ARTICLES

The Gap Between Informational Goals and the Duty to Gather Information: Challenging Piecemealed Review under the Washington State Environmental Policy Act

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In 1971, Washington enacted the State Environmental Policy Act[1] (SEPA), thereby announcing its recognition of "the necessary harmony between humans and the environment in order to prevent and eliminate damage to the environment and biosphere, as well as to promote the welfare of humans and the understanding of our ecological systems."[2] To implement this policy, SEPA requires agencies to gather relevant information and engage in an open and public study of "probable significant, adverse" environmental impacts for all "proposals for legislation and other major actions."[3] Procedurally, SEPA requires agencies to make a threshold determination of whether the project is likely to significantly affect the environment and, where such impacts are likely, to produce an environmental impact statement (EIS).[4]

One problem faced in implementing the goals of SEPA is the practice of "piecemealing." Defined broadly, piecemealing is a method of circumventing SEPA's informational mandate by dividing

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1. WASH. REV. CODE Ch. 43.21C (2000).
2. Stempel v. Dep't of Water Res., 82 Wash. 2d 109, 117, 508 P.2d 166, 171 (1973).
3. WASH. REV. CODE § 43.21C.031 (2000).
4. *See* WASH. ADMIN. CODE § 197-11-330 (2001).

a proposal into pieces and separately studying their adverse impacts.[5] In such cases, the environmental impacts of each individual part may appear negligible, and so comprehensive environmental review appears unwarranted even though the proposal as a whole may have a significant impact on the environment.[6] Piecemealing may occur in the context of a physical project, such as the segmentation of a construction proposal into several small, insignificant actions.[7] It may also occur over time, when environmental review is conducted only on current segments of a project, and review of later segments is postponed until they actually begin construction.[8] Under either scenario, the danger of piecemealed review is that "the later environmental review often seems merely a formality, as the construction of the later segments of the project has already been mandated by the earlier construction."[9]

Piecemealing detracts from the informational goals of SEPA, as codified in its legislative and regulatory mandates.[10] Both state and federal courts have disapproved of piecemeal review whenever they have successfully identified it.[11] Therefore, one would expect that the problem of piecemealed review should not exist. However, the courts have been inconsistent in their treatment of piecemeal review, particularly where the project under review seems to indicate few environmental concerns on its own. Because of this uncertainty, environmental advocates continue to raise the SEPA flag in response to allegedly improper "phased" and "tiered" environmental studies[12] while agencies and courts struggle over, and often simply ignore, the piecemeal problem.[13] As a consequence, the rural and natural land-

5. *See* Juanita Bay Valley Cmty. Ass'n v. City of Kirkland, 9 Wash. App. 59, 72, 510 P.2d 1140, 1149 (1973).

6. *See Id.*

7. *See, e.g.*, Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971) (holding that an agency acted appropriately when it fragmented highway study into three parts, rendering outside portions exempt from NEPA because the size of each individually failed to qualify as a "major federal action").

8. Concerned Taxpayers Opposed to Modified Mid-S. Sequim Bypass v. Dep't of Transp., 90 Wash. App. 225, 231 n.2, 951 P.2d 812, 816 n.2 (1998).

9. *Id.*

10. *See infra* notes 48–52 and accompanying text.

11. *See infra* notes 71–81 and accompanying text.

12. In the author's experience, at least half of the projects challenged under SEPA include an allegation of improperly piecemealed review.

13. *See, e.g.*, Org. to Preserve Agric. Lands v. Adams County, 128 Wash. 2d 869, 880–81, 913 P.2d 793, 800–01 (1996) (Deciding that landfill siting environmental issues, such as groundwater study, could be deferred to a later operating permit application even though the application for an operating permit would not concern the suitability of the site for a landfill. The court was content to refer to a preliminary groundwater analysis which inquired only into

scape of Washington is being altered by patchwork development without an understanding of the inevitable impacts.

Part I of this Article introduces the piecemeal problem by describing three common piecemeal situations. The first situation occurs when a project proposal is divided into such small parts that the environmental impacts from each individual part appear insignificant and the impact from the sum of the parts is ignored. The second situation arises when a project proposal is properly divided into phases of construction, but earlier phases avoid the speculative study of environmental impacts accumulating with later phases, and later phases are drawn narrowly to avoid study of the cumulative impacts from earlier phases. The final piecemeal situation arises when environmental review of land use legislation is deferred based on promises of site-specific review for projects subject to the proposed scheme, but project proponents subsequently disclaim responsibility for assessing the cumulative environmental impacts from that legislation. Part II will then demonstrate the legislative and regulatory intent that environmental impacts be examined in a thorough and comprehensive manner and confirm this requirement of comprehensive review with a brief examination of case law that establishes a prohibition against piecemealed review.

After Parts I and II establish that the piecemeal problem should not exist, Part III will proceed to discuss the source of the continuing piecemeal problem, specifically addressing the continuing confusion in the application of two independent regulatory standards purporting to restrict piecemealed review—cumulative impact analysis and project connectivity. Part IV examines in detail the judicial confusion over the interpretation of these standards under both SEPA and its federal counterpart, the National Environmental Policy Act (NEPA).[14] Having established that the interpretive confusion is unwarranted, Part V then considers whether practical concerns may justify the piecemeal loophole and concludes that such concerns are inimical to the purposes underlying SEPA. Finally, Part VI of this essay examines supplementary environmental studies as a potential, but questionable, solution to the piecemealing problem.

I. AN INTRODUCTION TO PIECEMEALING—THREE EXAMPLES

When SEPA is stripped down to its effective elements, shed of the sparkle and glitter of its "green aspirations," all that remains is the

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the "general physical conditions at the site" and noted that the applicant would be required to study remediation methods at a later date.).

14. 42 U.S.C. § 4331 (1994).

mandate that information accompany action.[15] SEPA was designed to combat the ignorance that results from uninformed decision making.[16] Pursuant to the SEPA mandates, agencies are required to prepare a thorough, two-tiered environmental review, including information gathering and environmental analysis on collective and cumulative impacts.[17] The threshold determination is whether the proposal satisfies the triggering test: is it a major action significantly affecting the environment?[18] Then, if there is a likelihood of "more than a moderate" unmitigated adverse effect on the environment, the lead agency must order an environmental impact statement.[19]

Agencies fall short of SEPA's goals when information is omitted from, or ignored in, the study of environmental impacts; one of the reasons SEPA was enacted was to ensure the "consideration of environmental factors at the earliest possible stage to allow decisions to be based on *complete disclosure* of environmental consequences."[20] Although SEPA does not require any particular result in environmental decision making, it does mandate that "environmental amenities and values be given appropriate consideration in decision making along with economic and technical considerations."[21] However, piecemealing neutralizes the ability of agencies and the public to access this information.

Piecemealing may be generalized into three different scenarios. The first scenario, referred to as the classic piecemealing example, typically occurs as the segmentation of large, significant projects into smaller, insignificant parts. Classic piecemealing effects prospective ignorance due to the difficulties in predicting the cumulative impacts, number of project parts, or even the ultimate size of the project. In the other two types of piecemealing—the plan-to-project gap and regulatory postponement—environmental review of land use planning

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15. *See* Merkel v. Port of Brownsville, 8 Wash. App. 844, 847, 509 P.2d 390, 393 (1973) ("To achieve these goals, . . . [SEPA] requires all state and local agencies, in performing their respective functions, to be cognizant of and responsive to possible consequences in their actions."); *see also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 333 (1989) ("[NEPA] simply prescribes the necessary process for preventing uninformed—rather than unwise—agency action.").

16. *See Merkel*, 8 Wash. App. at 848, 509 P.2d at 393.

17. *See* Tucker v. Columbia River Gorge Comm'n, 73 Wash. App. 74, 82, 867 P.2d 686, 690 (1994).

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

19. *See* WASH. ADMIN. CODE § 197-11-794 (2001); Norway Hill Pres. & Prot. Ass'n v. King County Council, 87 Wash. 2d 267, 278, 522 P.2d 674, 680 (1976).

20. Alpine Lakes Prot. Soc'y v. Wash. State Dep't of Natural Res., 102 Wash. App. 1, 15–16, 979 P.2d 929, 936 (1999) (emphasis added).

21. Stempel v. Dep't of Water Res., 82 Wash. 2d 109, 118, 508 P.2d 166, 172 (1973); WASH. REV. CODE § 43.21C.030(2)(b) (2000).

avoids premature cumulative impact studies because the nature of the projects that may be implemented under the plan is speculative. Subsequently, the individual projects implementing the land use plan seem too minor to be shouldered with the burden of a significant environmental impact study.

All three scenarios thus have a common result: the full environmental impacts of a project are never fully investigated or understood.

A. *Classic piecemealing—Project Segmentation*

Highway construction is the most common example of classic piecemealed review because new highways are often planned and implemented in small, cost-feasible segments. As each segment is processed for environmental and regulatory compliance, the lead agency typically limits environmental impact analysis to the physical footprint of the proposed segment. The project is approved, and construction commences without an understanding of the adverse impacts from constructing the entire stretch of roadway. This, the most rampant example of piecemealed review, is usually easy to identify.

On the local level, classic piecemealing typically occurs in "phased" developments. In phased developments, project proponents seek approval of plans to construct a project in a patchwork fashion over a period of time. Planning for these projects is often piecemealed as a matter of practicality because financial or planning concerns force the project proponent to proceed in phases. On occasion, deferral of a comprehensive environmental impact study appears logical because later phases of a project may be subject to change. In the absence of a concrete plan, project proponents cannot be expected to predict environmental impacts at the beginning of the planning stages.[22] However, an appropriate circumstance for phased construction does not directly translate into an appropriate circumstance for phased environmental review.[23] From a SEPA perspective, phasing is improper if it results in an avoidance of a cumulative impact study for the entire project or for the combination of the various phases of the project.[24]

Unfortunately, agencies often have a common sense tendency to assume that proposals that appear benign are benign.[25] Because the environmental impact from a small enough segment can appear insig-

22. Cheney v. City of Mountlake Terrace, 87 Wash. 2d 338, 344, 552 P.2d 184, 188–89 (1976).

23. *See* WASH. ADMIN. CODE § 197-11-060 (2001).

24. *See* WASH. ADMIN. CODE § 197-11-060(5) (2001).

25. *See* Achen v. City of Battle Ground, Western Washington Growth Management Hearings Board, No. 99-2-0040, Final Decision and Order, at 14 (May 16, 2000).

nificant, agencies often process these applications as garden variety proposals for which far-reaching environmental study seems gratuitous. Moreover, the assumed impact from a garden variety proposal that is substituted for the inquiry into the significance of an action is very difficult to overcome. Accordingly, garden variety projects are rubber stamped, and despite SEPA, piecemeal development continues without an understanding of the cumulative effects of successive development on the environment.

B. Plan-to-Project Gap—Continuing Violations

Piecemealed review may also occur in relation to the latter phases of multi-phase developments or when a particular project is so successful that the proponent later decides to expand on the original plan. Either way, environmental review of the project as a whole is deferred until the completion of a later phase. In these cases, there may be gaps in the comprehensiveness of adverse impact review, the administrative record may demonstrate only patchwork environmental review, and there may be little or no disclosure of cumulative adverse impacts.

The plan-to-project type of SEPA violation is often more difficult to detect. Based on timing alone, the applications for earlier phases can justifiably claim that impacts from the entire project are speculative because information may be unavailable until construction on the later phases begins. Then, later development projects within the confines of the original project maintain the appearance of independence because boundaries for the applications are drawn narrowly to exclude the impacts from earlier phases of construction. As the later phases of development are implemented, the already constructed phases create background impact levels against which the later proposals are evaluated. Cursory environmental review in these circumstances often follows as a matter of course.

A recent example of this scenario occurred in the the City of Vancouver, Washington, which currently boasts a 161-acre planned unit development (PUD) on the outskirts of the city limits. The PUD designation was approved in 1988, at which time the applicant specified certain planned uses, but set aside several lots for later development.[26] Primary opposition to the PUD came from members of the general public, who were concerned with imminent changes to a rural environment adjacent to the Columbia River.[27] When the proposal was approved, the entire PUD was shouldered with a Mitigated De-

26. Fisher's Landing Towncenter, PUD 88-03-112/613, Clark County Hearing Examiner's Final Order (June 20, 1988).

27. *Id.* at 11.

termination of Non-Significance (MDNS) that promised more comprehensive environmental study as development progressed.[28]

In the final development phases of the PUD, one of the commercial tenants applied for approval of an on-site gasoline facility.[29] The project was opposed by concerned neighbors, who requested that the agency honor earlier promises of a comprehensive environmental review. These same neighbors had witnessed the evolution of their once rural area into a busy, congested area on the outskirts of the City of Vancouver.[30] Significantly, every project constructed within the planned boundaries was individually issued a negative threshold determination under SEPA.[31]

The neighbors argued that the environmental impacts from the gasoline facility should be studied as part of the larger development project.[32] First, the neighbors pointed out that the proposed gasoline facility would substantially change the original planning approval since the facility was neither included in, nor studied for, the original application.[33] Second, the neighbors requested study of cumulative impacts from the piece-by-piece development within the planning boundaries because the existing record did not demonstrate the slightest consideration of cumulative impacts.[34] Finally, the neighbors asked for fulfillment of promises for a comprehensive study of those environmental impacts deferred to obtain the original approval.[35]

It was clear to the administrative hearings officer, petitioner, and applicant alike that the gasoline facility proposal constituted another phase of the larger project.[36] The site had been paved during the construction of earlier phases of the project. Traffic volumes to and from the commercial establishments in the development had risen and were expected to grow with the added convenience of an on-site gas station. The feasibility of the gasoline facility was based on the project's incorporation into the existing commercial activity at the site. Although the gas station was held to be part of a larger project, the hearings offi-

28. *Id.* at 14.

29. Fred Meyer's Gasoline Facility, AU 994372/PSR 200-00023/CUP 2000-00006, City of Vancouver Hearing Examiner's Final Order (August 3, 2000).

30. Fisher's Landing Towncenter, PUD 88-03-112/613, at 14.

31. Telephone interview with Barbara Ritchie, SEPA Unit, Dep't of Ecology, in Vancouver, WA (Nov. 14, 2001). *See also* EIS Database Report including Environmental Impact Statements Received by the Dep't of Ecology from Clark County and the City of Vancouver from January 1, 1988 to the Present, via FAX from Barbara Ritchie, SEPA Unit, Dep't of Ecology (Nov. 14, 2001) (on file with *Seattle University Law Review*).

32. Fred Meyer's Gasoline Facility, AU 994372/PSR 200-00023/CUP 2000-00006, at 3.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 3–4.

cer was reluctant to find that this circumstance mandated a comprehensive environmental review of the entire project.[37]

The reasons for the hearing officer's reluctance are unclear. Perhaps he did not think to look past the physical project boundaries. Perhaps he compared gas station impacts to the background levels of existing impacts. The impacts of a gas station in a town center are likely to appear less significant than the impacts of the same gas station located on a rural, grassy knoll. Of course, such changes are the very reason for comprehensive, cumulative impact studies. However, the gas station in this case was approved without a comprehensive impact study.[38]

C. Regulatory Postponement—Avoiding Review by Hiding the Ball

A third piecemealing situation occurs when the lead agency for a legislative or regulatory proposal defers environmental review until the impacts are better understood, typically in the context of project proposals that are regulated by such action.[39] This is a close relative of the plan-to-project gap, but is less frequently identified. Tiering in this situation is appropriate so long as a site-specific environmental study is eventually accomplished.[40]

An example of this type of piecemealing is found in environmental studies for local traffic concurrency regulations mandated under the Growth Management Act (GMA).[41] For instance, the Vancouver City Council worked through several concurrency regulatory efforts over several years. For a time, the city relied on an interim regulatory system to manage transportation capital facilities that was enforced pending adoption of permanent standards.[42] However, when the City of Vancouver issued a negative threshold determination for permanent concurrency standards, it intentionally refused to study the

37. *Id.* at 20 (finding that such a study would be speculative).

38. This approval was affirmed in *Boehm v. City of Vancouver*, No. 00-2-04060 (Clark County Super. Ct. 2000), and is currently pending before Division II of the Washington State Court of Appeals.

39. *See, e.g.*, Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County, 96 Wash. 2d 201, 634 P.2d 853 (1981).

40. *See* WASH. ADMIN. CODE § 197-11-600(2) (2001).

41. WASH. REV. CODE § 36.70A.070 (2000).

42. Vancouver, Wash., Ordinance 3284 (Dec. 23, 1996), *formerly codified at* VANCOUVER, WASH., MUNICIPAL CODE ch. 11.95.; Vancouver, Wash., Ordinance 3354, *codified at* VANCOUVER, WASH., MUNICIPAL CODE ch. 11.95 (1998).

majority of the environmental impacts expected to result from the changes to the new permanent standards.[43]

Of approximately eighty questions in an environmental checklist used to make the threshold determination, the City concluded that sixty-five did not apply ("non-project; does not apply"), with the remainder scattered among various selections of "will be reviewed" and other non-environmental discussion.[44] Such a determination of nonsignificance suggests that environmental study would be "tiered," or postponed, but not avoided. Otherwise, the threshold determination would fail to demonstrate that the lead agency had fully considered environmental impacts. However, tiered review in this case may have been proper if the city lacked sufficient information to make a determination on the probability of significant environmental impacts from the adoption of the new concurrency standards.[45]

Unfortunately, the City failed to conduct the intended tiered review of the traffic impacts of subsequent projects.[46] One would expect traffic patterns and volume to change over ten years, five years, and even over a period of twelve months. Yet, the effects of changing traffic patterns are not considered in administrative records of projects regulated by the new concurrency standards. Increased roadway runoff from impervious surfaces carry significant loads of sediment, rubber, oil, and antifreeze into surface waters, increasing the likelihood of turbidity and degradation of local water quality. Alteration of traffic patterns by means of geography, speed, volume, and type clearly affects the local quality of life. The danger of these imminent impacts is probable, significant, and adverse and is directly caused by the traffic in the area benefitting from the new concurrency standards. In this context, the city's successive negative threshold determinations and reluctance to require comprehensive environmental study simply fail to effectuate the informational purposes of SEPA.

In each of these instances of piecemealed review, the common element is the effect on our understanding of environmental impacts:

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43. Revised Notice of Mitigated Determination of Nonsignificance, issued by City of Vancouver on December 1, 1999, at 12; Environmental Checklist for Revised Notice of Mitigated Determination of Nonsignificance, issued by City of Vancouver on December 1, 1999.

44. *Id.*

45. In such cases, the previous SEPA document is incorporated by reference and becomes part of the new document and administrative record. *See* WASH. ADMIN. CODE § 197-11-635 (2001); Klickitat County Citizens Against Imported Waste v. Klickitat County, 122 Wash. 2d 619, 635, 860 P.2d 390, 399 (1993).

46. *See, eg.*, Grand Firs Subdivision, AU991131, City of Vancouver Hearing Examiner's Final Order (2000) (finding, in an unrelated SEPA appeal, that adoption of concurrency standards must have encompassed such impacts, and that any attack on the environmental review of those standards would be impermissibly collateral).

construction commences and the landscape is irreversibly altered without a thorough understanding of how those projects will adversely affect the environment. The problem does not lie in the significance of each individual part of a project, but in the sum of the project's constituent parts. For this reason, challenges to piecemealed review under SEPA are typically leveled at an absence of, or inadequacy in, *cumulative* impact studies for the proposals at hand.

II. CLOSING THE PIECEMEAL LOOPHOLE

When piecemealed environmental review occurs, agencies lack information regarding the adverse impacts a project proposal will cause in conjunction with other actions. However, SEPA and its federal counterpart are well suited to battle this issue. The drafters of SEPA appear to have anticipated piecemealed review and designed the statute with the tools to prevent information gaps and ensure informed decision making. Likewise, some courts have recognized the risks of piecemealing and have applied these statutory tools to prohibit agencies from conducting only piecemealed review.

A. Regulatory Prohibition of Piecemealed Environmental Review

SEPA is an "action-forcing"[47] statute designed to curtail the ill effects of overzealous and careless governmental actions by requiring comprehensive and thorough environmental review. SEPA requires agencies to "include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement . . . on the environmental impact of the proposed action."[48] The intended effect of this mandate is to compel agencies "to be cognizant of and responsive to possible environmental consequences in their actions."[49]

Thus, SEPA, like NEPA, serves a dual role. First, "[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant envi-

47. "The term 'action-forcing' was introduced during the Senate's consideration of NEPA, and refers to the notion that preparation of an EIS ensures that the environmental goals set out in NEPA are 'infused into the ongoing programs and actions of the Federal Government.'" 115 CONG. REC. 40416 (1969) (remarks of Sen. Jackson) (cited in Kleppe v. Sierra Club, 427 U.S. 390, 409 n.18 (1976)).

48. WASH. REV. CODE § 43.21C.030 (2000); *see also* 42 U.S.C. § 4332(2)(c) (1994) (NEPA counterpart).

49. *See also* Town of Huntington v. Marsh, 859 F.2d 1134, 1141 (2d Cir. 1988) (stating that the purpose of the mandate is to "compel the decision-maker to give serious weight to environmental factors . . . and to enable the public to understand and consider meaningfully the factors involved.") (citations omitted).

ronmental impacts."[50] Second, SEPA, like NEPA, "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[51] SEPA aims to correct a history of unreasoned agency action and ensure that future actions will be based on information, rather than in spite of it.[52] In sum, piecemealed review should not exist where SEPA is properly enforced.

SEPA provides four useful tools for agencies attempting to close information gaps and advance SEPA's general policy goals. First, SEPA requires an agency to define the boundaries of the proposal at hand.[53] Of course, SEPA does not require a "crystal ball" inquiry into the possible impacts, where identifying those potentially adverse impacts becomes an exercise in speculation.[54] SEPA focuses on proposed rather than contemplated actions, and defines "actions" to include only those future proposals that have a degree of relative certainty.[55] However, environmental review must be at least as broad as the proposal, and in most cases, the environmental study will exceed the boundaries of the proposed project.[56]

Second, although SEPA does not require redundant and repetitive study,[57] it does require that where actions are "related to each

50. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

51. *Id. See generally* Kenneth Murchinson, *Does NEPA Matter?—An Analysis of the Historical Development and Contemporary Significance of the National Environmental Policy Act*, 18 U. RICH. L. REV. 557, 612 (1984) (arguing that environmental organizations would be far less effective without information gathered through the NEPA procedures).

52. *See also* Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989) (stating that the purpose of NEPA is to ensure an agency "will not act on incomplete information, only to regret its decision after it is too late to correct.").

53. *See* WASH. ADMIN. CODE §§ 197-11-060, -704(1)–(2), -792 (2001).

54. *See* Cheney v. City of Mountlake Terrace, 87 Wash. 2d 338, 344, 552 P.2d 184, 188 (1976) ("it is impractical if not impossible to identify and evaluate every remote and speculative consequence of an action."); *see also* County of Suffolk v. Sec'y of Interior, 562 F.2d 1368, 1378 (2d Cir. 1977).

55. *See* WASH. ADMIN. CODE § 197-11-704 (2001); *Cheney*, 87 Wash. 2d at 344–45, 552 P.2d at 188 (holding that a possible future, yet unproposed development project is not an action or proposal such that an environmental document must be prepared for its impacts); *see also* Kleppe v. Sierra Club, 427 U.S. 390, 410 n.20 (1976).

56. *See Cheney*, 87 Wash. 2d at 344, 552 P.2d at 188 ("implicit in the statute is the requirement that the decision makers consider more than what might be the narrow, limited environmental impact of the immediate, pending action").

57. *See* WASH. ADMIN. CODE § 197-11-060 (2001). Because separate environmental determinations could cover the same impacts and projects, the 1995 regulatory reform legislation prohibits the revival of past determinations without discovery of new information or some pressing reason to reopen discussion. Engrossed Substitute House Bill (ESHB) 1724, 1995 Wash. Laws ch. 347. In particular, regulatory reform was intended to relieve local government from the duplicative study of environmental impacts, first at the proposal of comprehensive plan amendments and then again for projects subject to the comprehensive plan. WASH. REV. CODE § 43.21C.240 (2000).

other closely enough to be, in effect, a single course of action," the environmental review is performed in a single document.[58] Actions are considered sufficiently related if they will not proceed unless the other actions are "implemented simultaneously with them," or are "interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation."[59]

Third, SEPA regulations suggest that projects should be joined for the purpose of analyzing their adverse impacts when they are either: (1) linked geographically; (2) related by some relevant similarity, such as timing, impacts, alternatives, methods of implementation, media, or subject matter; or (3) sharing a stage of technological development.[60] SEPA thus suggests an optional ground for closing piecemealed review, creating a strong presumption that separate projects should be studied together when impacts are "similar," related in kind, type, or location.[61]

Finally, SEPA requires cumulative impact consideration among separate projects, as well as where several projects impact the same local environment.[62] Although SEPA contains neither a statutory nor regulatory definition of "cumulative impacts" or "cumulative effects," Washington courts may be guided by NEPA's expansive definition,[63] which includes environmental impacts resulting from "the incremental

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58. *See* WASH. ADMIN. CODE § 197-11-060(3)(b) (2001); *see also* 40 C.F.R. § 1508.25 (2000).

59. *See* WASH. ADMIN. CODE §§ 197-11-060(3)(b)(i)–(ii), -060(5)(d) (2001); *see also* 40 C.F.R. § 1508.25(a)(1) (2000). The rule prohibits phased review of a substantial project or connected projects if:

> (i) The sequence is from a narrow project document to a broad policy document;
> (ii) [Phased review] would merely divide a larger system into exempted fragments or avoid discussion of cumulative impacts; or
> (iii) [Phased review] would segment and avoid present consideration of proposals and their impacts that are required to be evaluated in a single environmental document under WAC 197-11-060(3)(b) or 197-11-305(1) (2001); however, the level of detail and type of environmental review may vary with the nature and timing of proposals and their component parts.

WASH. ADMIN. CODE § 197-11-060(5)(d).

60. This provision does not contain an outer boundary for cumulative impact study. The extent of connected impacts could conceivably extend throughout the world for eternity. However, no court has been bold enough to give such an expansive interpretation.

61. *See* WASH. ADMIN. CODE § 197-11-060(3)(c)(i) (2001) ("Proposals are similar if, when viewed with other reasonably foreseeable actions, they have common aspects that provide a basis for evaluating their environmental consequences together, such as common timing, types of impacts, alternatives, or geography."); *see also* 40 C.F.R. § 1502.4 (2000) (NEPA counterpart).

62. *See* WASH. ADMIN. CODE §§ 197-11-060(4)(e), -228(2)(c), -235(5)(b), -792(2)(c)(iii) (2001).

63. *See, e.g.*, Eastlake Cmty. Council v. Roanoke Ass'n., Inc., 82 Wash. 2d 475, 488 n.5, 513 P.2d 36, 45 n.5 (1973).

impact of the action when added to other past, present, and reasonably foreseeable future actions."[64]

In certain situations, SEPA regulations do seek efficiency by allowing agencies to "phase" and "tier" environmental review.[65] Phased review allows the lead agency to study adverse environmental impacts effectively where separate determinations cover the same impacts and projects. Agencies have flexibility in phasing decisions in the non-project planning stages.[66] Of course, these provisions do not permit escape from the informational requirements of SEPA. In theory, the later environmental document for the project implementation must include an analysis of the impacts not already covered in the programmatic environmental study.[67] Accordingly, not every proposal is ripe for phased review.

SEPA drafters anticipated the possibility of complacency in environmental studies and equipped SEPA with tools to deal with such situations. SEPA's regulatory language suggests that piecemealed and segmented environmental review is properly cured by the agency's first withdrawing of the respondent's threshold determination,[68] and then ordering project proponents to perform supplemental environmental review.[69] Other SEPA regulations require supplemental review (in the form of either a new threshold determination or a supplemental environmental impact statement) where there has been (1) a substantial change to a proposal, increasing the likelihood of significant adverse environmental impacts; (2) a discovery of new information that suggests the likelihood of significant adverse environmental impacts; or (3) a threshold determination that was based on material non-disclosure of information.[70]

The legislative drafters thus ensured that agencies could overcome the problem of piecemeal review. However, where the agencies have failed to properly utilize their powers under SEPA, it is left to the courts to ensure that the practice of piecemeal review is not allowed to continue.

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64. 40 C.F.R. § 1508.7 (2000); *see also* 40 C.F.R. § 1508.27(b)(7) (2000) ("Significance exists if it reasonable to anticipate a cumulatively significant impact on the environment.").

65. *See* WASH. ADMIN. CODE § 197-11-060(5) (2001); San Juan County v. Dep't of Natural Res., 28 Wash. App. 796, 802, 626 P.2d 995, 998 (1981) (finding that the potential for a project's future expansion was not firm enough to justify environmental review of that contingent future action).

66. *See* WASH. ADMIN. CODE §§ 197-11-442, -600(2) (2001).

67. *See* WASH. ADMIN. CODE § 197-11-443(2) (2001).

68. *See* WASH. ADMIN. CODE § 197-11-340(3)(a) (2001).

69. *See* WASH. ADMIN. CODE § 197-11-060 (2001); *see also* 40 C.F.R. § 1509(c)(1)(ii) (2000) (NEPA counterpart).

70. *See* WASH. ADMIN. CODE § 197-11-600(3) (2001).

B. Judicial Attack on Piecemealed Projects

An active Washington court wasted no time implementing the full mandate of SEPA against piecemealed review. In *Merkel v. Port of Brownsville*,[71] the plaintiffs challenged a proposal for upland clearing and grading on property adjacent to a small marina redevelopment project. The defendant Port claimed that upland construction was actually a separate project because the water-dependent and uplands areas fell under different regulatory schemes, and were, therefore, independent.[72] The court disagreed, finding that "[t]here is nothing in the record . . . to indicate that the contemplated construction has ever been anything but one project."[73] The *Merkel* court ordered the Port to combine the projects for purposes of environmental analysis. The court then emphasized the incompatibility of piecemeal review with SEPA's goals as follows:

> The frustrating effect of such piecemeal administrative approvals upon the vitality of [SEPA] compels us to answer in the negative. . . . To permit the piecemeal development urged upon us . . . would lower the environmental mandates of these acts to the status of mere admonitions. The result would be frustration rather than fulfillment of the legislative intent inherent in these acts.[74]

Federal courts applying NEPA have also addressed the question of piecemealed environmental study, referred to as improper project segmentation. Like the *Merkel* court, federal courts have been aware that segmentation "allows an agency to avoid the NEPA requirement that an EIS be prepared for all major federal actions with significant impacts by dividing the overall plan into component parts, each involving action with less significant environmental effects."[75] Federal courts appear to have firmly rejected agency attempts to bypass NEPA's protections, often finding agencies engaged in unlawful segmentation of projects in order to avoid consideration of an action's effects on the environment.[76]

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71. 8 Wash. App. 844, 509 P.2d 390 (1973).

72. *Id.* at 850, 509 P.2d at 395.

73. *Id.*

74. *Id.* at 851, 509 P.2d at 395.

75. Taxpayer's Watchdog, Inc. v. Stanley, 819 F.2d 294, 298 (D.C. Cir. 1987).

76. *See, e.g.*, City of Rochester v. United States Postal Serv., 541 F.2d 967, 972 (2d Cir. 1976) (holding that avoiding comprehensive study of environmental impact by dividing project into smaller, insignificant proposals would create "a clear loophole in NEPA"); Alpine Lakes Prot. Soc'y v. Schlapfer, 518 F.2d 1089, 1090 (9th Cir. 1975) (holding that when reviewing piecemealed impact studies courts should look to "prevent the policies of NEPA from being nibbled away by multiple increments"); Thomas v. Peterson, 753 F.2d 754, 758–59 (9th Cir. 1985)

For instance, in *Chelsea Neighborhood Ass'n v. United States Postal Service*,[77] the Second Circuit reviewed a citizen challenge to a proposed postal vehicle maintenance facility. The plaintiffs challenged the proposal under NEPA because the postal service had not studied the significant adverse impacts from development of the *entire* property. Among other things, the proposal included on-site housing units that were mentioned, but effectively excluded from the environmental determination. The Second Circuit insightfully determined that the informational purposes of NEPA would be subverted if the project could be divided and studied as independent, insignificant actions.[78]

Likewise, in *Thomas v. Peterson*, the Ninth Circuit addressed the issue of whether NEPA required the Forest Service to consider, in a single review process, the environmental impacts of a forest road intended to facilitate logging and any resulting timber sales.[79] The *Thomas* court was satisfied by plaintiff's demonstration of interconnectedness and held that the logging operations and the construction of the road were "connected actions" because "the timber sales [could not] proceed without the road, and the road would not be built but for the contemplated timber sales."[80]

The introductory section of this essay described three different types of piecemealing, one of which results in prospective ignorance, the other two ignoring the cumulative impacts of past actions. In the seemingly comprehensive SEPA framework, the mere existence of piecemealed review defies logic. The regulatory framework of SEPA appears to anticipate piecemealed review and, when properly identi-

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(holding that the construction of a road to facilitate logging and the sale of the timber that would result from that logging were "connected actions" and, therefore, had to be addressed in a single EIS); Port of Astoria v. Hodel, 595 F.2d 467, 477–78 (9th Cir. 1979) (holding that an EIS had to consider the impacts of supplying federal power and constructing a private magnesium plant that used the power because the two actions were connected).

77. Chelsea Neighborhood Ass'n v. United States Postal Serv., 516 F.2d 378 (2d Cir. 1975).

78. *Id.* at 388.

79. Thomas v. Peterson, 753 F.2d 754, 759 (9th Cir. 1985).

80. *Id.* The court continued:

> [T]he Fish & Wildlife Service has written, "Separate documentation of related and cumulative potential impacts may be leading to aquatic habitat degradation unaccounted for in individual EA's (i.e., undocumented cumulative effects) . . . . Lack of an overall effort to document cumulative impacts could be having present and future detrimental effects on wolf recovery potential." These comments are sufficient to raise "substantial questions" as to whether the road and the timber sales will have significant cumulative environmental effects. Therefore, on this basis also, the Forest Service is required to prepare an EIS analyzing such effects.

Id. (citations omitted); *see also* People of Enewetak v. Laird, 353 F. Supp 811 (D. Haw. 1973).

fied, piecemealing is flatly rejected.[81] Nonetheless, the practice is an ongoing problem before agencies and courts, suggesting a loophole or some other deficiency in the SEPA regulatory scheme.

III. SOURCES OF THE CONTINUING PIECEMEAL PROBLEM

It is likely that there are several contributing sources to the ongoing piecemeal problem. At the onset, we can look to consistency in the regulations themselves to identify confusion. This section encounters two such problems, both of which are subject to an interpretation that undermines the need for cumulative impact study: the first concerns the SEPA requirement that "interdependent" projects be studied together; and the second is the potential of abuse in the phasing process.

A. Impact versus Connectedness Analysis—Mutually Exclusive?

Under SEPA, evaluation in a single document is mandatory when projects are "related to each other closely enough to be, in effect, a single course of action."[82] The "project connectedness" or "interdependency" inquiry is grounded in the assumption that the project itself is central to the analysis. In addition, comprehensive SEPA review is triggered by an interrelation or accumulation of impacts.[83] Interestingly, although the two standards aim at the enforcement of SEPA against piecemealed review, courts have applied the standards in a confusing, inconsistent manner.[84]

Cumulative impact analysis is extremely broad.[85] The courts have repeatedly stated that requiring a study of cumulative impacts means gaining an understanding of impacts that accumulate, through time and across project boundaries, by studying the combined effects of those impacts.[86] Moreover, the cumulative impacts mandate is as grounded in common sense as it is in law.[87] The Washington Su-

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81. *See, e.g.*, Merkel v. Port of Brownsville, 8 Wash. App. 844, 851, 509 P.2d 390, 394 (1973); *see also* Sierra Club v. Penfold, 664 F. Supp. 1299, 1303 (D. Alaska 1987) ("[I]f ever there was a paradigm instance of 'cumulative' or 'synergistic' impacts, it is this case. Dozens of small operations of a single type incrementally contribute to deterioration of water quality in a common drainage stream."), *aff'd*, 857 F.2d 1307 (9th Cir. 1988).

82. WASH. ADMIN. CODE § 197-11-060(3)(b) (2001).

83. *See* WASH. ADMIN. CODE §§ 197-11-060(5)(d), -060(3)(c) (2001).

84. For a deeper discussion of the possible confusion among these standards under NEPA, see Terence L. Thatcher, *Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment Under the National Environmental Policy Act*, 20 ENVTL. L. 611 (1990).

85. *See Penfold*, 664 F. Supp. at 1303.

86. *See* Hayes v. Yount, 87 Wash. 2d 280, 287, 552 P.2d 1038, 1043 (1976).

87. *See Penfold*, 664 F. Supp. at 1307 (referring to the "common-sense principles" of cumulative impact study).

preme Court has illustrated the logic behind the cumulative impacts study requirement as follows: "Logic and common sense suggest that numerous projects, each having no significant effect individually, may well have very significant effects when taken together. This concept of cumulative environmental harm has received legislative and judicial recognition."[88] Implicit in the court's "logic and common sense" is that alteration of the natural landscape can have a continuing adverse impact; therefore, the fact that a project was previously reviewed does not mean that it will no longer have an impact, especially when added to subsequent actions altering or impacting the environment.[89] Not surprisingly, an awareness of the cumulative impacts caused by a proposal is an essential element of the threshold environmental determination,[90] and courts interpreting the mandate of SEPA have determined that the failure to engage in cumulative impact analysis is a proper ground for denial of a development application.[91]

In contrast to cumulative impact analysis, a determination of project connectivity is limited to a demonstration of property and proposal ownership, functionality of the proposals themselves, and possibly shared facilities, geography and funding.[92] Project-based analysis is very much limited to the face of the application and that information disclosed by the applicant. In theory, because "interdependent" projects are likely to have cumulative impacts, but projects need not be physically or functionally connected to accumulate impacts, the sheer expansiveness of cumulative impacts analysis will subsume analysis based on project connectivity or interdependence.

Despite the differences between project connectivity and cumulative impact analyses, the two are not in conflict. Whether viewed from a project-based or impact-based context, the weight of SEPA law prohibits the piecemealing of projects into a size at which impacts appear insignificant in order to avoid the study of environmental impacts.[93] Both standards effectuate the informational goals of SEPA by enlarging the study of adverse environmental impacts from a given proposal. At the very least, a finding that two projects fail to share the

88. *See Hayes*, 87 Wash. 2d at 287–88, 552 P.2d at 1038.

89. *Id.*

90. *See, e.g.*, Alpine Lakes Prot. Soc'y v. Wash. State Dep't of Natural Res., 102 Wash. App. 1, 14–15, 979 P.2d 929, 936–38 (1999).

91. *See* Tucker v. Columbia River Gorge Comm'n, 73 Wash. App. 74, 82, 867 P.2d 686, 690 (1994). Likewise, under NEPA, "[i]f several actions have a cumulative environmental effect, this consequence must be considered in an EIS." Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998).

92. *See* WASH. ADMIN. CODE §§ 197-11-060(3), -060(5) (2001).

93. *See* WASH. ADMIN. CODE § 197-11-060(5)(d); *see also* 40 C.F.R. § 1508.25(a)(1) (2000) (NEPA counterpart).

requisite interdependence should not effect an exemption from consideration of the combined impacts caused from completion of both proposals. Again, although two projects may be functionally and physically distinct, the combined effect of completing both projects may still have a cumulative impact.

Why, then, do courts fail to implement the cumulative impact standard? Reconciliation of regulatory and statutory language is not an unfamiliar task to courts. Oddly, although cumulative impacts issues may be the most familiar basis for public challenges to SEPA proceedings, seldom does the judiciary discuss the relations between cumulative impacts and project connectedness analysis. In fact, instead of reconciling the possible interpretations of the separate regulations, courts appear to independently interpret them and choose either cumulative impact or connectivity analysis, but not both.[94] In many cases, the court's choice between the analyses typically determines whether the challenged environmental study is found inadequate or not. Interestingly, in virtually every case refusing to remand for improper piecemealing, the Washington State Supreme Court chose to review only the connectedness of the challenged projects.

Worse yet, even though an agency may not ignore the environmental impacts of actions that are connected to other actions,[95] courts have cited the "connected action" definition to exempt projects from cumulative environmental review. For instance, in *Morongo Band of Mission Indians v. FAA*,[96] the federal court interpreting NEPA specifically affirmed segregation of environmental studies, ignoring the interaction between an airport's arrival enhancement project (AEP) from review of a larger airport expansion project. The FAA was preparing an EIS for the latter, but neglected contemporaneous review of the former, finding that each project had independent utility.[97] The court expressly recognized interconnection of the impacts and that the expansion project would exacerbate the problems being addressed by the AEP, but found that the AEP proposal was designed to deal with existing problems and, therefore, was not functionally connected to a future expansion project.[98] The *Morongo Band* court dismissed the chal-

94. *Compare* Merkel v. Port of Brownsville, 8 Wash. App. 844, 851, 509 P.2d 390, 394 (1973) (impact accumulation) *with* Org. to Preserve Agric. Lands v. Adams County, 128 Wash. 2d 869, 880, 913 P.2d 793, 800 (1996) (phasing rule). *Compare* Tenakee Springs v. Clough, 915 F.2d 1308, 1312 (9th Cir. 1990) (impact analysis) *with* Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105, 1115 (9th Cir. 2000) (connectedness).

95. *See* Village of Grand View v. Skinner, 947 F.2d 651, 657 (2d Cir. 1991); *see also* 40 C.F.R. § 1508.25(a)(1) (2001); WASH. ADMIN. CODE § 197-11-060 (2001).

96. 161 F.3d 569 (9th Cir. 1998).

97. *Id.* at 580.

98. *Id.*

lenge without considering the propriety of ordering a cumulative impact study.

B. Phased Review—Avoiding Cumulative Impact Studies

Another possible source of confusion, leading to the piecemeal gap in SEPA, is in relation to the "phasing" rule. Environmental review may be phased.[99] Phased review aims at creating greater efficiency in environmental review and "assists agencies and the public to focus on issues that are ready for decision and exclude from consideration issues already decided or not yet ready."[100] SEPA rules provide three distinct, functionally related criteria delineating properly phased review: one provision provides authority to phase, and the other two limit exercise of the practice.

First, agencies may "phase" review when either (1) the sequence of review is from a broader, non-project environmental document to later review of a narrow, site-specific scope; or (2) when the present proceeding is too early to identify environmental impacts, and the agency will complete subsequent environmental review at a later stage of development.[101] Second, the rules also specify that phased review is *not* appropriate in piecemealing situations, including when phased review "would merely divide a larger system into exempted fragments," or more importantly, when phasing would "avoid discussion of cumulative impacts."[102] To repeat, phased review may not be interpreted to avoid the study of cumulative impacts. The rules go even further, prohibiting deferral of environmental review when such deferral "would segment and avoid present consideration of proposals and their impacts that are required to be evaluated in a single environmental document . . . ."[103] It is arguable that SEPA regulations could not have been better drafted to provide a more effective prohibition against piecemealed review.

Nonetheless, the third provision on phasing is most often cited by courts to exempt agency study of cumulative impacts or to otherwise evade piecemealing challenges. The third provision states that "[p]roposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document."[104] Under this rule, the adverse environmental impacts from separate proposals must be analyzed in

99. *See* WASH. ADMIN. CODE § 197-11-060(5) (2001).
100. WASH. ADMIN. CODE § 197-11-060(5)(b) (2001).
101. WASH. ADMIN. CODE § 197-11-060(5)(c) (2001).
102. WASH. ADMIN. CODE § 197-11-060(5)(d) (2001).
103. *Id.*
104. WASH. ADMIN. CODE § 197-11-060(3)(b).

the same environmental document if they: "(i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or (ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation."[105]

This rule only discusses combining the study of several projects into a single, comprehensive document. Notably, the provision is not presented as an exemption, justification or excuse. This provision demands that the lead agency broaden the scope of an environmental study under the stated circumstances. Under the above regulatory analysis, citation to the phasing rule to *relieve* a proposal of further study is contrary to both the rules and purposes of SEPA. However, as described below, case law indicates that the courts do not apply SEPA as it is written, suggesting the possibility of extra-statutory motives in environmental review.

IV. THE JUDICIAL EXPERIENCE

If the informational purposes of SEPA presented here are accurate, a piecemeal challenge should be answered with a greater effort at information gathering. On other issues, Washington courts have implemented this policy in a commendable fashion.[106] Unfortunately, Washington courts often resolve piecemeal challenges without discussion, or by briefly and generically citing to SEPA regulations.[107] Occasionally, the court is even faced with ill-conceived challenges under circumstances that hardly suggest impropriety.[108] Even from the reported cases demonstrating merit, courts have yet to establish an appropriate test for distinguishing proper versus improper segregated review. Under both SEPA and NEPA, this lack of guidance has clouded judicial understanding of the piecemeal problem.

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105. *Id.*

106. *See, e.g.*, Gardner v. Pierce County, 27 Wash. App. 241, 245, 617 P.2d 743, 746 (1980) (demanding adequate information to make a threshold determination); Bellevue Farm Owners v. Shorelines Bd., 100 Wash. App. 341, 352–53, 997 P.2d 380, 386–87 (2000) (rejecting the argument that one agency's DNS under SEPA could preclude a different agency's impact analysis under the Shorelines Management Act).

107. *See, e.g.*, Puget Sound Energy v. State Shorelines Hearings Bd., No. 44083-7-I, 2000 WL 987128 (Wash. App. July 17, 2000) (Although dismissed on grounds of standing, the court cited the phasing rule and dismissed a challenge alleging piecemealing of electricity substation from erection of power line. The court reasoned that projects were not connected because the application to erect the power lines had not yet been filed.).

108. *See* Swift v. Island County, 87 Wash. 2d 348, 362, 552 P.2d 175, 184 (1976) (dismissing piecemeal challenge because cumulative impacts would be covered in a court-ordered project-wide EIS); Concerned Taxpayers Opposed to Modified Mid-S. Sequim Bypass v. Dep't. of Transp., 90 Wash. App. 225, 231, 951 P.2d 812, 817 (1998) (rejecting misconceived piecemeal challenge against EIS that studied present project proposal and future additions to the project).

A. SEPA's Project-Based Analysis

It is possible to interpret SEPA case law to hold that the piecemeal prohibition is a means to close the loophole and effectuate the informational purposes of SEPA. Although there are no cases distinguishing piecemealed from properly phased review, the courts have on occasion considered evidence suggesting that the impacts from separate projects may combine or accumulate. Courts have found that separate projects are sufficiently related for analysis in a single document when they are linked by a common purpose such as a destination or a development project,[109] or where two projects share a geographical location.[110]

Unfortunately, the more convincing reading of Washington case law indicates that, besides the *Merkel* decision, Washington courts seem to focus their attention on connectivity analysis. In *Cathcart-Maltby-Clearview Community Council v. Snohomish County*,[111] a dissatisfied community challenged a rezone approval that would enable the transformation of 1,800 undeveloped acres into 6,000 residential units. The EIS for the rezone was conceded to be a "bare bones" study, "devoid of any quantitative discussion as to cumulative and secondary effects on the surrounding areas."[112] Nevertheless, the court found the EIS adequate as a matter of law because the developments would require later approvals and, hence, would eventually require environmental review.[113] The court was persuaded by evidence that the county had demonstrated a willingness to refuse site specific permit approvals where environmental problems persist.[114] However, the court did not address whether a comprehensive cumulative impact study would be performed as a condition of any particular site specific approval. The court failed to implement the cumulative impact mandate.

Unfortunately, the *Cathcart-Maltby-Clearview* court engaged in a gratuitous frolic down dictum lane that resulted in poor precedential decision making. The court misinterpreted SEPA and expressly promulgated criteria for when "piecemeal review is permissible."[115]

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109. *See* Merkel v. Port of Brownsville, 8 Wash. App. 844, 850, 509 P.2d 390, 394 (1973).

110. *See* Indian Trail Property Owner's Ass'n v. City of Spokane, 76 Wash. App. 430, 443, 886 P.2d 209, 218 (1994) (separating SEPA review for car wash from remainder of shopping center, even though car wash required separate development review, constituted error under SEPA).

111. 96 Wash. 2d 201, 634 P.2d 853 (1981).

112. *Id.* at 209–10.

113. *Id.*

114. *Id.* at 211.

115. *Id.* at 210.

According to the court, piecemeal review is appropriate "if the first phase of the project is independent of the second[,] and if the consequences of the ultimate development cannot be initially assessed."[116] Clearly, the court misspoke; the proposition, which is stated as a rule, only encompasses project connectedness analysis under the "phased review" rule.[117] The court did not add to this list an agency's obligation to discuss the cumulative impacts from these projects. Unfortunately, the court's semantic difficulty has subsequently been cited as the rule.[118]

Similarly, the court in *Organization to Preserve Agricultural Lands v. Adams County (OPAL)*[119] misunderstood the gravity of its piecemeal challenge. Because *OPAL* concerned a landfill siting proposal, review was limited to environmental issues affecting the decision to locate the landfill at that particular site. However, there were objections to the proposal due to deferral of a groundwater impact study for the proposed site. The court revisited the piecemeal rule and cited *Cathcart-Maltby-Clearview* for the proposition that deferral of environmental review is appropriate when the proposal is required to seek subsequent review. The court did not make the same semantic error as in *Cathcart-Maltby-Clearview* and instead cited the regulatory rules for phased review, relying on the fact that further review would be necessary for an operating permit.[120] The *OPAL* court's analysis, like the court's analysis in *Cathcart-Maltby-Clearview*, was incorrect. In both cases, environmental review was deferred to a later date and in the context of individual construction projects, making cumulative impact review unlikely. Indeed, the court in *Cathcart-Maltby-Clearview* admitted that segmenting review of the adverse environmental impacts

116. *Id.* (citing Barrie v. Kitsap County, 93 Wash. 2d 843, 613 P.2d 1148 (1980), and Cheney v. City of Mountlake Terrace, 87 Wash. 2d 338, 552 P.2d 184 (1976)).

117. *See* WASH. ADMIN. CODE §§ 197-11-060(3)(b), -060(5) (2001).

118. *See, e.g.*, Murden Cove v. Kitsap County, 41 Wash. App. 515, 526, 704 P.2d 1242, 1249 (1985). In *Murden Cove*, the court reviewed a negative threshold determination issued for a rezone and planned unit development application. The applicant, whose tract extended beyond the application boundary, sought a zoning designation that would permit industrial uses on an undeveloped portion of the property. The environmental checklist submitted for the application, along with the negative threshold determination, contained incomplete information and analysis for the proposed land uses on the site. The court upheld the approval, finding that a rezone for a planned unit development, approved for the purpose of enabling the development of the property, was not "dependent upon, functionally related to, or causally connected to" the future development. The *Murden Cove* court specifically cited the "rule" that "piecemeal review is permissible." *Id.* at 526.

119. Org. to Preserve Agric. Lands v. Adams County, 128 Wash. 2d 869, 880, 913 P.2d 793 (1996).

120. *Id.* at 880–81, 634 P.2d at 800–01.

of the siting decision to a time when the parties have already committed to the site results in improper piecemealing.[121]

In sum, Washington courts have been reluctant to apply the wisdom of the *Merkel* court and have consistently rejected challenges to piecemealed review when brought early in the development process. The courts' stance on this issue incorrectly implies that the Washington piecemeal test is contingent on the interdependency of the proposals themselves rather than the interrelation of the environmental impacts. Additionally, although one might think Washington courts could look to the federal courts for guidance, the federal courts themselves have fared no better.

B. The Federal Experience

Federal courts have created similar interpretive difficulties in implementing the NEPA regulatory scheme. Since NEPA's youth, federal courts have been actively engaged in developing criteria designed to determine whether project segmentation is improper.[122] However, federal courts have been unable to reconcile the definition of cumulative impacts, which expands the scope of environmental study, with the court's application of "connectedness," which has been interpreted to limit the scope of study. In this sense, the Ninth Circuit's interpretation of NEPA is exemplary, not for its adherence to the principals expressed in NEPA, but for consistently demonstrating the uncertainty and confusion displayed in other jurisdictions. Early on, the Ninth Circuit's persistence in thwarting segmented review was unparalleled. However, recent case law contradicts the earlier holdings.

Over a decade ago, the Ninth Circuit correctly interpreted the NEPA statute and invalidated a permit issued by the Federal Energy Regulatory Commission (FERC) for violations of NEPA. In *LaFlamme v. FERC*,[123] FERC had based its assertion of NEPA compliance on a comprehensive EIS that had been prepared for a separate project. However, the adopted EIS failed to analyze the cumulative impacts from a handful of unrelated projects that would impact the same general location as FERC's proposed project. The court cited

121. Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County, 96 Wash. 2d 201, 210–11, 634 P.2d 853, 859 (1981).

122. Federal courts often demonstrate a willingness to strictly apply the regulatory terms to effectuate more the policy of NEPA. For example, one federal court has stated that "the concepts of 'independent utility' or 'logical termini' are not talismans that truncate the natural scope of an EIS. Reason mandates that the defendants assess the environmental harm" that arises from the proposed project. Appalachian Mountain Club v. Brinegar, 394 F. Supp. 105, 117 (D. N.H. 1975).

123. 852 F.2d 389 (9th Cir. 1988).

NEPA's definition for "cumulative impacts" and refused FERC's assertion of NEPA compliance, finding that FERC had violated NEPA when "they examined the . . . project in *isolation*, without considering the 'net' impact that all projects in the area may have on the environment."[124] The *LaFlamme* court was not bound by project connectivity; the court concentrated on geographical relation, hence *impact* connectivity was the proper target of the cumulative impact study.

Two years later, the Ninth Circuit Court applied the *LaFlamme* holding to invalidate a ten-volume Supplemental Environmental Impact Statement (SEIS) prepared for old growth timber harvesting in Alaska.[125] Again citing to cumulative impacts analysis, the court was concerned by the lack of cumulative impact study for a number of other geographically-related projects.[126] The court cited *LaFlamme* for the prohibition against examining "single projects in isolation without considering the net impact that all the projects in the area might have on the environment."[127]

A string of cases between 1998 and 1999 confirmed the Ninth Circuit's impact based, geographical approach to environmental impact study. In *Neighbors of Cuddy Mountain v. United States Forest Service*,[128] the Ninth Circuit invalidated an EIS for the failure to evaluate adequately the cumulative effects of three nearby timber sales.[129] In *Blue Mountains Biodiversity Project v. Blackwood*,[130] the court ordered a single, comprehensive EIS to evaluate the cumulative impacts of five independent timber sales where all five sales contributed to a fire recovery strategy in the Umatilla National Forest.

Finally, in *Muckleshoot Indian Tribe v. United States Forest Service*,[131] the court examined the review of several resource management plans and land exchanges geared toward enabling timber sales in Mt. Baker-Snoqualmie National Forest. In response to the challenge, the Forest Service had produced a plethora of watershed analyses and environmental impact statements prepared at various times over a fifteen year period.[132] Nonetheless, the *Muckleshoot* court sent a message of strict NEPA compliance, rejecting the Forest Service's EIS because the analysis of impacts accumulating from other projects in the area

124. *Id.* at 402.
125. City of Tenakee Springs v. Clough, 915 F.2d 1308 (9th Cir. 1990).
126. *Id.* at 1313.
127. *Id.* at 1312.
128. 137 F.3d 1372 (9th Cir.1998).
129. *Id.* at 1378–81.
130. 161 F.3d 1208 (9th Cir. 1998).
131. 177 F.3d 800, 811 (9th Cir. 1999).
132. *See id.*

was "far too general and one-sided to meet the NEPA requirements," and failed to provide "a useful analysis" as required under NEPA.[133]

This series of Ninth Circuit cases may represent the most successful reported effort combating piecemealed review. In each instance, the court was influenced by the combined, singular effect made by separate projects, at separate times, involving separate actors. The court was less concerned with the interdependency or connectedness of the projects themselves and did not allow the facade of project connectedness to block a searching inquiry into the synergistic impacts affecting a local environment.

All good things, it is said, must come to an end. So it was with the Ninth Circuit's battle against piecemealed environmental study. In *Wetlands Action Network v. United States Army Corps of Engineers*,[134] the Ninth Circuit refocused its attention to a strict "independent utility" test. The *Wetlands Action* court noted the lack of clarity in multi-party piecemealing cases because NEPA "does not specify the scope of analysis that federal agencies must conduct in determining whether their actions, when combined with private actions, come within the mandate of [NEPA]."[135] Citing to the regulations, the court inquired into the connectivity of the project with other phases of development and the cumulative impact from the project as a whole. The court rejected a finding of connectivity because each phase had "independent utility" and could be substantially justified without reference to other phases.[136] Notably, the court did not attempt to assert that the phased project would not cause cumulative impacts, or that the phases would not cause impacts on the same geographical area. By way of explanation, the court stated that it was unwilling to "require the government to do the impractical."[137]

The most surprising aspect of the *Wetlands Action* decision is the manner in which the court avoided NEPA cumulative impact regulations and Ninth Circuit precedent. Essentially, the court rejected the cumulative impact challenge by distinguishing the *Blue Mountains* situation on the grounds that the projects in that case *could have* met the connectivity test.[138] However, the court's analysis is incorrect. Even under NEPA, project based analysis should not be used to re-

133. *Id.* at 811 (citing City of Carmel-by-the-Sea v. United States Dep't of Transp., 123 F.3d 1142, 1160 (9th Cir. 1997)).

134. 222 F.3d 1105 (9th Cir. 2000).

135. *Id.* at 1115 (quoting Sylvester v. U.S. Army Corps of Eng'rs, 884 F.2d 394, 398 (9th Cir.1989)).

136. *Id.* at 1118–19.

137. *Id.* at 1119.

138. *Id.*

place cumulative impact analysis, thereby relieving the agency of further environmental review.[139] Indeed, although the project connectivity analysis and cumulative impact analysis are grounded in different assumptions, the two need not conflict.

V. PRACTICAL DILEMMA?

Washington courts have struggled to reconcile their reading of permissible phased review with the requirement that agencies analyze probable cumulative impacts. At least in theory, the court is authorized to order comprehensive, cumulative and supplemental environmental review for project proposals. The court's order can take the form of a new threshold determination,[140] an order for preparation of an environmental impact statement, or some form of a supplemental study,[141] including use of an addendum.[142] Unfortunately, the existence of authority does not an argument make. The piecemeal problem clearly does not arise from lack of judicial or regulatory authority. Therefore, although it is easy to read the case law to indicate an inability to formulate a workable, consistent rule delineating piecemealed from properly phased review, it is more likely that the rule evades crystallization due to the practical concerns implicated by a piecemeal challenge.

The piecemeal loophole may be problematic simply because the practice is so easily identified, but infrequently corrected. One need not receive advanced training, pour over technical manuals, or achieve some sort of scientific expertise to identify an improperly piecemealed study. However, when a single project application is presented to a hearing examiner, council, commission, or court, common sense seems to dictate that a cumulative impact study would impose disproportionately burdensome duties far exceeding the boundaries of the application at hand.[143] This is the practical problem courts face in enforcing SEPA obligations: there are no defined limits to the potential cumulative impacts from a given proposal. In theory, impacts from past, present and reasonably foreseeable future projects can extend indefinitely into both the past and future. Similarly, the shared or com-

139. *See* Thatcher, *supra* note 84, at 632–33.

140. WASH. ADMIN. CODE § 197-11-340(3) (2001).

141. WASH. ADMIN. CODE § 197-11-620 (2001).

142. WASH. ADMIN. CODE § 197-11-625(2001).

143. *See* Thomas O. McGarity, *Judicial Enforcement of NEPA-Inspired Promises*, 20 ENVTL. L. 569, 608–09 (1990) (discussing the problem of agency as 'reluctant regulator,' and concluding that effective NEPA enforcement might only be possible through "innovative use of statutes other than NEPA that empower agencies to act.").

bined impacts a proposal may have with other present projects is indistinct as a geographical matter.

Therefore, the real problem for local environmental reviewers may be the lack of proportionality between the size of a development project and the cost of studying the probable impacts from that project. Few hearings examiners, council members, or superior courts want to be responsible for forcing the proponents of a small subdivision to analyze the environmental impacts caused by physical and planning changes over ten years of development through a particular traffic corridor. In such circumstances, the project is reviewed on an individual and isolated basis, and agencies in good conscience can approve construction based on a finding that the proposed construction will not have a significant, adverse environmental impact.

Similarly, the Ninth Circuit court in *Wetlands Action* rejected the piecemeal challenge because it was unwilling to "require the government to do the impractical."[144] The court's reluctance is reminiscent of the Supreme Court's holding in *Kleppe v. Sierra Club*[145] dismissing the need for a cumulative impact study for a slew of locationally linked, coal related projects. After noting that the cumulative impact challenge was unsupported by the evidence, the *Kleppe* Court stated that "[e]ven if environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations necessitate restricting the scope of comprehensive statements."[146] The Court, however, did not define the boundaries of practicality.

Possibly, the *Wetlands Action* decision and *Kleppe* dictum create a new standard of judicial review: if comprehensive environmental review is "impractical," the court is authorized to craft an exception to the informational goals of SEPA and NEPA. Indeed, the *Wetlands Action* court appeared particularly influenced by the size of each phase: Phase I alone boasted development of 600 acres, five million feet of office space, and 13,000 units of hotel and retail space.[147] Although an environmental study that combined review of Phases I and II would significantly advance understanding of the environmental needs in the *Wetlands Action* location, a study of that scope is also financially significant. A claim to impracticality is a very powerful position.

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144. Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105, 1119 (9th Cir. 2000).

145. 427 U.S. 390 (1976).

146. *Id.* at 413–14.

147. *Wetlands Action Network*, 222 F.3d at 1118.

The SEPA statutory scheme directly confronts the "practicality" argument. The Washington State Legislature declared that "it is the continuing responsibility of . . . agencies of the state to use all practicable means" to effectuate the goals of SEPA.[148] The legislature also declared that SEPA should be complied with "to the fullest extent possible."[149] On its face, such language could be read to support a practicality ceiling on SEPA compliance. However, the standard for an agency's authority to forego impact analysis is high.

Subsequently, the Department of Ecology precluded the practicality argument by indicating that the information relating to environmental impacts may only be ignored where the costs of gaining such information are "exorbitant," or the means of gathering the information "are speculative or not known."[150] The Department of Ecology has further mandated that, if uncertainty is unavoidable, "the agency shall weigh the need for the action with the severity of possible impacts which would occur if the agency were to decide to proceed in the face of uncertainty."[151] Faced with the defendant's argument of increased project costs, the *Merkel* court held that despite the inconvenience incurred in a comprehensive environmental study, "these inconveniences are far outweighed by the public's interest in attaining and maintaining an environment consistent with legislatively promulgated goals."[152]

Washington courts have not blatantly disregarded this prohibition, perhaps due to precedent or from the obvious and inevitable regulatory dilemma that would be caused.[153] Nonetheless, the practicality issue occasionally appears in judicial inquiries into the policies of SEPA. In *City of Bellevue v. King County Boundary Review Board*,[154] the Washington Supreme Court affirmed a SEPA enforcement against an annexation decision. However, Judge Hamilton, joined by Judges Hicks and Rosellin, dissented from the majority because of practical considerations in SEPA enforcement. To the dissenters, "subjecting simple actions, such as annexation, to SEPA clearly will result in stagnation of responsible growth and development."[155] Fortunately, the dissenter's fears have yet been unrealized.

148. WASH. REV. CODE § 43.21C.020 (2000).

149. WASH. REV. CODE § 43.21C.030.

150. WASH. ADMIN. CODE § 197-11-080(1)–(3) (2001).

151. *Id.* 197-11-(3)(b).

152. Merkel v. Port of Brownsville, 8 Wash. App. 844, 851–52, 509 P.2d 390, 395 (1973).

153. *But see* Concerned Taxpayers Opposed to Modified Mid-S. Sequim Bypass v. Dep't of Transp., 90 Wash. App. 225, 231, 951 P.2d 812, 816 (1998) (applying a "flexible cost-effectiveness standard" to dismiss an otherwise misconceived piecemeal challenge).

154. 90 Wash.2d 856, 586 P.2d 470 (1978).

155. *Id.* at 871.

However, the dissent went further in the attempt to mandate new policy for SEPA, stating that "[a]s a practical matter, requiring threshold determinations at such an early stage will create additional and extended litigation driving up the costs of worthy and needed projects."[156]

The *City of Bellevue* majority rejected the practicality argument. The majority cited to the "pervasive impact"[157] of the SEPA regulatory scheme, which requires an "independent and comprehensive assessment of environmental factors"[158] and "overlays"[159] other statutory requirements. Interestingly, neither the majority nor the dissent discussed the relation between practicality and the SEPA purpose of ensuring informed (and sometimes expensive) agency action. One thing is clear: had the *City of Bellevue* dissent carried the day, SEPA would impose significantly less effective responsibilities on state and local agencies. Agencies could perform a cost/benefit assessment to determine whether SEPA would, in those circumstances and under those conditions, require environmental study at all.

VI. SOLUTION—SUPPLEMENTAL ENVIRONMENTAL IMPACT STUDIES

The thrust of my argument has been that cumulative environmental impacts are often overlooked both at the agency level and in the courts despite the seemingly comprehensive SEPA requirements. A possible solution to this problem is supplemental environmental review. After a plan has been implemented or a project constructed, the actual environmental impacts become clear.[160] At such time, any objective onlooker can deduce discrepancies between the projected and actual environmental impacts. A court can then compare the accuracy of the environmental study versus the actuality of the project.[161] Certainly, post-implementation and post-construction environmental review could further the SEPA promise of disclosure and accurate information. However, the question is whether such responsibilities will be enforced by agencies and courts.[162] The answer is maybe.

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156. *Id.*

157. *Id.* at 866.

158. *Id.* at 868.

159. *Id.* at 865.

160. *See* WASH. ADMIN. CODE § 197-11-330(2)(b) (2001).

161. *See* Currens v. Sleek, 138 Wash. 2d 858, 868, 983 P.2d 626 (1999) (finding that projected construction impacts in a surface water trespass action were improperly considered in the threshold determination when viewed in light of the impacts of the project after construction).

162. *See* Note, *EIS Supplements for Improperly Completed Projects: A Logical Extension of Judicial Review Under NEPA*, 81 MICH. L. REV. 221, 229–30 (1982) (arguing that "the perception that the filing of the original EIS concludes the agency's responsibility to consider environ-

SEPA does not require further impact review if the probable significant adverse impacts were covered in prior environmental determinations.[163] Nonetheless, SEPA regulations clearly contemplate situations where supplemental study is appropriate. Washington courts have repeatedly stated that supplemental environmental impact studies may be a means to cure deficient studies.[164] The court in *Cathcart-Maltby-Clearview* held that, although a comprehensive cumulative impact study was premature at the planning stage, "[a]s the data becomes available or, at the latest, when sector plan approval is sought, the secondary and cumulative impacts on the entire affected area . . . must be quantitatively assessed and the costs of mitigating them identified."[165] The court's holding has intuitive appeal. Reliable information regarding the probable, significant adverse environmental impacts becomes available over time and with the initiation of new projects. An accurate understanding of the adverse environmental impacts from construction cannot possibly be indefinitely speculative. Unfortunately, not a single court has enforced such a deferred mandate,[166] and the status and effect of the *Cathcart-Maltby-Clearview* reasoning remains something of a mystery.

In the federal context, NEPA case law suggests that subsequent, supplemental environmental review is entirely appropriate and feasible. This issue was addressed by the First Circuit in *DuBois v. United*

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mental values restores the pre-NEPA status quo"); William L. Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L.J. 205, 247–48 (1989) (arguing that a supplemental study may be necessary because "the entire efficacy of the EIS process is called into question when changes are made to a project after the publication of a final impact statement").

163. *See* Nisqually Delta Ass'n v. City of DuPont, 103 Wash. 2d 720, 696 P.2d 1222 (1985).

164. Org. to Preserve Agric. Lands v. Adams County, 128 Wash. 2d 869, 880, 913 P.2d 793, 800 (1996) (holding that greater detail in environmental impact analysis can be required at subsequent phases in phased review); Ullock v. City of Bremerton, 17 Wash. App. 573, 583, 565 P.2d 1179 (1977) (holding that the City would be required to make a more comprehensive environmental impact analysis at the permit stage); Greenpeace v. Nat'l Marine Fisheries Serv., 55 F. Supp.2d 1248, 1273–74 (W.D. Wash. 1999) (holding that a supplemental impact study required where successive changes each had negligible impacts, but the cumulative impacts had never been studied).

165. Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County, 96 Wash. 2d 201, 209–12, 634 P.2d 853, 858–60 (1981).

166. Although no reported cases discuss the *Cathcart-Maltby-Clearview* scenario, courts have considered challenges to the adequacy of environmental studies based on "new information." Such challenges have not been very successful. *See, e.g.*, Wells v. Whatcom County, 105 Wash. App. 143, 153, 19 P.3d 453, 458 (2001) (suggesting that the failure to previously challenge the action would bar later new information challenge and finding that "there must either be a substantial change in the proposal, approval of which would likely have new significant adverse impacts, or an impact previously identified as needing further evaluation.").

States Department of Agriculture,[167] where the court declared that the adoption of a prior EIS was a failure to perform supplemental environmental impact studies and, therefore, arbitrary and capricious. The court reversed the adoption because the proposed action had undergone change, and aspects of the newly considered action had not been considered in conjunction with other functions of the environmental impact statement. The court was persuaded by the regulatory language of NEPA: an agency "shall" prepare a supplemental EIS if the agency makes substantial changes to the proposed action which have a significant effect on the environment.[168] The court found that "use of the word 'shall' here is mandatory, not precatory. It creates a duty on the part of the agency to prepare a supplemental EIS if substantial changes are relevant to environmental concerns."[169]

Federal courts have also ordered agencies to supplement environmental review in order to cure ignorance of the cumulative impacts of successive amendments to non-project proposals. This response is consistent with federal courts' focus on the dangers of piecemealing at subsequent stages of development.[170] In *Greenpeace v. National Marine Fisheries Service*,[171] a federal district court specifically dealt with the problem of successive amendments to a regulatory scheme in which each piece was individually determined not to have a significant impact. Considering the original regulation together with changes, the cumulative impact had not gone unstudied. The *Greenpeace* court succinctly stated that "NEPA does not permit [an agency] to continue making individually minor but collectively significant changes . . . without preparing an SEIS analyzing these changes."[172] The court held that a supplemental study was the proper means to comply with NEPA where successive additions to a proposal occurred over a significant period of time. The court speculated that such changes could combine to cause a significant cumulative impact and held that the unstudied possibility of such impact should be analyzed.[173]

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167. 102 F.3d 1273 (1st Cir. 1996)

168. *Id.*

169. *Id.* at 1292.

170. *See, e.g.*, Swain v. Brinegar, 542 F.2d 364 (7th Cir. 1976) (invalidating an EIS where only the immediate impacts of a fifteen-mile stretch of road were studied, but where the appropriate study scope was forty-two miles of highway); Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971) (finding that fragmenting highway study into three parts, rendering outside portions exempt because not a "major federal action" violated prohibition on piecemealing).

171. 55 F. Supp.2d 1248 (W.D. Wash. 1999).

172. *Id.* at 1273–74.

173. *Id.*

The federal courts in *Dubois* and *Greenpeace* demonstrate that piecemealed review can be effectively corrected. Requiring supplemental review could alleviate the problems of speculation about impacts in earlier phases and, in later phases, would vindicate the plaintiff's concerns (and court's promise) in *Cathcart-Maltby-Clearview*. Furthermore, although such a requirement might not neutralize the practicality concerns that seem to underlie judicial understanding of piecemealing, a supplementary environmental review requirement might be a justifiable cost of allowing a piecemealed project to proceed.

VII. CONCLUSION

It is not contentious to say that, in the short history of United States environmental law, few legislative acts have been drafted with such skill and foresight as to predict all misuses. Legislative drafters often overlook the dreaded (or sought after) "loopholes" created by statutory language that allow inventive, meticulous attorneys to find and widen gaps in regulatory schemes. Loopholes, it is assumed, hinder the effectiveness of a good idea. The piecemeal loophole distinguishes itself because it arises as a matter of circumstance: the loophole is used by agencies and confirmed by courts against clear prohibitions where economic and timing concerns suggest their own influence on the court's reasoning. As such, piecemealing might be best categorized as a de facto loophole and simply left alone.

The basic structure of SEPA implies that the existence and significance of adverse environmental impacts are guiding factors in determining whether the statute imposes significant procedural obligations. Common sense dictates that the inquiry into adverse impacts should focus on whether the impacts from one project will be exacerbated by, affected by, or will affect the impacts from another project. However, where courts have cited the project connectedness or phased review rules, awareness of cumulative impacts ends up lacking. The court's understanding of project connectedness and phasing fundamentally alters the informational purposes of SEPA and is contrary to a common sense reading. Yet, it occasionally surfaces in judicial review of piecemeal challenges.

Luckily, Washington courts appear amenable to the notion of using supplemental impact studies to cure cumulative impact ignorance. Will these promises be enforced? It is difficult to say, particularly in the absence of a single Washington case enforcing *Cathcart-Maltby-Clearview*, which mandated a reexamination of environmental impacts after a development had time to progress and permit a more efficient

and economic determination. SEPA goals and mandates provide a solid basis for implementing the *Cathcart-Maltby-Clearview* promise. Moreover, if the Washington courts do not take seriously the effect of ignoring cumulative impacts, we may find ourselves in the precise situation SEPA was designed to avoid: waking up in a permanently altered world without having noticed the piecemeal changes and unable to live with the result.