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THE COMING OF AGE OF STATE ENVIRONMENTAL POLICY ACTS

Jeffrey T. Renz*

The National Environmental Policy Act of 1969¹ (NEPA) was the precursor to a series of similar state environmental policy acts (SEPA) enacted during the environmental decade of the 1970's. NEPA combined a procedural requirement that federal agencies prepare environmental impact statements on their proposed major actions significantly affecting the environment with a directive that these agencies "consider" the environmental impacts of their proposals. Twenty-four states now have similar requirements for preparation of environmental impact statements,² for substantive application of environmental laws,³ or for limited environmental reviews.⁴

In many cases the express language of these state environmental policy acts differs from that of NEPA. Additionally, several recent federal court decisions have severely limited the scope of NEPA and its effect on agency decision-making.⁵ As a result, state environmental policy acts are now construed more broadly and applied more stringently than NEPA. State courts tend to require environmental impact statements in situations where federal courts would not and scrutinize the contents of those

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1. 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1976).

2. California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21176 (as amended 1983); Connecticut Environmental Policy Act of 1973, CONN. GEN. STAT. ANN. §§ 22a-1 to -7 (1981); HAWAII REV. STAT. §§ 343-1 to -8 (1980 Supp.); IND. CODE ANN. §§ 13-1-10-1 to -8 (1981); Maryland Environmental Policy Act of 1973, MD. NAT. RES. CODE ANN. §§ 1-301 to 305 (1974, as amended); Massachusetts Environmental Policy Act, MASS. ANN. LAWS, ch. 30 §§ 62-62H (1981 as amended); Minnesota Environmental Policy Act of 1973, MINN. STAT. ANN. §§ 116D.01-.07 (as amended, 1981); Montana Environmental Policy Act, MONT. CODE ANN. §§ 75-1-101 to 324 (1983); New York State Environmental Quality Review Act, N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 0117 (McKinney Supp. 1982) North Carolina Environmental Policy Act of 1971, N.C. GEN. STAT. §§ 113A-1 to -10 (1978); Public Policy Environmental Act, P.R. LAWS ANN. 12 §§ 1121-42 (1978); South Dakota Environmental Policy Act, S.D. CODE ANN. §§ 34A-9-1 to -13 (1977); Virginia Environmental Quality Act, VA. CODE, §§ 10-177 to 186 (1982 Supp.); Washington State Environmental Policy Act, WASH. REV. CODE ANN. §§ 43.21C.010 to .910 (1981); Wisconsin Environmental Policy Act of 1971, WIS. STAT. ANN. § 1.11 (1982).

3. Michigan Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. §§ 691.1201-1207 (1982 Supp.); Minnesota Environmental Rights Act, MINN. STAT. ANN. Ch 116B (1981).

4. Arizona Fish and Game Policy Memorandum, July 1, 1971; DEL. CODE ANN. §§ 7-7001 to 7005 (1974); GA. CODE ANN. §§ 95A-101 to 1306a (1976); KY. REV. STAT. § 278.025 (1981); MISS. CODE ANN. §§ 49-27-1 to 69 (1981); NEV. REV. STAT. §§ 321.640 -770 (1979); N.J. STAT. ANN. §§ 13:19-7(g); 27:23-23.4 (1981); R.I. GEN. LAWS § 10-8(b)(1981).

5. See, Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978); Strycker's Bay Neighborhood Corp. v. Karlen, 444 U.S. 223 (1979).

statements more closely. In addition, those courts apply the SEPA requirements for circulation of and comments to an EIS more strictly. Finally, the majority of state courts have required state and local agencies to abide by the substantive policies as well as the procedural requirements of their state acts. Since 1969, NEPA, and federal cases interpreting it, have served as the source of persuasive authority in state cases interpreting and applying SEPA.⁶ Since the late 1970's a large body of state law, interpreting and applying state environmental policy acts, has developed. This article analyzes the body of state case law that has arisen as a result of the interpretation and application of state environmental policy acts.

I. THE EIS PROCESS AND COMMON REQUIREMENTS OF STATE ENVIRONMENTAL POLICY ACTS

All state environmental policy acts require, to varying degrees, preparation of a statement or report (EIS) describing the environmental impacts of a proposal, alternatives to the proposal, and unavoidable adverse environmental effects.

The EIS process follows a common scheme. First, a proposal surfaces which calls for action by a governmental body. Under the requirements of a SEPA, the governmental body determines if the action falls within the purview of the SEPA. It then determines if the environmental effects of the proposal, if any, are significant. If so, the agency prepares a draft and a final EIS, and, finally, reaches a decision on the proposal. This process serves as the framework to analyze and compare the requirements of various SEPA's in the following discussion.

Three points of analysis are necessary in any discussion of the SEPA schemes. The first point is found in the question: when must an EIS be prepared? This comprises several subquestions: (1) Who, among the categories of state agencies, local governments, quasi-governmental bodies, and private entities, must prepare an EIS? (2) What constitutes a major action significantly affecting the quality of the environment? (3) What must an agency do before it determines that an EIS is or is not necessary? The second point lies in the requirements for the contents of the EIS. Stated differently, when is an EIS "adequate"? The third point is, how are decision-makers required to treat an EIS once it is prepared?

The following analysis will also comment upon the standard of review which state courts apply to each of these steps and consider specific provisions in state environmental policy acts and other state laws which

6. *Village Laguna of Laguna Beach, Inc. v. Bd. of Sup'v'rs.*, 134 Cal. App. 3d 1022, 185 Cal. Rptr. 41, 44 (1982); *Kadillak v. Anaconda Co.*, 184 Mont. 127, 137, 602 P.2d 147 (1979); *Wis. Envtl. Decade v. Pub. Serv. Comm'n*, 98 Wis. 2d 682, 298 N.W.2d 205, 208 (1980).

affect their operation.

II. WHEN MUST AN EIS BE PREPARED?

A. *Who Must Prepare an EIS?*

The express provisions of the SEPA determine who must prepare an EIS. As a general rule, EISs must be prepared by state agencies.⁷ New York,⁸ Hawaii,⁹ Massachusetts,¹⁰ California,¹¹ and Washington¹² extend this requirement to local governments and quasi-governmental bodies.¹³ Minnesota requires all governmental bodies¹⁴ and, when government action is not involved, private entities,¹⁵ to prepare EIS's on their major actions.

Commonly, more than one agency may have jurisdiction over a proposal. In such cases, only one agency is required to prepare an EIS. The "lead agency" designation is determined by statute, by regulation, by agreement, or by prior court decisions.¹⁶

B. *What is a "Major Action"?*

As a general rule, any discretionary action¹⁷ which may culminate in physical changes¹⁸ to the environment is a "major action" under state environmental policy acts. The sole exception to this rule is found in the

7. CONN. GEN. STAT. ANN. § 22a-1b(b) (1981); IND. CODE ANN. § 13-1-10.3 (2)(1981); MD. NAT. RES. CODE ANN. § 1-304 (1974); MONT. CODE ANN. § 75-1-201 (1983); N.C. GEN. STAT. § 113A-4 (1978); S.D. CODE ANN. § 34A-9-1(1)(1977); WIS. STAT. ANN. § 1.11 (1982); *see*, Robinson v. Kunach, 76 Wis. 2d 436, 251 N.W.2d 449, 454 (1977) (counties are not "agencies of the state").

8. N.Y. ENVTL. CONSERV. LAW § 8-0105 (2,3).

9. HAWAII REV. STAT. § 343-1 (3) (1980 Supp.).

10. MASS. ANN. LAWS Ch. 30 § 62 (1981).

11. CAL. PUB. RES. CODE § 21063 (1977).

12. WASH. REV. CODE ANN. § 43.21C.030 (1981).

13. *See also*, South Brunswick Twp. v. N.J. Turnpike Auth., 129 N.J. Super. 126, 322 A.2d 478 (1974) (turnpike authority); Shawn v. Golden Gate Bridge, 60 Cal. App. 3d 699, 131 Cal. Rptr. 867 (1976) (transportation district).

14. MINN. STAT. ANN. § 116D.04 (1981).

15. *Id.*

16. People ex rel Younger v. LAFCO, 81 Cal. App. 3d 464, 146 Cal. Rptr. 400 (1978) (1st agency to act); Citizens Task Force on Sohio v. Bd. of Harbor Comm'rs, 23 Cal. 3d 812, 591 P.2d 1236, 1237 (1979) (*per curiam*); Bozung v. LAFCO of Ventura County, 13 Cal. 3d 263, 529 P.2d 1017 (1975) (1st agency to act); *cf.*, Sierra Club v. Palisades Interstate Park Comm'n, 114 Misc. 2d 52, 450 N.Y.S.2d 677 (1982) (by designation); CAL. PUB. RES. CODE § 21067.

17. Loveless v. Yantis, 82 Wash. 2d 754, 513 P.2d 1023, 1029 (1973) (*en banc*); Eastlake Comm. Counc. v. Roanoke Assoc., Inc., 82 Wash. 2d 475, 513 P.2d 36, 49 (1973).

18. Fullerton Joint Union H.S. Dist. v. State Bd. of Educ., 32 Cal. 3d 779, 654 P.2d 168, 177-79 (1982) (*en banc*); Board of Visitors, Marcy Psychiatric Center v. Coughlin, 465 N.Y.S.2d 124 (N.Y. Sup.) *rev'd on other grounds*, 60 N.Y. 2d 14, 466 N.Y.S.2d 668 (1983).

Maryland Environmental Policy Act.¹⁹ That Act expressly limits "actions" to "requests for legislative appropriations or other legislative actions. . . ."²⁰ The scope of the general rule becomes clear when we examine its various applications.

Discretionary v. Ministerial Acts. Discretionary actions trigger a SEPA; ministerial actions do not. A series of cases illustrate this principle. In *New York Chapter of the Appalachian Mountain Club v. Flacke*,²¹ the New York Department of Transportation (DOT) was involved in planning and construction of the Westway highway project. A substantial portion of the highway was to be constructed on filled tidal (or littoral) wetlands. Rather than go through complicated procedures leading to a state wetlands permit, the DOT petitioned the Department of Environmental Conservation to declare 200 acres of the wetlands to be a non-littoral zone. The DEC, without preparing an EIS, "demapped" the 200 acre parcel.

Under the DEC's regulations, areas where water depth exceeded six feet were not included in a littoral zone. Other areas could be determined to be littoral, based upon the application of various subjective criteria. In its review, the court determined that 150 acres of the contested area lay under more than six feet of water and thus the subjective criteria did not apply to these parcels. The court reasoned that, since the DEC's application of the objective standard of a six-foot depth involved no exercise of discretion, it was not an action to which New York's environmental policy act applied.²² As to the remaining 50 acres, the court held that these qualified for subjective review. Because such a subjective review involved an exercise of discretion it was a major action.²³ The court thus directed the DEC to determine if an EIS was required.

A similar case was *Coon Creek Watershed District v. State Environmental Quality Board*,²⁴ where the court found that repair of a county ditch was statutorily mandated (and therefore ministerial) but disagreed with the contention that the project was therefore exempt from the Environmental Policy Act. The Court determined,

The requirement of an EIS does not preclude the repair but merely insures that the environmental effects will be considered and that the repair will be done in the least harmful way.²⁵

In effect the Court held that even if the decision to repair was ministerial, the manner in which the repair was to be done. Therefore an EIS was

19. MD. CODE ANN. § 1-301(c) (1974).

20. *Id.*; Mayor and City of Baltimore v. State, 281 Md. 217, 378 A.2d 1326, 1328 (1977).

21. 109 Misc. 2d 514, 440 N.Y.S.2d 430 (1980).

22. 440 N.Y.S.2d at 436.

23. *Id.*

24. 315 N.W.2d 604 (Minn. 1982).

25. *Id.* at 605.

required to aid the agency in identifying and avoiding adverse environmental effects.

In contrast, the Wisconsin Supreme Court, in *Wisconsin's Environmental Decade v. Department of Industry, Labor, and Human Relations*,²⁶ held that the defendant's granting of a permit after an objective application of fixed standards for sewage holding tanks involved no exercise of discretion, and required no EIS.²⁷

The troubling aspect of this distinction is its potential for abuse. For example, an industry may apply for a discharge permit for its effluent, an activity which can clearly have a significant effect upon the environment. If the applicant establishes that the effluent stream meets all fixed discharge standards, the permitting agency may plead that it has no discretion, and avoid all consideration of the impacts of the effluent on the receiving waters.

The trend, however, is to apply SEPA to "ministerial" actions. At least one court has held that the SEPA itself injects discretion into the agency's decision-making process. In *Juanita Bay Valley Community Association v. Kirkland*,²⁸ the Washington Appeals Court held

The change in the substantive law brought about by SEPA introduces an element of discretion into the making of decisions that were formerly ministerial, such that even if we assume, arguendo, that the issuance of a grading permit was, prior to SEPA a ministerial, non-discretionary act, SEPA makes it legislative and discretionary.²⁹

The Washington Court of Appeals simply stated the *Coon Creek* rule in a different way. Its reasoning is persuasive. A SEPA, at a minimum, requires an agency to *consider* environmental factors. That consideration, and the agency's determination of how to deal with significant impacts, is discretionary. The agency must, therefore, always consider environmental factors and, when "consideration" identifies potential significant effects, it must prepare an EIS, albeit its decision is "ministerial."

Permitting. Private applicants have argued, unsuccessfully, that an agency is not required to undertake an environmental review of private actions where the agency's action consists only of granting a permit. The leading case on this issue is *Friends of Mammoth v. Board of Supervisors*

26. 104 Wis. 2d 640, 312 N.W.2d 749 (1981).

27. The Court may also have been swayed by the fact that the Department processed 12,000 similar applications annually. *See also*, *Holtz & Krause, Inc. v. Dept. of Nat. Res.*, 85 Wis. 2d 198, 270 N.W.2d 409 (1978) (regulatory activities to protect the environment not subject to an EIS).

28. 9 Wash. App. 59, 510 P.2d 1140, 1149 (1973); *cf.* *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 578 P.2d 1309, 1312 (1978) (SEPA creates authority to deny permit).

29. *Id.* at 1149. This decision was ratified by the Washington Supreme Court in *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 578 P.2d 1309, 1312 (1978).

of *Mono County*.³⁰ There, a developer applied for a special use permit to develop a series of condominiums. The California Supreme Court, sitting *en banc*, looked to the legislative intent expressed in California's CEQA. It found that the intent of the act was to afford fullest possible protection to the environment³¹ and thus, the Act's definition of a "project" (or action) covered a wide range of activities, including the permitting of private activities.³² Courts in other states have either reached the same result³³ or have considered, without comment, cases in which a permit was at issue.³⁴

A distinctly anomalous decision in this area is *Montana Wilderness Association v. Board of Health and Environmental Sciences*.³⁵ In this case, the Montana Department of Health was asked to issue a certificate "lifting sanitary restrictions" on the proposed Beaver Creek subdivision, a prerequisite to development. The Department prepared an EIS, whose adequacy was immediately challenged, and approved the water, sewer, and solid waste aspects of development. The Supreme Court, over a strong dissent, held that the Department was not required to prepare an EIS because the majority of the regulatory functions had been committed by law to local government.³⁶

Timing. The timing of the action in relation to the entire proposal can be important when determining whether SEPA applies to the action. The critical question is whether the action itself will, or is a step in a process which will, *culminate* in physical changes to the environment. For example, condemnation which merely results in change of title to land is not necessarily a major action,³⁷ unless it is a prelude to development. Similarly, while a proposal to merely annex land may not trigger the environmental policy act, an annexation proposal leading to change in the land's use does.³⁸

30. 8 Cal. 3d 247, 502 P.2d 1049 (1972) (*en banc*).

31. 502 P.2d at 1056.

32. *Id.* at 1054.

33. In *Re Environmental Management Commission*, 53 N.C. App. 135, 280 S.E.2d 520, 526 (1981); *State v. Lake Lawrence Public Lands Protective Ass'n*, 92 Wash. 2d 656, 601 P.2d 494, 497 (1979) (*en banc*); *Manchester Envtl. Coalition v. Stockton*, 184 Conn. 51, 441 A.2d 68, 78 (1981).

34. *Northeast Solite Corporation v. Flacke*, 124 Misc. 2d 313, 451 N.Y.S.2d 633 (1982); *P.E.E.R. v. Minn. Env. Qual. Council*, 266 N.W.2d 858 (Minn. 1978).

35. 171 Mont. 477, 559 P.2d 1157 (1976) (hereinafter, "*Beaver Creek II*").

36. 559 P.2d at 1161.

37. In *Re Petition of Gray's Harbor*, 30 Wash. App. 855, 638 P.2d 633, 639 (1982); *Indiana State Highway Comm'n v. Ziliak*, 428 N.E.2d 275, 279 (Ind. App. 1981) (express exemption in Act.); *State v. Williams & Hesse*, 53 N.C.App. 674 281 S.E.2d 721 (1981).

38. *City of Santa Clara v. Santa Clara County LAFCO*, 139 Cal. App. 3d 923, 189 Cal. Rptr. 112 (1983); *Pistoresi v. City of Madera*, 138 Cal. App. 3d 284, 188 Cal. Rptr. 136 (1982); *People ex rel. Younger v. Local Agency Formation Comm'n*, 81 Cal. App. 3d 464, 146 Cal. Rptr. 400 (1978); *see also, Fullerton Joint Union*, 654 P.2d at 179-80 (new school district); *Board of Visitors*, 465 N.Y.S.2d at 128 (conversion of mental hospital); *Programming and Systems, Inc. v. N.Y. State Urban*

Miscellaneous "Actions". Most state environmental policy acts expressly include proposals for legislation as "major actions." One court, however, has held that general legislation, in that case a proposed ordinance regulating siting of dumps, is not the kind of action requiring an EIS.³⁹ As a rule, legislative actions on specific proposals such as zoning changes,⁴⁰ annexation,⁴¹ or the sale of land⁴² are "major actions."

Likewise, ratemaking for public utilities is a "major action" which may require an EIS.⁴³ Finally, an agency's decision *not* to undertake a project, when that decision will not alter the physical environment, is not a "major action."⁴⁴

Conclusion. Generally, state environmental policy acts are applied more broadly than NEPA and encompass nearly all governmental activities. However, simply because an activity qualifies as a "major action" does not necessarily mean an EIS is required. The action must also have potential significant environmental effects.

III. WHAT ARE "SIGNIFICANT EFFECTS"?

A. Introduction

As we noted, an EIS must be prepared for a major action when it may have significant environmental effects. As a rule, if there is a possibility that a project will have significant effects on the environment, state courts have required an EIS. Similarly, where the effects on the environment are of doubtful significance, state courts have resolved the doubt in favor of preparing an EIS. Thus state courts require EIS where federal courts would not.⁴⁵

Development Corp., 93 App. Div. 2d 733, 461 N.Y.S.2d 279, 280 (1983); *Town of Yorktown v. N.Y. State Department of Mental Hygiene*, 92 App. Div. 2d 897, 459 N.Y.S.2d 891 (1983).

39. *Niagara Recycling, Inc. v. Town Board of Town of Niagara*, 83 A.D.2d 335, 443 N.Y.S.2d 951 (1981).

40. *Starbird v. San Benito County*, 122 Cal. App. 3d 657, 176 Cal. Rptr. 149 (1981).

41. *See, supra* note 39.

42. *Devitt v. Heimbach*, 109 Misc. 2d 463, 440 N.Y.S.2d 465, 470 (1981), *aff'd*, 58 N.Y.2d 925, 447 N.E.2d 59, 460 N.Y.S.2d 512 (1983).

43. *W.E.D. I*, 79 Wis. 2d 409, 256 N.W.2d 149 (1977); *but see, W.E.D. II*, 105 Wis. 2d 457, 313 N.W.2d 863 (1981); MONT. CODE ANN. § 75-1-201(2) (1983).

44. *City of National City v. State*, 140 Cal. App. 3d 598, 189 Cal. Rptr. 682 (1983)

45. *Compare, Coon Creek Watershed District v. State Environmental Quality Board*, 315 N.W.2d 604 (Minn. 1982), (8.2 mile ditch repair), *with Simmans v. Grant*, 370 F. Supp. 5 (S.D. Tex. 1974) (no significant impacts in 11 mile channelization project); *compare, In Re City of White Bear Lake*, 311 Minn. 146, 247 N.W.2d 901 (1978), *with Rucker v. Willis*, 484 F.2d 158 (4th Cir. 1973) (pier); *compare, W.E.D. I*, 79 Wis. 2d 409, 256 N.W.2d 149 (1977), *with Morrisville v. Delaware River Basin Comm'n*, 399 F. Supp. 469 (E.D. Pa. 1975) (ratemaking). *See, Manchester Environmental Coalition v. Stockton*, 184 Conn. 51, 441 A.2d 68, 78 (1981) (SEPA threshold lower than NEPA.); *Tehan v. Scrivani*, 468 N.Y.S.2d 402, 405 (N.Y. Supp. 1983) (low threshold); *Life of the Land v.*

B. *When Does A Major Action Significantly Affect The Environment?*

Although a proposal may be a "major action," an EIS is called for only if it significantly affects or may significantly affect the environment. This threshold determination has been the subject of much litigation. State courts have considered where the line between significance and non-significance should be drawn and, as discussed in the next section, how an agency must go about drawing the line.

In determining when significant effects come into play, we must first look to the express language and the stated policy of the various state environmental policy acts. This language falls into two classes. Some SEPA's require an EIS for actions significantly affecting the environment.⁴⁶ Others seem to employ a lower threshold, requiring an EIS for actions which *may* or *could* significantly affect the environment.⁴⁷ These express terms make little practical difference. When the Act's language is applied to a given "major action," the SEPA's policy dictates that all doubts be resolved in favor of preparing an EIS.

The California Environmental Quality Act contains the lowest threshold requirement for preparation of an EIS. The California Public Resources Code,⁴⁸ defines "significant effect on the environment" as "a substantial or potentially substantial adverse change in the environment." The California Supreme Court applied this requirement in *No Oil, Inc. v. City of Los Angeles*.⁴⁹ After reviewing the Act's policy statement,⁵⁰ the court held that an EIS must be prepared:

whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact.⁵¹

The Supreme Court expressly rejected the standard set forth by the trial court: that the project must have an important or momentous effect of semipermanent duration.⁵² As a result, California agencies now prepare an EIS whenever there is substantial evidence in the record that a project may

Ariyoshi, 53 Hawaii 156, 163, 577 P.2d 1116, 1121 (1978) (SEPA requires more information); *H.O.M.E.S. v. N.Y. State Urban Development Corp.*, 69 App. Div. 2d 222, 418 N.Y.S.2d 827, 832 (1979) (SEPA threshold is lower); *Onondaga Landfill Systems, Inc. v. Flacke*, 81 App. Div. 2d 1022, 440 N.Y.S.2d 788, 790 (1981).

46. These include Hawaii, Indiana, Maryland, Minnesota, Montana, North Carolina, Washington, and Wisconsin. *See supra* note 2.

47. These include California, Connecticut, Massachusetts, South Dakota and New York. *See supra* note 2.

48. CAL. PUB. RES. CODE § 21068.

49. 13 Cal. 3d 68, 529 P.2d 66 (1974) (*en banc*).

50. 529 P.2d at 76.

51. *Id.* at 70.

52. *Id.* at 76. This was based in part on the CEQA's policy statement.

have significant environmental effects.⁵³

Several other states employ a statutory threshold lower than NEPA's.⁵⁴ Connecticut considers actions to be significant if they "could have a major impact"⁵⁵ or if they "could serve short term to the disadvantage of long term goals."⁵⁶ This standard was applied in *Manchester Environmental Coalition v. Stockton*,⁵⁷ where the court held that an EIS is "required whenever the project will arguably damage the environment."⁵⁸ Massachusetts requires an EIS for actions which "may" result in damage to the environment.⁵⁹ The Massachusetts Supreme Court holds that "the threshold of potential environmental damage to warrant an impact statement under MEPA is minimal."⁶⁰ New York, too, employs a "low threshold,"⁶¹ requiring an EIS when an action may "fairly be said" to have significant impacts.⁶²

The language of the remaining State Environmental Policy Acts appear, through their omission of "may," to require a higher threshold determination.⁶³ In practice, there is little difference between these two express standards. For example, North Carolina courts hold that where substantial evidence shows potential adverse environmental effects, significant effects are shown.⁶⁴ Similarly, Wisconsin courts hold that where issues of arguably significant environmental impacts are raised, the agency

53. *Id.* at 77. See also, *Friends of "B" Street v. City of Hayward*, 106 Cal. App. 3d 988 (1980); *Brentwood Ass'n for No Drilling, Inc. v. City of Los Angeles*, 184 Cal. Rptr. 664, 134 Cal. App. 3d 491 (1982).

54. See generally *supra* note 46.

55. CONN. GEN. STAT. ANN. § 22a-1c (1981).

56. *Id.*

57. See *supra* note 33.

58. *Id.*

59. MASS. ANN. LAWS Ch. 30 § 62A (1981).

60. *Secretary of Environmental Affairs v. Massachusetts Port Auth.*, 366 Mass. 755, 323 N.E.2d 329, 338 (1975).

61. *Tehan v. Scrivani*, 468 N.Y.S.2d 402, 405 (N.Y. Sup. 1983).

62. *H.O.M.E.S. v. N.Y. Urban Development Corp.*, 69 App. Div. 2d 222, 418 N.Y.S.2d 827, 832 (1979); *Schweiss v. Ambach*, 115 Misc. 390, 454 N.Y.S.2d 260, 262-63 (1982).

63. The Minnesota Environmental Policy Act requires an EIS, whenever "there is potential for significant environmental effects." MINN. STAT. ANN. § 116D.04 (1983 Supp.). The import of this standard is not clear. On one hand the Minnesota Supreme Court has allowed "substantial compliance" with MEPA, forgiving the absence of an EIS. *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 326 (Minn. 1977). On the other, it has required an EIS for the repair of an 8 mile long county ditch. *Coon Creek Watershed District v. State Env. Qual. Bd.*, 315 N.W.2d 604 (Minn. 1982). The Minnesota Court's "substantial compliance" rule is clearly out of line with the majority rule of strict, literal compliance. This may be resolved as Minnesota has yet to squarely face a dispute in which no environmental study was prepared. (In *No Power Line*, environmental impacts were addressed under the state's facility siting act).

64. *In Re Environmental Management Comm'n*, 53 N.C. App. 135, 280 S.E.2d 520, 526 (1981).

is required to justify any finding of no significant impact.⁶⁵ Washington's Supreme Court also sets a low threshold,⁶⁶ requiring an EIS for an action "when there is a reasonable probability that it will have more than a moderate effect on the quality of the environment."⁶⁷ At first blush, this standard appears higher than the "arguable damage" rule of other jurisdictions. Washington, however, requires *prima facie* compliance with its SEPA for *all* major actions before the agency decides whether to prepare an EIS.⁶⁸ Hawaii applies similar standards.⁶⁹

C. *Procedural Prerequisites to Determinations That A Major Action Will Have No Significant Impacts*

The state or local government agency *must* determine if an EIS is required for any proposal.⁷⁰ State courts subject these determinations to strict scrutiny. No matter what standard of review was employed by the particular state court, it has held that the agency's determination must satisfy a number of criteria before it will pass muster.

The first requirement is that of a reviewable record.⁷¹ The record must be in writing,⁷² and sufficient to allow the court to review it and determine if the agency considered environmental factors.⁷³ Second, the record must show that the agency identified areas of environmental concern.⁷⁴ This means the agency must, at a minimum, conduct an independent study of the proposal. Agency determinations simply concluding that there are no areas of environmental concern, without showing in the record that the agency undertook a valid, good faith effort to identify them, are

65. *W.E.D. I*, 79 Wis. 2d 409, 256 N.W.2d 149, 157 (1977).

66. Washington's State Environmental Policy Act is identical to the Montana Environmental Policy Act. Montana has yet to determine when environmental impacts are "significant." *Cf.*, *Kadillak v. Anaconda Co.*, 184 Mont. 127, 602 P.2d 147 (1979).

67. *Norway Hill Prot. Ass'n v. King County Council*, 87 Wash. 2d 267, 275, 552 P.2d 674, 679 (1976); *Swift v. Island County*, 87 Wash. 2d 348, 552 P.2d 175 (1976); *Sisley v. San Juan County*, 89 Wash. 2d 78, 569 P.2d 712 (1977) (*en banc*); *see*, *Narrowview Preservation Ass'n v. Tacoma*, 84 Wash. 2d 416, 526 P.2d 897 (1974).

68. *Hayden v. City of Port Townsend*, 93 Wash. 2d 870, 613 P.2d 1164, 1169 (1980) (*en banc*); *Gardner v. Pierce County Bd. of Comm'rs*, 27 Wash. App. 2d 241, 617 P.2d 743, 746 (1980); *Sisley*, *supra*, 569 P.2d at 716; *Juanita Bay Valley Comm. Ass'n v. Kirkland*, 9 Wash. App. 59, 510 P.2d 1140, 1149 (1973).

69. *Molokai Homesteaders Coop. Ass'n v. Cobb*, 63 Hawaii 453, 629 P.2d 1134 (1981).

70. *Hayden*, 613 P.2d at 1169; *Lassila v. City of Wenatchee*, 89 Wash. 2d 804, 576 P.2d 54, 59 (1981).

71. *Lassila*, 576 P.2d at 60; *W.E.D. I*, 256 N.W.2d at 155.

72. *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 529 P.2d 66, 74 (1974) (*en banc*); *Friends of Mammoth v. Bd. of Supervisors of Mono County*, 8 Cal. 3d 247, 502 P.2d 1049, 1064-65 (1972) (*en banc*); *Tehan*, 468 N.Y.S.2d at 406. *But see*, *Hayden*, 613 P.2d at 1170.

73. *Gardner*, 617 P.2d at 746; *Sisley*, 569 P.2d at 717; *W.E.D. I*, 256 N.W.2d at 155.

74. *W.E.D. I*, 256 N.W.2d at 155-56; *Kanaley v. Brennan*, 465 N.Y.S.2d 130, 133 (N.Y. Sup. 1983).

overturned.⁷⁵

The agency must then study the environmental concerns it identifies, as well as those brought to its attention,⁷⁶ and, on the basis of facts elicited in its studies, reach a determination as to whether the environmental impact is "significant."⁷⁷

The leading New York decision is *Schenectady Chemicals, Inc. v. Flacke*,⁷⁸ in which the New York Department of Environmental Conservation had decided that no significant impacts would result from the operation of a sand and gravel mining operation. When a controversy arose over the gravel pit's potential impact on an underlying aquifer, the DEC assigned its geologist to study the potential impacts. The geologist concluded that the aquifer would not be affected and the DEC did not change its determination. The appellate court reversed. It found that the geologist had conducted his review under the state's Mined Land Reclamation Law, whose requirements were more narrow than New York's SEPA. The case was remanded to the DEC for a "hard look" under the "broader requirements" of the environmental policy act.⁷⁹

California, under the CEQA, requires a "threshold study" of environmental impacts.⁸⁰ The study must be in writing,⁸¹ must identify potential environmental impacts, and must set out written statements of supporting facts upon which the agency bases its determination.⁸²

Washington courts expressly require *prima facie* compliance with its State Environmental Policy Act.⁸³ In *Juanita Bay Valley Community Association v. Kirkland*, the Washington Court of Appeals held that the Washington State Environmental Policy Act⁸⁴ necessarily required con-

75. *Noel v. Cole*, 98 Wash. 2d 375, 655 P.2d 245 (1982) (*en banc*); *Soulev. Town of Colonie*, 464 N.Y.S.2d 576 (N.Y. Sup. 1983); *Devitt v. Heimbach*, 58 N.Y.2d 925, 447 N.E.2d 59, 460 N.Y.S.2d 512 (1983); *County of Freebourn v. Bryson*, 297 Minn. 218, 243 N.W.2d 316 (1976) (action under Minn. Env't'l Rights Act); *cf.*, *Schenectady Chemicals, Inc. v. Flacke*, 83 App. Div. 2d 460, 446 N.Y.S.2d 418 (1982).

76. *W.E.D. I*, 256 N.W.2d at 155-57, *Kanaley*, 465 N.Y.S.2d at 133; *Schenectady Chemicals*, 446 N.Y.S.2d at 419-20.

77. A number of cases require a "hard look." The "hard look" is a fuzzy standard. What constitutes a "hard look" will vary from judge to judge. A better rule is a requirement of strict compliance which requires an agency to consider, at a minimum, on the record, the criteria set out in the SEPA, all possible environmental impacts, and to make findings with regard to each.

78. *Supra*, note 75.

79. *See also*, *Kanaley*, 465 N.Y.S.2d at 133; *Soulev*, 464 N.Y.S.2d at 579.

80. *Fullerton Joint Union H.S. Dist. v. State Bd. of Ed.*, 32 Cal. 3d 779, 654 P.2d 168, 177-98 (1982) (*en banc*); *Pistoresi v. City of Madera*, 138 Cal. App. 3d 284, 188 Cal. Rptr. 136 (1982).

81. *No Oil Inc.*, 529 P.2d at 70.

82. *Friends of Mammoth*, 502 P.2d at 1064-65, *cf. W.E.D. I*, 256 N.W.2d at 155-56; *Lassila*, 576 P.2d at 59-60.

83. *Hayden*, 613 P.2d at 1169; *Sisley*, 569 P.2d at 716; *Norway Hill*, 552 P.2d at 679; *Lassila*, 576 P.2d at 59-60; *Juanita Bay*, 510 P.2d at 1149.

84. WASH. REV. CODE ANN. § 43.21 C.030(2)(c).

sideration of environmental factors by the decision-making body before it could determine whether or not an EIS must be prepared.⁸⁵ This was followed by the Washington Supreme Court in *Norway Hill Preservation Association v. King County Council*.⁸⁶ That court held that the SEPA policies of full disclosure and consideration of environmental values required an agency to actually consider environmental factors before it might determine that a proposal has no significant impacts.⁸⁷ It is clear that in all cases the agency must actually consider environmental factors in advance, whether an EIS is prepared or not.⁸⁸ Thus, the tendency among other state courts, although unstated, is to require *prima facie* compliance with the state environmental policy act before the agency makes a threshold determination.⁸⁹

The final requirement is that the agency base its determination of whether an EIS is necessary on written statements of supporting facts.⁹⁰ Thus, where agencies "found" no significant impacts but failed to substantiate their "findings"⁹¹ and where agencies were apprised of, but failed to look at environmental impacts,⁹² their decisions were overturned.

Courts apply various standards of review when addressing these requirements, ranging from *de novo*⁹³ review to a "clearly erroneous" standard.⁹⁴ When these cases are compared it is apparent that the standard of review has little meaning. The courts usually examine the entire record and determine, on the facts in the record, whether the requirements of the SEPA have been satisfied. This means that on occasion the court substitutes its interpretation of SEPA for the agency's.⁹⁵ The agency's

85. 510 P.2d at 1147.

86. *Supra*, note 67.

87. 552 P.2d at 679.

88. *Gardner*, 617 P.2d at 746; *Juanita Bay*, *supra* note 28.

89. *See, supra* notes 75-82; *Kanaley*, 465 N.Y.S.2d at 133.

90. *Gardner*, 617 P.2d at 746; *Lassila*, 576 P.2d at 60; *Friends of Mammoth*, 502 P.2d at 1064-65; *W.E.D. I.* 256 N.W.2d at 155-56.

91. *Lassila, supra*, note 83.

92. *Kanaley, supra* note 74; *H.O.M.E.S., supra* note 62.

93. *Sec'y of Envtl. Affairs v. Massachusetts Port Auth.*, 366 Mass. 755, 323 N.E.2d 329, 340 (1975); *City of Boston v. Massachusetts Port Auth.*, 364 Mass. 639, 308 N.E.2d 488, 503 (1974). These decisions were based on the Supreme Judicial Court's determination that health and life were at stake and that health and life were areas historically committed to judicial determination, therefore the court should conduct a *de novo* review.

94. *Hayden*, 613 P.2d at 1170; *Sisley*, 569 P.2d at 717. *See, Brentwood Association.*, 184 Cal. Rptr. at 669 (standard of review is substantial evidence of significant effects.); *Kanaley*, 465 N.Y.S.2d at 134 (arbitrary and capricious); *Board of Visitors v. Coughlin*, 60 N.Y.2d 14, 466 N.Y.S.2d 668, 671 (1983) (arbitrary and capricious); *Soule*, 464 N.Y.S.2d at 578 (arbitrary and capricious, abuse of discretion, and not in accordance with law).

95. *Sisley*, 569 P.2d at 715-16; *Norway Hill*, 552 P.2d at 679. This is proper, as it is the Court's role to apply the law to the facts in the record. *See, Noel v. Cole*, 98 Wash. 2d 375, 655 P.2d 245, 248 (1982) (*en banc*), where the Washington Supreme Court held that, until an agency satisfies SEPA, its

determination is generally upheld when it satisfies the criteria set out above and is consistent with the facts in the record.⁹⁶

This raises another issue often encountered at this stage of SEPA: When should the Court consider evidence of environmental impacts not raised before the agency? On one hand, SEPA call for full disclosure during the decision-making process and invite input from the public, from experts, and from sister agencies.⁹⁷ This policy towards full disclosure likewise applies to any relevant information that can be presented at the adjudicatory (or appeal) stage of the process (i.e. in the courthouse). On the other, a plaintiff should not be allowed to "sandbag" the agency by waiting until the parties are in court to present new environmental impacts.

The competing requirements of administrative law and state environmental policy acts call for a flexible approach to this question. Where the agency's action is unannounced and unnoticed, affected parties ought to have the opportunity to raise environmental impacts before the court. If they are clearly significant, the court should require an EIS. If they are not clearly significant the matter should be returned to the agency for further consideration. The duty of identifying and addressing potential impacts lies not with the public, but with the agency.⁹⁸ For this reason, a party who does not participate in the agency's proceedings should also be permitted to challenge the agency's finding of no significant impact on the grounds that the agency failed to consider obvious impacts. This is true even where the party declined the opportunity to participate. A party otherwise should be permitted to raise new impacts before the court where it shows good cause.

No matter what rule is applied for standing, no matter what standard of review is applied, and no matter what the depth and scope of the agency's review, if a proposal will significantly affect the environment, an EIS is likely to be required.

IV. CONTENTS OF THE EIS

The specific subjects which the agency must discuss are set out in the statute. Generally, these track the requirements of NEPA and call for a detailed discussion of:

- (1) The environmental impacts of the proposal;
- (2) any adverse environmental affects which cannot be avoided if

actions are *ultra vires*.

96. See, *supra* notes 71-91. *Cohalen v. Carey*, 88 App. Div. 2d 77, 452 N.Y.S.2d 639, 641 (1982). In many cases, agency decisions are affirmed simply because the complainant has failed to establish that there were environmental impacts which the agency failed to address. *Perley v. County of Calaveras*, 137 Cal. App. 3d 424, 187 Cal. Rptr. 53 (1982); *Cohalen; Soule*, 464 N.Y.S.2d at 579-80; *Minnesota P.I.R.G. v. Minnesota Env. Qual. Council*, 306 Minn. 370, 237 N.W.2d 375 (1975).

97. For the policy behind this, see the discussion at notes 119 to 126.

98. *W.E.D. I*, 256 N.W.2d at 160.

the proposal is implemented;

(3) alternatives to the proposed action;

(4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and

(5) any irreversible and irretrievable commitments of resources which would be involved if the proposal was implemented.

Some states require less;⁹⁹ some require more.¹⁰⁰ If required, these subjects must be discussed in the EIS.

Agencies satisfy the EIS requirements by preparing a draft EIS, circulating the draft among sister agencies and the public, and by receiving comments to it. A final EIS (FEIS) is then prepared. The FEIS may include changes to the draft made necessary by new information received in comments or developed by the agency. It must include comments to the draft and the agency's responses to the comments. The FEIS then serves as the environmental document on which the agency bases its decision to proceed or not to proceed with a proposal. At this stage, disputes most often arise over the adequacy of the contents of the EIS and over the manner in which the agency prepared it.

The general test of the adequacy of the EIS is "whether the environmental effects of the proposed action and reasonable alternatives are sufficiently disclosed, discussed [sic] and that they are substantiated by supportive opinion and data."¹⁰¹ Some courts have applied what is referred to as a "rule of reason" to the discussion in the EIS.¹⁰² The rule of reason is, at best, an inadequate label. At worst, it has permitted agencies to escape the requirements of state environmental policy acts. The general test of "sufficiently disclosed, discussed, and substantiated" may be applied more objectively.

The thickness of the EIS should not be an indicator of its adequacy. If a voluminous document fails to discuss some impacts of a proposal, or otherwise fails to fulfill the Act's requirements of a detailed discussion, it is

99. Hawaii limits the contents of its EIS's to discussions of the impacts of a proposal and of its alternatives. HAWAII REV. STAT. § 343-2(9) (1982 Supp.).

100. CONN. GEN. STAT. ANN. § 22a-1b(b) (description of the proposal). CAL. PUB. RES. CODE § 21100 (mitigation measures; growth inducing impacts); MD. ANN. CODE § 1-304 (mitigation measures); S.D. CODE ANN. § 34A-9-7 (mitigation measures, growth-inducing aspects); N.C. STAT. ANN. § 113A-4(2)(c) (mitigation measures).

101. *Ullock v. City of Bremerton*, 17 Wash. App. 573, 565 P.2d 1179, 1184 (1977), citing *Leschi v. Highway Comm'n*, 84 Wash. 2d 271, 525 P.2d 774 (1974).

102. *Life of the Land v. Ariyoshi*, 53 Hawaii 156, 577 P.2d 1116, 1121 (1978); *Barrie v. Kitsap County*, 93 Wash. 2d 843, 613 P.2d 1148, 1155 (1980); *Orange County v. North Carolina Dept. of Trans.*, 46 N.C. App. 350, 265 S.E.2d 890, 912 (1980); *Village Laguna of Laguna Beach, Inc. v. Bd. of Supervisors*, 134 Cal. App. 3d 1022, 1029, 185 Cal. Rptr. 41, 44 (1982); *Coalition Against Lincoln West, Inc. v. City of New York*, 465 N.Y.S.2d 170 (N.Y. Sup. 1983); *W.E.D. I*, 298 N.W.2d at 208.

insufficient. Nevertheless, the EIS need not be perfect.¹⁰³ The EIS must simply discuss and analyze the topics set out in the Act in detail and it must back up the discussion with facts and data. The studies which generate the data need not be attached to the EIS; but the EIS must refer to them. EIS which contained inaccurate or misleading representations have been condemned.¹⁰⁴

The EIS must be prepared as early as possible in the decision-making process,¹⁰⁵ so that the decision-maker has adequate time to review the information in the EIS before it considers and acts on a proposal.¹⁰⁶ Along this line an environmental study done pursuant to another statute does not necessarily satisfy the SEPA requirements.¹⁰⁷

The EIS must discuss more than just the impacts of the agency's action. If the agency's action applies only to a portion of a larger project or to a phase of the project, the environmental impacts of the entire proposal must be considered and discussed.¹⁰⁸ Cumulative impacts of interrelated projects must also be considered.¹⁰⁹ An EIS must compare the proposal with the existing environment. For example, where a planning board proposed to amend its general plan, its EIS comparing relative impacts under the original plan and under the amended plan was found to be inadequate.¹¹⁰

Generally, courts approve an EIS where matters asserted by com-

103. *San Francisco Ecology Center v. City and County of San Francisco*, 48 Cal. App. 3d 584, 122 Cal. Rptr. 100, 106 (1975).

104. *County of Inyo v. City of Los Angeles*, 124 Cal. App. 3d 1, 177 Cal. Rptr. 479, 483-85 (1981).

105. *City of Glens Falls v. Board of Education*, 88 App. Div. 2d 233, 453 N.Y.S.2d 891, 894 (1982).

106. *Devitt v. Heimbach*, 460 N.Y.S.2d at 512-13; *Tri County Taxpayers Ass'n, Inc. v. Town of Queensbury*, 55 N.Y.2d 41, 432 N.E.2d 592, 447 N.Y.S.2d 699, 701 (1982). In another series of decisions, New York and California courts have required agencies to prepare an EIS in advance of referenda and bond issue elections. The courts note that, in such cases, the electorate is the decision-maker and must, therefore, be apprised of the information in the EIS. *Tri County Taxpayers Ass'n*, 447 N.Y.S.2d at 701; *Fullerton Joint Union H.S. Dist.*, 654 P.2d at 180.

107. *In Re Environmental Management Comm'n*, 280 S.E.2d at 526. *Contra, No Power Line, Inc.*, 202 N.W.2d at 327, which permits "substantial compliance" with MEPA. This case appears to be an anomaly. *Compare, P.E.E.R. v. Minnesota Env. Qual. Council*, 266 N.W.2d 858 (Minn. 1978); *cf. Rural Land Owners Ass'n v. Lodi City Council*, 143 Cal. App. 3d 1013, 192 Cal. Rptr. 325, 329 (1983) ("harmless error" standard was improper).

108. *Juanita Bay*, 510 P.2d at 1149.

109. *Rural Land Owners Ass'n*, 192 Cal. Rptr. at 332; *cf. Onondaga Landfill Systems*, 440 N.Y.S. at 789; *See also, Wisconsin's Environmental Decade, Inc. v. Dept. of Nat. Resources*, 94 Wis. 2d 263, 288 N.W.2d 168 (1979), where the court approved a sewer project which, after being divided into two parts, did not trigger the SEPA, despite what the dissent refers to as a "rather transparent subterfuge." *Id.* at 179.

110. *Environmental Planning and Information Council of Western El Dorado County, Inc. v. County of El Dorado*, 131 Cal. App. 3d 350, 182 Cal. Rptr. 317, 320-21 (1982).

plainants to be inadequate are nonetheless discussed.¹¹¹ But where readily apparent impacts or obvious alternatives are omitted, the matter will be sent back to the agency.¹¹²

As mentioned above, the EIS must describe reasonable alternatives and discuss their impacts. This discussion need not be exhaustive. The agency is not required to address infeasible alternatives. Where it has described a range of alternatives, the agency is not required to discuss every possible alternative within that range.¹¹³ The discussion, however, is not limited to alternatives similar to the proposed project. Rather, the agency is required to identify the objective the proposal is intended to achieve and discuss the alternatives which will achieve it.¹¹⁴ In doing so the agency is not limited to alternatives within its expertise.¹¹⁵ Finally, it must discuss the impacts of a "no project" alternative.¹¹⁶

State environmental policy acts require agencies to consider and develop alternatives to a proposal even where no EIS is required.¹¹⁷ Like the EIS requirement, the study of alternatives must be thorough, but not exhaustive, and it must be in writing.¹¹⁸

The agency is required to circulate its EIS among sister agencies and the public. Although the EIS is in part an informational document,¹¹⁹ the circulation requirement is more than just formal. Circulation serves as a check on any institutional bias within the agency.¹²⁰ The lead agency's

111. *Wisconsin's Environmental Decade v. Pub. Service. Comm.*, 98 Wis. 2d 682, 298 N.W.2d 205, 208 (1980).

112. *El Dorado Union H.S. District v. City of Placerville*, 144 Cal. App. 3d 123, 192 Cal. Rptr. 480 (1983); *County of Inyo*, 177 Cal. Rptr. at 483-84; *cf. Webster Associates v. Town of Webster*, 59 N.Y.2d 220, 464 N.Y.S.2d 431 (1983). (Omission of alternative not fatal as all persons were aware of it.) The Montana case of *State ex rel. Montana Wilderness Association v. Bd. of Natural Resources*, 39 St. Rptr. 1238, 648 P.2d 734 (Mont. 1982) is distinctly out of line with this rule. Despite the Board's admission that it failed to adequately discuss alternatives in its EIS on a transmission line proposal, and the Court's findings that reasonable and obvious alternatives had not been discussed, the Supreme Court approved the project on the rationale that the EIS was not "grossly insufficient as a matter of law." 648 P.2d at 744.

113. *E.D.F., Inc. v. Flacke*, 465 N.Y.S.2d 759 (N.Y. Sup. 1983); *N.R.D.C. v. City of New York*, 112 Misc. 2d 106, 446 N.Y.S.2d 871, 873 (1982).

114. *Barrie v. Kitsap County*, 93 Wash. 2d 843, 613 P.2d 1148, 1155-56 (1980). Again, *compare, State ex rel. M.W.A.*, 648 P.2d at 742.

115. *See, N.R.D.C. v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972).

116. *County of Inyo*, 177 Cal. Rptr. at 483-84. In error is *State ex rel. M.W.A.*, 648 P.2d at 745.

117. *See, e.g., IND. CODE ANN. § 13-1-10-3(2)(d)*(1981); *MD. NAT. RES. CODE ANN. § 1-303(2)* (1974); *MONT. CODE ANN. § 75-1-201(1)(b)(iv)* (1983); *WASH. REV. CODE ANN. § 43.21C.030(2)(e)* (1981); *WIS. STAT. ANN. § 1.11(2)(e)* (1982).

118. *W.E.D. I*, 79 Wis. 2d 161, 255 N.W.2d 917, 925-26 (1977). Again, *State ex rel. M.W.A.* is in error. 648 P.2d at 743 (Defendant claimed no legal mandate required studies of alternatives).

119. *Twain Harte Homeowners v. County of Tuolumne*, 138 Cal. App. 3d 664, 188 Cal. Rptr. 233, 239-40 (1982).

120. *Glen Head-Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay*, 88 App. Div. 2d 484, 453 N.Y.S.2d 732, 739 (1982); *W.E.D. I*, 256 N.W.2d at 155.

perceptions of the project and of its mission often differ altogether from those of the reviewing agency. Thus, an agency whose mission it is to develop water resources may view impacts differently from the agency whose mission is to protect and enhance fish habitat. Circulation ensures that the EIS reflects the range of opinion among local, state, and federal agencies.

Circulation also provides an independent opportunity for experts and agencies with expertise the circulating agency may lack, to identify additional environmental impacts, additional alternatives, and defects in the draft EIS.¹²¹ It provides a forum for opposing opinions and data.¹²² The EIS may be the only vehicle by which the agency may tap a reservoir of outside expertise.¹²³

The agency must include the comments it receives, and its responses to them, in the final EIS. These comments must be demonstrably available to the decision-making body.¹²⁴ Where comments to the EIS raise new concerns or set out conflicting opinions and data, the agency must engage in a good-faith, reasoned analysis of the new information.¹²⁵ Agencies generally satisfy this requirement by setting written comments and the agency's response side by side in a separate section. A "good-faith, reasoned analysis" means more than simply acknowledging a comment, however. The agency must go so far as to show that it has considered and weighed the arguments for the point in the comment. Where a point is rejected, the agency must set out valid reasons for rejecting it. When a comment is valid, the agency must demonstrate that the EIS has been corrected or clarified.

Occasionally, comments will raise significant new problems or present significant new information. When significant information is received, it is incumbent upon the agency to circulate the new information, either as a supplement to the draft EIS or as a revised draft EIS, for further comment. This fulfills the EIS's dual role as an "alarm bell,"¹²⁶ warning the public and governmental officials about the impacts of a project before it is undertaken, and as a magnet, attracting new information, opposing points of view and information and advice on how to mitigate identified impacts.

State and federal courts tend to be divided on when the agency must circulate new information. State courts tend to require supplements or

121. *Glen Head*, 453 N.Y.S.2d at 739.

122. *Id.*

123. *Rye Town*, 442 N.Y.S.2d at 71; *cf.*, *Barrie*, 613 P.2d at 1157.

124. *Rural Land Owners Ass'n*, 192 Cal. Rptr. at 330.

125. *Twain Harte Homeowners*, 188 Cal. Rptr. at 240; *Rural Land Owners Ass'n*, 192 Cal. Rptr. at 331; *San Francisco Ecology Center*, 122 Cal. Rptr. at 108; *H.O.M.E.S.*, 418 N.Y.S.2d at 832.

126. *Board of Visitors*, 465 N.Y.S.2d at 128; *Town of Henrietta v. Dept. of Environmental Conservation*, 76 A.D.2d 215, 430 N.Y.S.2d 440, 445 (1980).

revised EIS's where new impacts are identified,¹²⁷ new alternatives are considered,¹²⁸ or new, conflicting information is presented.¹²⁹ Federal courts err on the side of expediting a project.¹³⁰

The leading case on this requirement is *P.E.E.R. v. Minnesota Environmental Quality Council*,¹³¹ in which the defendant, after preparing a draft EIS, conducted extensive hearings on proposed transmission line corridors. During the hearing process, an alternative route was added. The alternative was mentioned, but not discussed in detail, in the final EIS. The new alternative was adopted. The Minnesota Supreme Court held the final EIS to be inadequate for failure to discuss, circulate, and receive comments on the new alternative.¹³²

In *Sutter Sensible Planning, Inc. v. Sutter County Board of Supervisors*,¹³³ the California Court of Appeals held that comments are an integral part of an EIS. The court found a revised final EIS inadequate even though the revision corrected inadequacies in the original EIS because the revised version was never circulated for comment.

State courts look extensively to the legislative policy of the SEPA when reviewing the contents of the EIS and the procedures the agency followed in preparing and circulating it. SEPA policies which call for "full consideration" of environmental effects and the directives that environmental impacts be considered "to the fullest extent possible" require strict, literal compliance with the Act. Nevertheless, if a complainant is unable to establish that there are impacts or alternatives which have not been addressed in the EIS, a court will approve the document.

By calling for strict, literal compliance with the terms and policies of their state environmental policy acts, state courts have done more than just implement them. As the New York Supreme Court noted, a gray requirement of "substantial compliance" would give rise to numerous lawsuits as parties argued over what was or was not substantial. Literal enforcement renders judicial review more objective, more standardized, more consistent, and promotes the policies of the state environmental

127. *Glen Head*, 453 N.Y.S.2d at 739.

128. *P.E.E.R. v. Minn. Env. Qual. Council*, 266 N.W.2d 858, 863 (Minn. 1978); *Envtl. Council of Sacramento v. Bd. of Supervisors of Sacramento County*, 135 Cal. App. 3d 428, 185 Cal. Rptr. 363, 365 (1982).

129. *Barrie v. Kitsap County Boundary Review Board*, 97 Wash. 2d 212, 643 P.2d 433, 435 (1982) (*en banc*); *Sutter Sensible Planning, Inc. v. Sutter County Board of Supervisors*, 122 Cal. App. 3d 813, 176 Cal. Rptr. 342, 344-47 (1981); *but see*, *Environmental Law Fund, Inc. v. City of Watsonville*, 124 Cal. App. 3d 711, 177 Cal. Rptr. 542 (1981).

130. *See*, *Atchison, T. and S.F. Ry. Co. v. Marsh*, 655 F.2d 346 (D.C. Cir. 1981).

131. *Supra* note 128.

132. *Id.*, 266 N.W.2d at 863-71.

133. *Supra* note 129.

policy act.¹³⁴

V. SUBSTANCE V. PROCEDURE

When the United States Supreme Court decided *Strycker's Bay Neighborhood Council v. Karlen*,¹³⁵ and *Vermont Yankee Nuclear Power Corporation v. N.R.D.C.*,¹³⁶ it removed virtually all substance from the National Environmental Policy Act.¹³⁷ In so doing, it veered from the majority rule in state courts.

The SEPA policies of encouraging "productive and enjoyable harmony between man and his environment,"¹³⁸ of promoting "efforts which will prevent or eliminate damage to the environment,"¹³⁹ of stimulating "the health and welfare of man,"¹⁴⁰ and of fostering the general welfare¹⁴¹ are carried out only when agencies are required to carry them out. The mere preparation of a descriptive document fails to do this.

State courts, as a rule, have pointed to these policy statements and recognized their importance in carrying out the intent of their various legislatures. They have differed from the federal courts, which have incorrectly treated similar policy statements in NEPA¹⁴² as mere national goals,¹⁴³ and have required their state agencies to obey the substantive, as well as the procedural, requirements of their acts.

The question of the substantive application of a SEPA arises after an adequate EIS has been prepared and circulated. Those who argue that environmental policy acts are purely procedural claim that by merely preparing, circulating and reviewing an EIS, an agency satisfies the acts'

134. *Rye Town*, 442 N.Y.S.2d at 70-71.

135. 444 U.S. 223 (1979).

136. 435 U.S. 519 (1978).

137. *Stryckers' Bay* reversed a Second Circuit decision in which the Court of Appeals had ordered the Department of H.U.D. to render a decision which satisfied substantive requirements of NEPA. The Supreme Court noted that, in *Vermont Yankee*, it had held that "NEPA, while establishing 'significant substantive goals for the Nation,' imposes upon agencies duties that are 'essentially procedural.'" *Id.* at 227.

138. CONN. GEN. STAT. ANN. § 22a-1a (1981); HAWAII REV. STAT. § 344-3 (1980 Supp.); IND. CODE ANN. § 13-1-10-2 (1981); MINN. STAT. ANN. § 116D.01(a) (1981); MONT. CODE ANN. § 75-1-102 (1983); N.C. GEN. STAT. § 113A-2 (1978); WASH. REV. CODE ANN. § 43.21C.010(1) (1981).

139. MINN. STAT. ANN. § 116D.01(b); MONT. CODE ANN. § 75-1-102; WASH. REV. CODE ANN. § 43.21C.010(2);

140. MINN. STAT. ANN. § 116D.01(b); MONT. CODE ANN. § 75-1-102; WASH. REV. CODE ANN. § 43.21C.010(3).

141. CONN. GEN. STAT. ANN. § 22a-1e(a); HAWAII REV. STAT. § 344-3(1); IND. CODE ANN. § 13-1-10-2; MD. ANN. CODE § 1-302(b); MONT. CODE ANN. § 75-1-103(1); WASH. REV. CODE ANN. § 43.216.020(1)(a).

142. 42 U.S.C. §§ 4321, 4331 (1976)

143. Compare *Stryckers' Bay*, 444 U.S. at 227, with 2A SUTHERLAND STATUTORY CONSTRUCTION, § 56.02 (1973); Wisconsin's Environmental Decade v. Pub. Serv. Comm., 69 Wis. 2d 1, 230 N.W.2d 243, 251-52 (1975) (WEPA's preamble is a declaration of legislative intent).

requirements that the agency consider environmental impacts.¹⁴⁴ The proponents of the acts' substantive application argue that this is not enough. The agency, they claim, must act to mitigate environmental impacts, where possible, or in some cases refuse a permit (or scrap a proposal) for a project which will damage the environment. In all cases the agency should adopt the least environmentally damaging alternative. The majority rule among state courts is that the agency must comply with both the procedural directives and the substantive policies of state environmental policy acts.

A number of state environmental policy acts expressly require some kind of mitigation of impacts identified in the EIS.¹⁴⁵ When a SEPA expressly requires mitigation of impacts, the agency is required to make express finding with regard to mitigation. That is, the agency must either identify and discuss measures which will eliminate, avoid, minimize, or reduce environmental impacts,¹⁴⁶ identify alternatives in which the impacts are minimized or avoided,¹⁴⁷ or find that mitigation measures are infeasible.¹⁴⁸ The agency's findings must, of course, be supported by substantial evidence in the record.¹⁴⁹ "Partial" mitigation will fail to satisfy the SEPA when it requires the agency to avoid or minimize impacts or state reasons why avoidance or minimization is not feasible.¹⁵⁰ In short, the significant impacts of a project must be mitigated, a least damaging alternative must be chosen, or the agency must state why such measures are infeasible.

Among these, Minnesota has the strictest requirement. In *In re City of White Bear Lake*,¹⁵¹ the Minnesota Supreme Court reversed a trial court holding which had directed the Minnesota Department of Natural Resources to issue a permit for the least environmentally damaging alternative identified in an EIS. The Supreme Court noted that the Department had found that there was no feasible alternative which would

144. This is the thrust of *Vermont Yankee* and *Stryckers' Bay*.

145. CAL. PUB. RES. CODE § 21081; N.Y. ENV'TL CONSERV. LAW, § 8-0109(1); *Town of Henrietta v. Dept. of Env't'l Conservation*, 76 App. Div. 2d 215, 430 N.Y.S.2d 440, 444-49 (1980); *Glen Head*, 456 N.Y.S.2d at 737; *Rural Land Owners Ass'n*, 192 Cal. Rptr. at 332.

146. *Id.*

147. CAL. PUB. RES. CODE § 21081; *Town of Henrietta*, 430 N.Y.S.2d at 447; *Twain Harte Home Owners*, 188 Cal. Rptr. at 239-40; *Stevens v. City of Glendale*, 125 Cal. App. 3d 986, 178 Cal. Rptr. 367, 371 (1981); *Village of Laguna*, 185 Cal. Rptr. at 47.

148. *City of Del Mar v. City of San Diego*, 133 Cal. App. 3d 401, 183 Cal. Rptr. 898, 907-08 (1982); *Coalition Against Lincoln-West, Inc. v. City of New York*, 465 N.Y.S.2d 170, 176 (N.Y. Sup. 1983); *Town of Henrietta*, 410 N.Y.S.2d at 447-49; *Environmental Council of Sacramento*, 185 Cal. Rptr. at 368; *Town of Candor v. Flacke*, 82 App. Div. 2d 951, 440 N.Y.S.2d 769, 770 (1981).

149. *Rural Land Owners Ass'n*, 192 Cal. Rptr. at 332.

150. CAL. PUB. RES. CODE § 21081 (1983); MASS. GEN. STAT. § 61 (1981); MINN. STAT. ANN. § 116D.04(6) (1981); S.D. CODE ANN. § 34-9-10 (1977); N.Y. ENVTL. CONSERV. LAW § 8-0109.

151. 311 Minn. 146, 247 N.W.2d 901 (1976).

not cause environmental damage. It held that, under the Minnesota Environmental Policy Act, economic considerations alone could not justify environmentally damaging projects and that the Department was, therefore, required to deny a permit.¹⁵²

California and New York have similar express requirements for mitigation. In *Twain Harte Homeowners v. County of Tuolumne*,¹⁵³ the California Court of Appeals held that the CEQA required the County to set forth the reasons why the value of a proposed development outweighed its environmental impacts. An earlier case, *Stevens v. City of Glendale*,¹⁵⁴ established the rule that the City was required to outline specific social, physical, and economic reasons why alternatives which minimized environmental impacts could not be implemented.

The New York Supreme Court followed a similar tack in *Town of Henrietta v. Department of Environmental Conservation*.¹⁵⁵ The Court upheld a permit which imposed 18 protective conditions upon a development. The Court held that the SEQRA required an agency to formulate its decision on the basis of the adverse environmental impacts identified in the EIS.¹⁵⁶ It held, too, that the SEQRA also required the agency to make written findings that it has imposed conditions necessary to minimize or avoid adverse environmental effects identified by the EIS.¹⁵⁷

Although other state acts lack the express requirements found in the New York and California acts, those courts which have considered this issue follow the majority rule. In the leading case of *Polygon Corporation v. City of Seattle*,¹⁵⁸ the Washington Supreme Court, after reviewing the policies of SEPA,¹⁵⁹ rejected arguments that the Act was purely procedural:

Such a reading of SEPA would thwart the policies it establishes and would render the provision that "environmental amenities and values will be given appropriate consideration in decision making" a nullity.¹⁶⁰

The court noted further that "full" consideration of environmental values impells substantive authority in the Act.¹⁶¹

152. *Id.*, 247 N.W.2d at 906-07.

153. 138 Cal. App. 3d 664, 188 Cal Rptr. 233, 239-40 (1982).

154. 125 Cal. App. 3d 986, 178 Cal. Rptr. 367, 371 (1981).

155. 76 App. Div. 2d 215, 430 N.Y.S.2d 440, 447-49 (1980).

156. *Id.* at 446.

157. *Id.* at 447.

158. 90 Wash. 2d 59, 578 P.2d 1309 (1978).

159. As we noted above, the Montana Environmental Policy Act is identical to the Washington State Environmental Policy Act.

160. 578 P.2d at 1312.

161. *Id.* See also, *State v. Lake Lawrence Public Lands Protective Ass'n*, 92 Wash. 2d 656, 601 P.2d 494, 497 (1979) (*en banc*) (counties have independent authority, under SEPA, to deny permits);

In an earlier case,¹⁶² Washington's Court of Appeals noted: if a particular government action were to result in severe environmental consequences and there were no other important beneficial consequences against which to balance them, the courts would be warranted in holding the action to be either ultra vires or arbitrary and capricious and violative of the substantive policies of SEPA.¹⁶³

Finally, one year after *Vermont Yankee*, the Washington Supreme Court reaffirmed the substantive role of the Washington SEPA in *ASARCO, Inc. v. Air Quality Coalition*,¹⁶⁴ holding that it was not only the substantive policy of SEPA to prevent environmental degradation but, where possible, to reverse damage already done.¹⁶⁵

Other state courts have yet to directly confront the issue of procedural v. substantive authority,¹⁶⁶ but the reasoning of the Washington Supreme Court, as well as the New York and California courts, is persuasive. Unless the state environmental policy act is given substantive effect, it directs nothing more than a paper-shuffling exercise. The Act is a mechanism for public input into the decision. If the public input can be ignored, this function is frustrated. If the Acts' policies are not applied, then they are meaningless.¹⁶⁷

VI. CONCLUSION

State courts should be expected to continue to follow the trend of requiring agencies to show *prima facie* consideration of environmental factors in all cases, of requiring EIS where federal courts do not, and of giving SEPA substantive effect. There appear to be two reasons behind such stricter application of SEPA.

First, early cases interpreting SEPA looked to existing federal cases for guidance. This pre-*Vermont Yankee* body of federal law tended to enforce NEPA more strictly than do federal courts today. Later state

Juanita Bay, 510 P.2d at 1149 (SEPA renders ministerial decisions discretionary).

162. *Ullock v. City of Bremerton*, 17 Wash. App. 573, 565 P.2d 1179 (1977).

163. 565 P.2d at 1186.

164. 92 Wash. 2d 685, 601 P.2d 501 (1979).

165. 601 P.2d at 515.

166. *See also*, *Eastlake Comm. Council v. East Roanoke Assoc., Inc.*, 82 Wash. 2d 475, 513 P.2d 36, 49 (1973). *Cf. W.E.D. I.*, 256 N.W.2d at 153 (*dictum*).

167. State courts have yet to determine the effects of constitutional provisions mandating environmental protection upon the application of their state environmental policy acts. A Montana trial court considered this issue and held that Montana's environmental provisions, MONT. CONST. art. II § 3 and art. IX (1972), mandate substantive application of the Montana Environmental Policy Act. *Cabinet Resource Group v. Dept. of State Lands*, No. 43914 (1st Jud. Dist., Sept. 29, 1982) (Denying Motion for Summary Judgment); *cf.*, *Borough of Moosic v. Pennsylvania Public Utility Comm'n*, 429 A.2d 1237, 1240 (Pa. 1981) (State Constitution does not require EIS preparation); *Rudder v. Wise County Redevelopment and Housing Authority*, 249 S.E.2d 177, 180 (Va. 1978) (same).

courts looked to these state cases for precedent, preserving a stricter state rule in that state's jurisprudence.

But, by far, the most important factor has been the state courts' treatment of the policies of their state acts. While federal courts were holding that the policies of NEPA provided only national goals,¹⁶⁸ state courts were finding precedent in SEPA policies for *prima facie* compliance with the SEPA in all cases, consideration of environmental factors on the record in all cases, and broad substantive application of the SEPA's requirements.

The substantive applications of SEPA have not reached their high water mark. The limits of the substantive application of SEPA will likely be reached as plaintiffs begin to argue that an agency's decision to approve or undertake a project violated the substantive policies of SEPA, or were otherwise *ultra vires* or arbitrary and capricious in light of those policies. The exact boundaries of SEPA's substantive effect are difficult to predict. The trends in the case law seem to indicate that, when significant environmental effects are identified but no measures are taken to minimize or avoid them, the courts will require an agency to satisfactorily justify, on the record before it, why the project was approved or undertaken in the face of these impacts.¹⁶⁹ Some states will follow Minnesota and invalidate such decisions.¹⁷⁰

This all reflects a trend, among the states which have SEPA, toward stronger measures to protect the environment. Since SEPA can be used to identify and correct environmental problems which do not fall under the more specific provisions of clean air, water, and solid waste laws and used to prospectively identify and correct environmental pollution which may occur in spite of the provisions of more specific pollution control acts, they are likely to remain in the forefront of that trend.¹⁷¹

Whether or not any of this comes to pass, it is apparent that there is now a body of state law, different from federal law, interpreting and applying SEPA. The leading authorities in this body of law appear to be the courts of Washington, California, and New York. The SEPA's of these three states are typical of SEPA's across the United States. State courts are looking to these states for persuasive authority and finding it. As this trend continues, state environmental policy acts are likely to continue to

168. See *supra* note 143.

169. See *supra* notes 153-57.

170. See *supra* note 163.

171. State constitutional provisions regarding the environment can affect agency discretion. How and why this happens is beyond the scope of this article.

Interested readers would do well by looking to, Tobias & McLean, *Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-existing Agency Authority*, 41 MONT. L. REV. 177 (1980); Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193.

develop and provide broader environmental protection than is found at the federal level.