's interest in the use of the shoreline.

As this chapter has demonstrated, the courts in Washington are nothing, if not vigorous in their application of environmental law to development initiated conflicts. It also appears that the court has granted the people of the state a substantive legal right to a healthful environment, the future will tell how that

right proceeds to be further refined by the courts. Will it lead to a more substantive "good faith" effort of administrative implementation? Or will the courts begin making substantive decisions if the administrative body merely adhers to procedural correctness in an attempt to avoid litigation?

In Eastlake, the court stated:

> The particular choice ultimately arrived at, be it abandonment, alteration, or permission to complete construction, is not dictated by SEPA.[6] It is the evaluation of pertinent environmental factors that is mandated.[54]

Footnote 6, if further pursued and expanded, would allow the court to rule on substantive questions. thus, it would appear to be trespassing on the jurisdictional boundaries of the administrative body if it so acted:

> Though a substantive result is not dictated by SEPA. Where adverse environmental impact is indicated, the approval of such a project may reveal an abuse of discretion by the public agency where mitigation or avoidance of damage was possible.[55]

And as we have already seen, whether or not a project may have an adverse impact on the environment, since it affects the legal rights of citizens to a healthful environment, is a question of law, reviewable by the court. The legal ambit of environmental management may indeed be all encompassing.

CHAPTER FOUR

SUGGESTED ADMINISTRATIVE SCHEME

Problems due to urbanization, population settlement, industrial development, technology advancement, and the depletion and dissipation of the state's natural resources, initiated a variety of responses from the legislature. Among the most important and encompassing of these responses were the three environmental statutes which have been discussed in this case study, SEPA, SMA, and ECPA.

SEPA is essentially an environmental, full disclosure law. It requires the consideration of environmental values in all major action (governmental decision which is both discretionary and non duplicative) and SEPA requires the preparation of an EIS when any proposal involves significant adverse impacts on the quality of the environment. Furthermore, the Supreme Court of Washington has apparently granted substantive legal rights to the people, through its interpretation of SEPA, where the legislature declared that the people have a "fundamental and inalienable right to a healthful environment." SEPA is indeed receiving vigorous application from the courts.

The legislature recognizes in SMA that the shorelines of the state are among its most valuable and fragile of natural resources and that it is necessary to initiate a coordinated planning and management program between local and state govern-

ment to ensure that development of the shorelines is consistent with policy expressed in SMA. The regulatory program established under SMA was designed to encourage appropriate shoreline uses.

In ECPA, the legislature expressed the concern of people who share an interest in the development of the state's natural resources. ECPA offers three potential, and essential, assets in the process of channeling development through a legal framework: interagency coordination, public participation, and increased efficiency in processing the developer's application.

The suggested administrative scheme proposes using ECPA's master application procedure as the legal structure for channeling development, and the EIS as the coordinative vehicle.

The EIS is the logical coordinative vehicle for inclusion in the administrative scheme. The courts have determined that the EIS is a document which reflects the procedural and substantive decisions made by the appropriate governmental agencies. They have also found the EIS to be a primary means to coordinate the consideration of environmental values.

The EIS would serve to bring the SMA permit process into the scheme. In Eastlake, a renewal of a building permit for a shorelines development, was deemed a major action, and thus, SEPA applied. Thus, it is clear, the provisions of SEPA overlay the SMA permit process. In Leschi, the court found that the provisions of SEPA are engrafted onto the existing statutory authorizations. Also regarding SEPA and the SMA permit process, SEPA provides that any EIS "shall accompany the proposal

through the existing agency review processes."[1] Therefore, a coordinative scheme which contemplates using the EIS as the coordinating vehicle, would also encompass the SMA permit process.

However, the legislative intent expressed in these three statutes could be more fully realized with certain modifications.

One of the fundamental defects of ECPA is that it is an optional procedure; whether or not the state permit system is utilized is left to the whims of the developer. As a beginning, the master application procedure should be made mandatory for developments with greater than local impact.[2] Generally, a development with a greater than local impact is one which is deemed to have a significant effect on more than one local governmental jurisdiction. Those developments significantly affecting more than one jurisdiction would be required to enter the state master application procedure. This seems reasonable, in that once it has been established more than one political jurisdiction will reasonably and probably be affected, a state public hearing will allow the affected parties to express their views and to submit supporting documents. (A party could be required to be an "aggrieved" party to gain standing before the hearing, see p. 58 of this study.)

Trial legislation could be enacted to test this aspect of the suggested scheme. An incremental approach would be useful to test for defects, and once improvements were made, the procedure could be expanded to include other types of develop-

ments. With the proper research and methodology, a category of developments could be selected which would avoid litigation on the grounds of denial of equal protection.

An applicant seeking a permit(s) for development which needs a major action for its approval, would be required to apply for a special development permit at the county permit information office. A proposal for development which, reasonably and probably, would have a greater than local impact, would be required to complete a master application form. After the applicant completes and submits the necessary forms to the information office, copies are sent to the local and state agencies which might require permits for such development, and to interested parties.

A local hearing examiner would also receive copies of all the forms, documents, and an environmental checklist.[4] The local hearing examiner is appointed by the local legislative body. Legislation could be enacted requiring the examiner not to be a member of the legislature or the local planning body. The state would provide procedural and substantive training for these officials to ensure they are aware of administrative and procedural requirements for hearings and compliance with SEPA. The concept of the local hearing examiner is important. The developer is assured that provisions of SEPA are being complied with, which would help to avoid future litigation, and reduce unsubstantiated challenges to delay to permit process. Also, the public would benefit from a fair hearing conducted by a properly trained official.

After the master application forms (with special development permit application included) have been received by the information office, notice is given for a local public hearing. Participating agencies, local governments (if development would have a greater than local impact) interested parties, and the applicant are notified.

The purpose of the local public hearing is to: (1) Determine whether or not the proposal for development involves any significant adverse impacts on the quality of the environment; and, (2) Determine whether or not the development would likely have a greater than local impact. Decisions are to be written, with specific findings of fact, reasoning, and conclusions as part of the record, reviewable by the court if necessary. Decisions of the hearing examiner are appealable to Superior Court.

The hearing begins only after the hearing examiner and the applicant have received decisions from the various local and state agencies on the proposal for development (those having jurisdiction by law or special expertise). After conducting the hearing and weighing the evidence presented, if the examiner concludes an EIS is required, a declaration of significance is issued. If the examiner decides that the development meets the "greater than local impact" test, the applicant is required to appear at a state public hearing with the draft EIS. If the proposal is considered not to meet the "greater than local impact" test, and no party to the hearing challenges the decision, the applicant must submit the draft EIS at the second phase of the local hearing--the hearing is not terminated under these

conditions. SEPA provisions still apply--circulation of draft EIS to other participating agencies, including the local government and the public. However, the suggested administrative scheme would enable the local government to supervise, and have input into the preparation of the EIS. It should also have review over all stages of the EIS preparation process. This is provided by granting the local government equal status with participating state agencies in the state hearing.

In this suggested administrative scheme, the local government's role does not conclude with the issuance of the certification form, as it does now under current provisions of ECPA's master application procedure. Making ECPA mandatory has been perceived by local government as further centralization of the land development permit process. Under this scheme local government retains some autonomy over the the permit process and increases its autonomy over the EIS process.

The state hearing is required because the development meets the "significant adverse impacts" test and the "greater than local impact" test. In this case, a special development permit can be granted only after the master application forms have been completed by the applicant, submitted, circulated, and the master application procedure has been successfully negotiated.

The first phases of the state public hearing is one in which the applicant "may submit any relevant information material in support of his application. Members of the public may present relevant views and supporting materials in relation to any or all of the applications being considered, and any SEPA re-

lated

lated documents, including a draft EIS."[6]

The first stage of the public hearing is recessed, not terminated, to allow parties to bring action on grounds that provisions of SEPA have not been complied with, or other grounds. The hearing recess enables the applicant to evaluate and incorporate comments into the final EIS. Provisions of ECPS's Master Application Procedures would now apply. Final decisions must be appealed within thirty days unless a modification of the proposed development has been attached to the master application. In such a case, the review period is extended thirty days. Review period commences when the master application center sends out notification to participating agencies and interested persons.

Section 70 of the Master Application Procedures provides that "any aggrieved by and desiring to appeal any final decision of a local government, issued through the provisions of this chapter, shall obtain review in the same manner which would apply if the local government had not used the procedures of this chapter." An "aggrieved" party is one whose legal rights are affected by a governmental decision (see p. 58 of this study). Since it has established in Leschi that the adequacy of an EIS affects a person's "fundamental and inalienable right to a healthful environment", the "aggrieved" party standing provision in the Master Application Procedures allows for the active participation of the public in the decision making process envisioned in the suggested administrative scheme.

Public participation in the EIS process under ECPA's procedures has been provided for, especially at the local level.

Interagency coordination is enhanced by using the EIS as the coordinative vehicle and by enabling local government to comment on, and review, the EIS at the state pulic hearing (where development would have a greater than local impact). The use of the local hearing examiner would seem to ensure that costly delays to the developer's application for permits would be mitigated, resulting in a more efficient processing system. Too, the public would be assured of a fair hearing.

However, it is the administrative decision making body which occupies the pivotal position in channeling development through environmental law. How they make their decisions and why, becomes significant.

CHAPTER FIVE

ENVIRONMENTAL LAW AND THE FUTURE

In channeling development through environmental law, the administrative decision making process (environmental management) plays a significant role in determining if, and under what conditions, development will be allowed to occur. Development signals a change in the distribution of natural resources, whether it occurs in the form of mining, the construction of homes, or whatever. Economic growth, especially in an economy like ours, depends upon development for its sustenance. Development in a purely economic sense can be considered as the opportunity to the benefits and resources of society, as an expansion of accessibility. Thus, there are large segments of our society demanding development.

On the other hand, with intensifying concern over the depletion and dissipation of natural resources, there are groups opposing development, and proposing order. Such opposition to development can be interpreted, and rightly so, as the unjust denial of opportunity to those desiring to expand their accessibility to society's benefits and resources.

It is the task of environmental management to consider these competing, conflicting claims over the use of natural resources (order, -conservation, is considered a use), and to reach conclusions concerning their allocation.

Often the questions concerning development take on another appearance. Many communities are enacting growth control ordinances to restrict the movement of people coming into the community in order to protect those community's values concerning quiet seclusion, aesthetic quality. In other words, the community desires order, not development. Should the right to maintain desired community values be allowed to interfere with people's right to movement? Which set of competing claims should prevail? Can a reasonable compromise be reached?

In the early stages of the administrative function of government, regulation was its primary responsibility. Land, and other natural resources, were considered too abundant to require allocation. But, gradually allocation became more important, until today, planning has become a predominant administrative function in determining who should receive the benefits of development and order, and who should pay the costs of development and order. The task is not easy:

> The evolution of functions of administrative agencies has been from regulation, to include allocation, and finally, to encompass planning. All this has happened without a sound theory of why the evolution should go the way it has. There has been a lack of theory to direct the development of "administrative law" in the United States. . .
>
> The integration of planning and allocation with the original function of the administrative agency--regulation has resulted in an absence of a body of planning law.[1]

In this context, environmental management, the manifestation of the administrative decision making process in channeling development through environmental law, should be based on a theory of planning law. Planning,comprising the

process of goal stipulation, the ends to be accomplished, and law, the legal means of accomplishing these goals.

Environmental management, the problems of economic growth, and the changing role of government present serious difficulties in determining the organizational patterns of communities, and thus, society. These difficulties however, present the opportunity for meaningful progress:

> A fundamental use of property combined with new methods of political participation will need to be found, more in keeping with the need for high information and its utilization. The fact that this makes social life a scientific problem should not deter us. It is politics that makes science moral.[2]

The question of whether a theory of planning law can provide environmental management with a foundation for decision making merits further attention. Needed is more research in the relatinship between a theory of planning law and the distribution of environmental amenities. This case study represents a beginning step on this path.

FOOTNOTES

INTRODUCTION

[1]The World Almanac & Book of Facts: 1978, "Washington", (New York: Newspaper Enterprise Association, Inc., 1977).

[2]"Committee Paper" prepared by Washington Conservation Society, meeting, 1977.

[3]Lawrence M. Friedman, A History Of American Law, (New York: Simon and Schuster, 1973), see in particular Part II, chapter v "An American Law of Property" and Part III, chapter iv "The Land: And Other Property". Friedman notes that the dominant perspective behind American land law "was that land should be freely bought and sold." p. 359. The conservation movement not only was concerned with the depletion of natural resources, but "A conservation mentality of another variety colored the growth of new tools of land-use control. Fashionable neighborhoods with 'good' addresses, developed in Eastern cities. These enclaves of wealth generated a demand for legal devices that would protect property values, and maintain the prevailing patterns of segregation by income and class." pp. 366-367.

[4]William H. Rodgers, Jr., Handbook on Environmental Law: Hornbook Series, (St. Paul: West Publishing Company, 1977), Sec. 2.16. Rodgers in his discussion of the "Public Trust Doctrine" in Chapter Two, "Common Law and the Variations" notes that "...public trust law recognizes that some types of natural resources are held in trust by government for the benefit of the public. These resources are protected by the trust doctrine against unfair dealing and dissipation, which is classical trust language suggesting the necessity for procedural correctness and substantive care." pp. 171-172. It appears, according to Rodger's analysis, that the courts have confined the public trust doctrine to navigable waters, the foreshore and the parklands. Compare with language in the Revised Code of Washington (RCW) 43.21C.020 (2)(a)(b), State Environmental Policy Act (SEPA).

[5]SEPA, ibid.

[6]RCW 90.58, Shoreline Management Act of 1971 (SMA).

[7]RCW 90.62, Environmental Coordination Procedures Act of 1973 (ECPA). Other relevant statutes which are not discussed in this study are: Planning Enabling Act, RCW 36.70, State

Economic Policy, RCW 43.21H; State Energy Policy, RCW 43.21F.020; Scenic and Recreational Highway Act of 1967, RCW 47.39; Limited Access Facilities Act, RCW 47.52; Solid Waste Management Act, RCW 70.95; Tidelands, Shorelands, and Harbor Areas Act, RCW 79.16; Natural Area Preserves Act, 79.70; Open Space, Agricultural, and Timber Lands--Current Use Assessment--Conservation Futures, RCW 84.34.

[8]Rodger's, Environmental Law, Sec. 7.11 "State Environmental Policy Acts" gives references to, and, a comparison with, various state environmentally related statutes.

[9]It is recognized that the political relationships operating in Washington are of importance; however, the prospects of conducting such a study in Rhode Island, given limited resources of time and money, seem to warrant an appropriate postponement.

[10]For EIS requirements see RCW 43.21C.030(2)(c)(i)-(v), and RCW 90.58.030(3)(d)(e) where generally, a "development" or a "substantial development" would adversely and significantly affect the quality of the environment. SEPA applies to the approving of permits for the development of the state's shorelines under SMA.

[1]RCW 43.21C.020(1).

[2]RCW 43.21C.010(2).

[3]RCW 43.21C.020(1).

[4]One of the important differences between SEPA and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.A. Sec. 4321 et seq. pertains to the inclusion of the "fundamental and inalienable right " provision in SEPA 43.21C.020(3). Identical language was included in the original version of NEPA passed by the Senate. The House version deleted the provision. The Act emerged from Conference with a similar provision, but without any reference to "fundamental and inalienable" rights. The compromise resulted from doubt on the part of the House conferees with respect to the legal scope of the original provision. H.R. Rep. No. 91-765, 91st Cong. 1st Sess. 8(1969).

[5]RCW 43.21C.020(3).

[6]Leschi Improvement Council v. State Highway Commission, 84 Wn2d 271, 525 P.2d 774, (1974).

[7]RCW 43.21C.080(2).

[8]RCW 43.21C.110(1).

[9]RCW 90.58.020.

[10]RCW 90.58.030(3)(d)(e).

[11]RCW 90.58.020.

[12]ibid.

[13]ibid.

[14]RCW 90.58.100(5).

[15]RCW 90.58.140(3).

[16]RCW 90.58.180(2).

[17]RCW 90.58.180(5).

[18]RCW 90.58.180(1).

[19]RCW 90.62.010(2)(a)-(d).

[20]RCW 90.62.020(4).

[21]ibid.

[22]RCW 90.62.020(7).

[23]RCW 90.62.060(1).

[24]RCW 34.04.130(6). For a more thorough discussion see C.E. Corker and R.W. Elliott, "The Environmental Coordination Procedures Act of 1973, or ECPA! ECPA! ECPA! Rah! Rah! Rah!" 49 Wash.L.Rev. 463 (1974); also, The Council of State Governments, Land: State Alternatives for Planning and Management, (Lexington, Kentucky: Council of State Governments, 1975), W. Masterson, "Coordinated Permits: The Washington Experience", Environmental Comment 5, (October 1975).

CHAPTER TWO

[1]"Forword" to SEPA Guidelines, WAC 197-10.

[2]WAC 197-10-020(1)(2).

[3]WAC 197-10-360(2).

[4]WAC 197-10-420(2).

[5]WAC 197-10-440(5).

[6]WAC 197-10-(5)(A)-(E).

[7]WAC 197-10-440(6)-(13).

[8]RCW 43.21C.030.

[9]RCW 90.58.020.

[10]WAC 173-16-010.

[11]WAC 173-16-040.

[12]WAC 173-16-040(2).

[13]WAC 173-16-040(3).

[14]RCW 90.58.020.

[15]WAC 173-16-050(5).

[16]WAC 173-16-060.

[17]WAC 173-16-060(1)-(21).

[18]WAC 173-16-070.

[19]WAC 173-14-020.

[20]RCW 90.58.030(E).

[21]See Geoffrey Crooks, "The Washington Shoreline Management Act of 1971" 49 WnLR 423 (1974) for a good discussion of SMA.

[22]WAC 173-08-050(4)(c)(i)-(iv).

[23]WAC 173-08-050(4).

[24]WAC 173-08-050(4)(a).

[25]WAC 173-08-050(4).

[26]WAC 173-08-050(7).

[27]WAC 173-08-050(8).

[28]WAC 173-08-030(8).

[29]WAC 173-08-030(9)(a).

[30]WAC 173-08-030(9)(b).

[31]WAC 173-08-030(9)(d).

[32]ibid.

[33]WAC 173-08-030(10).

[34]WAC 173-08-070.

[35]ibid.

[36]Steven H. Gifis, Law Dictionary, (Woodbury, New York: Barron's Educational Service, Inc., 1975).

[1]286 F.2d 583 (2d Cir. 1961).

[2]Leschi Improvement Council v. State Highway Commission, 84 Wn2d 271, 525 P.2d 774, (1974).

[3]Stempel v. Department of Water Resources, 82 Wn2d 109, 508 P.2d 166, (1973).

[4]ibid., p. 171.

[5]ibid., p. 171.

[6]Merkel v. Port of Brownsville, 8 Wn App 844, 509 P.2d 390, (1973).

[7]ibid., p. 394.

[8]ibid., p. 395.

[9]Juanita Bay Valley Community Association v. Kirkland, 9 Wn App 59, 510 P.2d 1140. (1973).

[10]ibid., p. 1143.

[11]ibid., p. 1149.

[12]Eastlake Community Council v. Roanoke Associates, Inc. 82 Wn2d 475, 513 P.2d 36.

[13]ibid., p. 39.

[14]ibid., p. 39.

[15]ibid., p. 41.

[16]ibid., p. 38.

[17]Loveless v. Yantis, 82 Wn2d 754, 513 P.2d 1023, (1973).

[18]ibid., p. 26.

[19]ibid., p. 26.

[20]Leschi. see above.

[21]ibid., p. 780.

[22]ibid., p. 781.

[23]ibid., p. 787.

[24]King County Employees' Asso. v. State Employee Retirement Board, 154 Wn2d 1, 336 P.2d 387.

[25]Leschi, p. 786.

[26]Washington Supreme Court citing Env. Defense Fund, Inc. v. Env. Prot. Agency, 150 U.S. App. D.C. 348, 465 F.2d 528, 541 (1972).

[27]Leschi, p. 787.

[28]ibid., p. 787.

[29]ibid., p. 787.

[30]DOE v. Kirkland, 84 Wn2d 25, 523 P.2d 175, (1974).

[31]ibid., p. 1181.

[32]Narrowsview Preservation Association v. Tacoma, 84 Wn2d 416, 526 P.2d 987, (1974).

[33]ibid., p. 994.

[34]RCW 90.58.030(3)(d).

[35]Byers v. Board of Clallam County Commissioners, 82 Wn2d 796, 529 P.2d 823, (1974).

[36]RCW 43.21C030(2)(c)(i).

[37]Hama Hama Co. v. Shorelines Hearings Board, 85 Wn2d 441, 536 P.2d 157, (1975).

[38]RCW 90.58.181.

[39]RCW90.58.900.

[40]Hama, p. 164.

[41]Johnston v. Grays Harbor County, 14 Wn App 378, 541 P.2d 1232, (1975).

[42]Norway Hill Preservation & Protection Association v. King County Council, 87 Wn2d 267, 552 P.2d 674, (1976).

[43]ibid., p. 677.

[44]ibid., p. 677.

[45]Swift v. Island County, 87 Wn2d 348, 552 P.2d 175, (1976).

[46]ibid., p. 176.

[47]ibid., p. 180.

[48]Hayes v. Yount, 87 Wn2d 280, 552 P.2d 1038, (1976).

[49]ibid., p. 1042.

[50]ibid., p. 1042.

[51]ibid., p. 1044.

[52]ibid., p. 1044.

[53]ibid., p. 1047.

[54]Eastlake, p. 49.

[55]ibid., p. 49.

Note: West's Pacific Reporter used in researching all cases.

[1]RCW 43.21C.030(2)(d).

[2]See American Law Institute's Model Land Development Code, Article 7-3-1, for discussion of more detail, developments of regional impact.

[3]Charles E. Corker and Richard W. Elliott, "The Environmental Coordination Procedures Act of 1973, or ECPA! ECPA! ECPA! Rah! Rah! Rah!." 49 Wn. L. R. 463 (1974).

[4]For an interesting discussion of the hearing examiner concept, as well as a fascinating account of the ill-fated Washington Land Use Act, see Cheryl A. Sylvester, "Phoenix Rising? The Washington Land Use Act." 11 Urban L. Ann. 131, (1976).

[5]Charles B. Roe, Jr. and Charles W. Lean, "The State Environmental Policy Act of 1971 and its 1973 Amendments." 49 Wn. L. R. 509, (1974).

[6]WAC 173-08-050(9)(a).

CHAPTER FIVE

[1]Charles Reich, "The Law of the Planned Society", 75 Yale L. J. 1227 (1966), p. 1233. An excellent study on the problems facing decision makers in contemporary society.

[2]David E. Apter, Choice and the Politics of Allocation, (New Haven: Yale University Press, 1971) p. 192.

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