

7-1-1981

## Environmental Law—Threshold Determination of the State Environmental Policy Act: Washington Adopts a More Flexible Approach—Equitable Remedies: Laches Defense Restricted—Hayden v. City of Port Townsend, 93 Wn. 2d 870, 614 P.2d 1164 (1980)

Deane W. Minor

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Environmental Law Commons](#)

---

### Recommended Citation

Deane W. Minor, Recent Developments, *Environmental Law—Threshold Determination of the State Environmental Policy Act: Washington Adopts a More Flexible Approach—Equitable Remedies: Laches Defense Restricted—Hayden v. City of Port Townsend*, 93 Wn. 2d 870, 614 P.2d 1164 (1980), 56 Wash. L. Rev. 549 (1981).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol56/iss3/12>

This Recent Developments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [cnyberg@uw.edu](mailto:cnyberg@uw.edu).

**ENVIRONMENTAL LAW—THRESHOLD DETERMINATION OF THE STATE ENVIRONMENTAL POLICY ACT: WASHINGTON ADOPTS A MORE FLEXIBLE APPROACH—EQUITABLE REMEDIES: LACHES DEFENSE RESTRICTED—*Hayden v. City of Port Townsend*, 93 Wn. 2d 870, 613 P.2d 1164 (1980).**

## I. INTRODUCTION

On July 14, 1976, a Port Townsend realtor sought to rezone property from public use<sup>1</sup> to general commercial use.<sup>2</sup> After several public hearings and meetings,<sup>3</sup> the city council authorized the rezone on March 1, 1977.<sup>4</sup> Any specific development proposal would require further council

---

1. This zoning district, P-I (public use), is misleading in name because private parties can use property with this classification for a number of private, commercial uses, such as boat sales and professional buildings, in addition to the many permitted public uses. *See* note 2 *infra*.

2. The 1969 Port Townsend Comprehensive Plan was developed under authority of WASH. REV. CODE § 35A.63.060 (1979). Under a comprehensive Port Townsend zoning ordinance adopted in 1971, the zoning classification P-I (public use) was given to property which would be used primarily for schools, public buildings, parks, and related uses. PORT TOWNSEND, WASH., MUNICIPAL CODE § 17.16.010 (Supp. 1980). The redistricting sought was C-II (general commercial use), which is described in the zoning ordinance as “[p]rimarily a general commercial district for the conduct of enterprise which depends on proximity to major streets or arterials for trade or transportation.” *Id.*

The Port Townsend zoning ordinance lists 241 categories of property uses. Forty-two are permitted in the P-I (public use) district, including many public uses, such as public transportation shelters, public utility installations, water and sewage treatment plants, libraries, jails, hospitals, churches, and colleges. In addition to these public uses, several private uses are allowed which are compatible with the public uses: garages, pleasure boat marinas, boat sales, retirement homes, and professional buildings. *Id.*

One hundred and twenty-seven uses are permitted in the C-II (general commercial) district. Retail outlets are prominent among the permitted uses, including grocery stores and clothing retailers. *Id.* The minutes of the Port Townsend Planning Commission hearing on September 27, 1976, indicate that the reason for the rezone request was a desire to construct a community shopping center and to provide motel sites. Minutes of the Port Townsend Planning Commission (Sept. 27, 1976) (on file with the *Washington Law Review*). “Hotels and inns” are permitted in the C-II but not the P-I district.

Theoretically, for purposes of the State Environmental Policy Act (SEPA), the Planning Commission’s decision to grant or refuse the rezone request should not have taken into consideration the possible use to which the rezoned property might be put. *See* note 5 *infra*.

3. The Port Townsend Planning Commission held a public hearing on Oct. 25, 1976, before recommending that the city council approve the rezone. Minutes of the Port Townsend Planning Commission (Oct. 25, 1976) (on file with the *Washington Law Review*). The city council held meetings on December 7, 1976, and January 4, 1977, to discuss the rezone before approving it. Minutes of the Port Townsend City Council (Dec. 7, 1976 & Jan. 4, 1977) (on file with the *Washington Law Review*).

The named plaintiffs, Stephen Hayden and Jeneen Hayden, were present and spoke at the planning commission hearing and the first city council meeting.

4. Port Townsend, Wash., Ordinance 1780 (Mar. 1, 1977).

approval.<sup>5</sup> Safeway Stores, Inc.,<sup>6</sup> announced in May of 1977 its intention to build a store on part of the rezoned property and submitted an environmental checklist<sup>7</sup> to the city engineer.

The Port Townsend city engineer<sup>8</sup> discussed with Safeway environ-

---

5. The Washington Court of Appeals described the mechanics of controlling land development in *Ullock v. City of Bremerton*, 17 Wn. App. 573, 565 P.2d 1179 (1977). In *Ullock*, the Environmental Impact Statement (EIS) in controversy addressed only the environmental impact of the rezone without addressing the specific impact of each of the 56 potential uses under the new zoning classification. The court approved of the generalized EIS:

The zoning action itself [to which the EIS was addressed] will have no immediate environmental consequences. . . . This decision does not violate SEPA as a matter of law, so long as the [Bremerton City] Council retains the authority to implement those environmental policies at the project stage. . . . [T]he City can and must require an environmental impact statement at the development permit stage, where a major action is contemplated which significantly affects the quality of the environment.

*Id.* at 583, 565 P.2d at 1185 (emphasis added).

See also *Bellevue v. King County Boundary Review Bd.*, 90 Wn. 2d 856, 869-71, 586 P.2d 470, 478-79 (1978) (Hamilton, J., dissenting). In *Bellevue*, Justice Hamilton decried the requirement of a threshold determination for simple actions such as the inclusion of property by annexation. According to Justice Hamilton, the threshold determination should be required when plans are developed for the annexed land.

The supreme court followed this two-stage approach in *Hayden v. City of Port Townsend*, 93 Wn. 2d 870, 613 P.2d 1164 (1980). Safeway did not seek approval of its plan to build a store on the rezoned land until after the rezone had been approved. Although the Port Townsend Planning Commission minutes for September 27, 1976 indicate that the commission knew plans were in the offing for a grocery store on the site, theoretically that information should have had no bearing on the rezone decision.

The court of appeals distinguished *Bellevue v. King County Boundary Review Bd.* in *Spokane County Fire Protection Dist. No. 8 v. Spokane County Boundary Review Bd.*, 27 Wn. App. 491, 618 P.2d 1326 (1980). The court noted that *Bellevue* was decided before the effective date of the Guidelines of the State Environmental Policy Act (Guidelines), and it held that the City of Spokane Plan Commission as lead agency fulfilled its duties under the Guidelines. *Id.* at 495, 618 P.2d at 1328-29.

6. The other two defendants were the City of Port Townsend and the Swains. The Swains, owners of Swains General Store in Port Angeles, Washington, purchased another portion of the rezoned property intending to develop it commercially. *Hayden v. City of Port Townsend*, 93 Wn. 2d 870, 876, 613 P.2d 1164, 1168 (1980).

The issues facing Safeway and the Swains were identical. Because the court referred to these two defendants collectively as Safeway, this note will do the same.

7. Completing the environmental checklist is a procedure required by the Guidelines which interpret and implement the State Environmental Policy Act, WASH. ADMIN. CODE § 197-10-365 (1977). As required by section 805(3)(b) of the Guidelines, the City of Port Townsend has adopted the checklist provision verbatim. PORT TOWNSEND, WASH., MUNICIPAL CODE § 19.04.020 (Supp. 1980).

8. Under the Guidelines, every private and public project proposal proponent is assigned to one agency, called the lead agency, charged with the duty of complying with the threshold determination procedures set forth in the Guidelines. WASH. ADMIN. CODE § 197-10-300 (1977). When the lead agency concludes that an EIS must be prepared, it is responsible for ensuring that the procedures for the draft EIS and final EIS are complied with. WASH. ADMIN. CODE §§ 197-10-400, -550 (1977). The Port Townsend guidelines ordinance, which adopted most of the Guidelines verbatim, implicitly designated the city engineer as the responsible official when the city is the lead agency. PORT TOWNSEND, WASH., MUNICIPAL CODE § 19.04.060(2), (4) (Supp. 1980).

mental problems that could result from its proposed use of the property.<sup>9</sup> After Safeway revised its plan to correct the potential problems, it submitted a written application for a building permit on October 14, 1977. The city engineer promptly issued a proposed negative threshold determination;<sup>10</sup> three weeks later on November 7, 1977, despite opposition from townspeople,<sup>11</sup> he issued a final negative threshold determination.<sup>12</sup> Safeway received a building permit shortly thereafter.<sup>13</sup>

A group of townspeople filed suit on December 6, 1977, challenging both the rezone and the issuance of Safeway's building permit. The trial court dismissed the complaint after a four-day trial. It held that the challenge to the rezone was barred by laches because the suit had not been filed until more than nine months after the rezone had been approved. The court also held that the negative threshold determination met the procedural safeguards provided by the State Environmental Policy Act (SEPA).<sup>14</sup>

---

9. The major problem anticipated by the city engineer was traffic congestion. Letter from Roger French, responsible SEPA official, to Safeway, Swains, the original property owner, and public officials involved (May 12, 1977) (on file with the *Washington Law Review*).

Two of the plaintiffs wrote to the Safeway real estate manager on August 20, 1977, enumerating several concerns, including water pollution from oil run-off from the parking lot and aesthetic blight. Similar concerns were expressed by other plaintiffs in a letter to the editor of the *Port Townsend Leader* on August 11, 1977, at 4 (on file with the *Washington Law Review*).

10. The negative threshold determination, also called a "declaration of nonsignificance," is the "written decision by the responsible official of the lead agency that a proposal will not have a significant adverse environmental impact and that therefore no environmental impact statement is required." WASH. ADMIN. CODE § 197-10-040(9) (1977). See notes 59-75 and accompanying text *infra*.

The proposed threshold determination should be completed within 15 days of the submission of the environmental checklist. WASH. ADMIN. CODE § 197-10-305 (1977); PORT TOWNSEND, WASH., MUNICIPAL CODE § 19.04.040(2)(a)-(b) (Supp. 1980).

11. The City Engineer received dozens of letters from Port Townsend residents who objected to this proposed negative threshold determination and requested that he reconsider the determination. Letters from Port Townsend residents (Oct. 25-31, 1977) (on file with the *Washington Law Review*). The SEPA Guidelines require only that "[i]f comments are received, the lead agency shall reconsider its proposed declaration; however, the lead agency is not required to modify its proposed declaration of nonsignificance to reflect the comments received." WASH. ADMIN. CODE § 197-10-340(5) (1977); PORT TOWNSEND, WASH., MUNICIPAL CODE § 19.04.020 (Supp. 1980). These letters did not have the effect desired by their authors. Mr. Glenn Abraham, the city attorney, commented: "[M]y recollection of the letters . . . is that they did not request any explanations; but were primarily devoted to either critical remarks or were intended to demonstrate the superior intellect of the writer." Letter from Glenn Abraham to author (Nov. 24, 1980) (on file with the *Washington Law Review*).

12. *Hayden v. City of Port Townsend*, 93 Wn. 2d 870, 874, 613 P.2d 1164, 1166 (1980). The SEPA official followed guideline procedures. See WASH. ADMIN. CODE § 197-10-340 (1977).

13. The *Hayden* court did not indicate precisely when the building permit was issued. 93 Wn. 2d at 874, 613 P.2d at 1167. The court did not need to be more precise because the time lapse between the issuance of the building permit and the filing of suit was not at issue in the laches question.

14. *Hayden v. City of Port Townsend*, No. 9220 (Jefferson County Super. Ct., June 20, 1978).

The appeal was transferred from the court of appeals to the supreme court.<sup>15</sup> The supreme court affirmed the trial court's finding that the facts supported the defense of laches; however, it held that laches should not be used to avoid addressing the merits of an environmental issue which concerned the entire community.<sup>16</sup> The court also held that the plaintiffs'

15. *Hayden v. City of Port Townsend*, 93 Wn. 2d 870, 613 P.2d 1164 (1980). Under WASH. REV. CODE § 2.06.030(d) (1979), "cases involving fundamental and urgent issues of broad public import requiring prompt and ultimate determination" should be transferred from the court of appeals to the supreme court. *See also* WASH. R. APP. P. 4.3 (1980) (allows for transfers which "promote the orderly administration of justice.")

16. *Hayden*, 93 Wn. 2d at 876, 613 P.2d at 1168. The plaintiffs could have focused their challenge solely on the building permit and probably avoided the laches issue because they filed suit within one month after Safeway obtained the building permit. *But see* *State ex rel. Morrison v. City of Seattle*, 6 Wn. App. 181, 185-86, 492 P.2d 1078, 1082 (1971) (The court accepted without qualification the trial court's dictum that a delay of 20 days by the plaintiffs after the defendant's purchase of the land in controversy raised the laches defense. The plaintiff in *Morrison* was fully aware that the defendant had options to buy the property.). For a discussion of why the court's use of the laches defense in an environmental case might depend on the particular plaintiff's situation, see note 56 *infra*.

The plaintiffs in *Hayden* included the challenge to the rezone for pragmatic, political reasons. A building permit EIS would not have been as useful to the plaintiffs as a rezone EIS. The Guidelines strictly limit the content of an EIS for a project such as Safeway's:

When the proposal is for a private project on a specific site, the alternatives considered shall be limited to the "no-action" alternative plus other reasonable alternative means of achieving the objective of the proposal on the same site or other sites owned or controlled by the same proponent . . . .

WASH. ADMIN. CODE § 197-10-440(12)(e) (1977). Because Safeway's proposal was a "private project on a specific site," the alternatives which the building permit EIS could address were severely limited by this section. The same section establishes that an EIS of the rezone is not subject to these limitations: "This limitation shall not apply when the project proponent is applying for a rezone . . . ." *Id.* As a result, with a rezone EIS the public could request consideration of any reasonable alternative in the draft of the EIS. WASH. ADMIN. CODE § 197-10-440(12)(a) (1977). In a case decided on the same day as *Hayden*, the supreme court demonstrated the distinction between the content of an EIS for a rezone and one for a private project on a specific site. After quoting WASH. ADMIN. CODE § 197-10-440(12) (1977) (excerpted in pertinent part above), the court held that the limitation on the private project EIS was not applicable to an EIS for a rezone. *Barrie v. Kitsap County*, 93 Wn. 2d 843, 854-56, 613 P.2d 1148, 1155-56 (1980).

The *Barrie* court also emphasized that the purpose of WASH. ADMIN. CODE § 197-10-440(12)(a) was to allow the county to study "other means of achieving the county's objective . . . , not the [project proponent's]." *Id.* at 856, 613 P.2d at 1156. In *Barrie*, the county objective "apparently" was a regional shopping center. *Id.* In *Hayden*, the City of Port Townsend does not appear to have had such a clear objective. The trial court noted the city's uncertainty: "After all of the studies made over the years about use of the lagoon area, the Council was faced with some sort of decision. The situation had reached the point where as we used to say in the military 'Let's do something even if it's right.'" *Hayden v. City of Port Townsend*, No. 9220 (Jefferson County Super. Ct., June 20, 1978). Because the City of Port Townsend did not have as specific an objective as did the county in *Barrie*, the reasonable alternatives which could have been addressed in the rezone EIS would have been broader; arguably such alternatives could have included noncommercial development such as a park. Then, if this park alternative had been discussed in the rezone EIS, the city council might have been less reluctant to reject Safeway's proposal.

In short, the plaintiffs wanted to broaden the range of options to include noncommercial development. Safeway wanted to limit the council's options to commercial development or the politically

challenge to the negative threshold determination was without merit.<sup>17</sup> In reaching this conclusion, the court “accorded substantial weight”<sup>18</sup> to the local government’s decision and applied the clearly erroneous standard of review.<sup>19</sup> The court commended the city engineer for his “eminently sensible”<sup>20</sup> procedure of discussing with Safeway the environmental problems he discovered during his review of the environmental checklist and then allowing the store an opportunity to alter plans before submitting its formal building permit application.<sup>21</sup>

The court’s rulings on the laches defense and the negative threshold determination represent significant departures from the court’s previous

---

unpopular “no-action” alternative. Safeway’s tool to limit the range of options was WASH. ADMIN. CODE § 197–10–440(12)(e) (1977). The noncommercial options could best be researched and developed in an EIS at the rezone stage; consequently, plaintiffs’ efforts to present the city council with noncommercial alternatives would be severely hampered if the property was not subjected to a second rezone process. For this reason, the issue of the validity of the rezone process was of critical tactical importance to both parties.

17. Laches was raised as a defense to both complaints: the rezone approved nine months earlier and the more recent approval of the building permit application. The court refused to consider laches as a defense to the more recent building permit process. The discussion of laches in the opinion and this note relates only to the earlier rezone process. *See* note 16 *supra*.

18. *Hayden*, 93 Wn. 2d at 880, 613 P.2d at 1170 (1980) (quoting WASH. REV. CODE § 43.21C.090 (1979)).

19. *Id.* The clearly erroneous standard of review of agency decision-making is preferred by Washington commentators. In several earlier decisions, including the leading case of *Norway Hill Preservation Council v. King County Council*, 87 Wn. 2d 267, 274, 552 P.2d 674, 678 (1976), the court used two standards of review: clearly erroneous and arbitrary and capricious. For criticism of the court’s use of the two standards of review, see Abrahams, *Scope of Review of Administrative Action in Washington: A Proposal*, 14 GONZ. L. REV. 75, 185–87 (1978) (standard of review in *Norway Hill* criticized as illogical and a misapplication of the arbitrary and capricious standard) and Andersen, *Judicial Review of Agency Fact Finding in Washington*, 13 WILLAMETTE L. REV. 397, 409–10 (1977) (recent decisions suggest that Washington courts have relaxed the strictness of review, contrary to the legislature’s intent). *See generally* Note, *Judicial Review of Federal Actions under § 102(2)(c) of NEPA: The Case for Reasonableness*, 28 OKLA. L. REV. 866 (1975) (review de novo is in keeping with purpose of NEPA); Note, *Threshold Determinations under NEPA*, 16 WM. & MARY L. REV. 107 (1975) (possible standard of review includes arbitrary and capricious, substantial evidence, reasonable basis, review de novo, and reasonableness; the author prefers reasonableness).

20. *Hayden*, 93 Wn. 2d at 880, 613 P.2d at 1170.

21. Although the city engineer, the responsible SEPA official, is responsible for the supervision or actual preparation of the EIS, *see* WASH. ADMIN. CODE § 197–10–200 (1977), he can require the applicant to write it. WASH. ADMIN. CODE § 197–10–100(4) (1977). Hence, it was in Safeway’s interest to avoid the EIS requirement if only to avoid the expense of preparing the statement. The Port Townsend Municipal Code requires the applicant to pay all costs connected with complying with SEPA. PORT TOWNSEND, WASH. MUNICIPAL CODE § 19.04.104 (Supp. 1980). The corresponding provision in the Guidelines neither authorizes nor forbids imposing SEPA costs on applicants. WASH. ADMIN. CODE § 197–10–860 (1977).

It was in Safeway’s interest to avoid the EIS requirement for other reasons as well. First, the preparation time would delay the commencement of construction and extend the period of unproductive use of the property. Second, the intricacies of EIS preparation would provide more opportunities for the plaintiffs to object, whether reasonably or unreasonably, to violations of procedural or substantive matters connected with the preparation of the document, leading to further expense and delay.

decisions. This note will examine the changes in the court's positions and discuss the effect of these changes on future environmental litigation.

## II. THE LACHES DOCTRINE

### A. Background

Laches<sup>22</sup> is an equitable defense which, if proved, will cause a court to dismiss a case. Laches has been applied by Washington courts since 1894<sup>23</sup> and is invoked when the defendant proves three elements. The defendant must show:

---

22. Pomeroy defined the doctrine of laches as "such neglect or omission to assert a right as taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity." 2 J. POMEROY, TREATISE ON EQUITY JURISPRUDENCE § 419, at 171-72 (5th ed. 1941) (quoting AM. & ENG. ENCYCLOPAEDIA OF LAW 97 (2d ed. 1910)). This definition explicitly includes two of the three elements of laches enunciated by the Supreme Court of Washington before *Hayden*: (1) an unwarranted delay by the plaintiff in bringing the action, and (2) prejudice to the defendant caused by the delay. See note 25 and accompanying text *infra*. These basic elements of laches have been accepted for over 100 years. See *Castner v. Walrod*, 83 Ill. 171 (1876); *Lindsay Petroleum Co. v. Hurd*, L.R. 5 P.C. 221 (1874).

For recent discussions of laches, see Comment, *Application of the Doctrines of Laches in Public Interest Litigation*, 56 B.U.L. REV. 181 (1976) (a "good" laches defense may be ignored to further public interests) and Note, *Administrative Law—Enforcement of Zoning Regulations—Laches: A Bar where Failure to Enforce Regulation Results in Substantial Prejudice*, 22 How. L.J. 513 (1979) (although historically the doctrine of laches has not been enforced against municipalities which delay in enforcing a zoning requirement, this case suggests that courts may be less willing to abide municipalities' inefficiency and inaction).

23. *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 37 P. 297 (1894).

Laches has been raised as a defense in Washington in the following types of cases:

(1) charges of fraudulent handling of stock, *Stewart v. Johnston*, 30 Wn. 2d 925, 195 P.2d 119 (1948);

(2) bonds, *Amende v. Pierce County*, 70 Wn. 2d 391, 423 P.2d 634 (1967);

(3) building association funds, *Conaway v. Co-operative Homebuilders*, 65 Wash. 39, 117 P. 716 (1911);

(4) cancellation of a mortgage, *Anderson Estate, Inc. v. Hoffman*, 171 Wash. 378, 18 P.2d 5 (1933);

(5) interference with riparian rights, *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 37 P. 297 (1894);

(6) alteration of a deed, *Chezum v. McBride*, 21 Wash. 558, 58 P. 1067 (1899);

(7) sale of property, *Shew v. Coon Bay Loafers, Inc.*, 76 Wn. 2d 40, 455 P.2d 359 (1969);

(8) complaints of mishandling probate funds, *Rutter v. Rutter*, 59 Wn. 2d 781, 370 P.2d 862 (1962); *Marsh v. Merrick*, 28 Wn. App. 156 (1981);

(9) adverse possession, *Arnold v. Melani*, 75 Wn. 2d 143, 449 P.2d 800 (1968);

(10) discharge of police officer, *Luellen v. City of Aberdeen*, 20 Wn. 2d 594, 148 P.2d 849 (1944);

(11) landlord-tenant rent surcharge dispute, *Panorama Residential Protective Ass'n v. Panorama Corp. of Wash.*, 28 Wn. App. 923 (1981);

(12) challenges to various municipal actions:

a. utility assessment, *Pratt v. Water Dist. No. 79*, 58 Wn. 2d 420, 363 P.2d 816 (1961);

- (1) the plaintiff knew he had a cause of action;
- (2) the plaintiff unreasonably delayed in bringing suit; and
- (3) the defendant was prejudiced by that delay.<sup>24</sup>

The availability of the defense in cases involving the public interest has been the subject of a number of conflicting Washington Supreme Court rulings.

In 1928, the Washington Supreme Court decided in *State ex rel. Mason v. Board of County Commissioners of King County*<sup>25</sup> that laches was not a defense in cases affecting public interests. *Mason* involved a redistricting proposal in King County which favored county voters over Seattle voters.<sup>26</sup> The court did not bar the suit even though the plaintiffs had delayed almost four months after the redistricting resolution was adopted, and appeals were required by statute to be brought within twenty days.<sup>27</sup> The court refused to apply laches because the matter was “one of public concern and public right.”<sup>28</sup>

In 1974, the supreme court appeared to abandon the sweeping *Mason* rule in a case involving the placement of an interstate highway. A plurality of the court in *Leschi Improvement Council v. Washington State Highway Commission*<sup>29</sup> discussed the approach of other jurisdictions which “sought to *balance* the public interest in the outcome of the suit against the harm caused by the delay in bringing suit.”<sup>30</sup> The *Leschi* court

---

b. county construction bids, *Reiner v. Clarke County*, 137 Wash. 194, 241 P. 973 (1926);

c. enforcement of Open Meetings Act of 1971, WASH. REV. CODE ch. 42.30 (1979), *Lopp v. Peninsula School Dist.*, 90 Wn. 2d 754, 585 P.2d 801 (1978);

d. special levy election, *LaVergne v. Boysen*, 82 Wn. 2d 718, 513 P.2d 547 (1973);

e. redistricting, *State ex rel. Mason v. Board of County Comm'rs of King County*, 146 Wash. 449, 263 P. 735 (1928), *overruled by Lopp v. Peninsula School Dist.*, 90 Wn. 2d 754, 585 P.2d 801 (1978);

f. zoning, *Chrobuck v. Snohomish County*, 78 Wn. 2d 858, 480 P.2d 489 (1971);

g. environmental concerns, *Eastlake Community Council v. Roanoke Assocs.*, 82 Wn. 2d 475, 513 P.2d 361 (1973).

For a review of early Washington cases that apply laches, see 6 WASH. L. REV. 91 (1931). The supreme court discusses several laches cases in *McKnight v. Basilides*, 19 Wn. 2d 391, 401-03, 143 P.2d 307, 312-13 (1943).

24. *Buell v. Bremerton*, 80 Wn. 2d 518, 522, 495 P.2d 1358, 1361 (1972). These traditional elements are rephrased only slightly in *Hayden v. City of Port Townsend*, 93 Wn. 2d 870, 874-75, 613 P.2d 1164, 1167 (1980).

25. 146 Wash. 449, 263 P. 735 (1928).

26. *Id.* at 452, 263 P. at 736.

27. The court rejected a statute of limitations defense because the plaintiffs were not permitted to appeal the resolution. Appeals could “be prosecuted only by one who was a party to the proceedings before the board,” and the plaintiff was not a party. *Id.* at 454-55, 263 P. at 737. Since the plaintiff had no remedy by appeal, he was not bound by the 20 day limitation.

28. *Id.* at 455, 263 P. at 737.

29. 84 Wn. 2d 271, 525 P.2d 774 (1974). For a discussion of *Leschi*, see note 46 *infra*.

30. *Id.* at 275, 525 P.2d at 779 (emphasis added).



emphasized the Fourth Circuit case of *Arlington Coalition on Transportation v. Volpe*,<sup>31</sup> where the only reason that court did not apply laches was that the costs of altering or abandoning this public<sup>32</sup> project did not yet outweigh the benefits of considering environmental concerns.<sup>33</sup> The *Leschi* court did not expressly adopt the *Arlington Coalition* balancing approach,<sup>34</sup> but the court's discussion of a balancing of interests in considering the laches defense indicated the court's willingness to deviate from the *Mason* rule and allow laches as a defense in cases involving the "public concern."

The indication in *Leschi* that the court preferred a balancing test even in cases involving the "public concern" proved correct in 1978, when the court overruled *Mason* in *Lopp v. Peninsula School District*.<sup>35</sup> In *Lopp*, the plaintiff sought to enjoin the sale of school bonds because of an alleged violation of the Open Public Meetings Act.<sup>36</sup> The plaintiff had delayed six weeks before bringing suit. The court held that laches should be available as a defense in cases affecting the public interest. It stated, "[t]he nature of the lawsuit, here a public interest lawsuit, is simply another factor to be considered by the court in determining whether the doctrine of laches should be applied."<sup>37</sup> The court concluded that the "balancing approach [noted in *Leschi*] is more logical"<sup>38</sup> and applied this approach to the facts of the case. Because the plaintiff had delayed for six weeks, and the school district would be harmed financially, the court held that the plaintiff's action was barred by laches.<sup>39</sup>

Before *Hayden*, then, one of the considerations the court used to determine whether laches should be applied was the nature of the case. The earlier *Mason* rule, that the laches defense was not available in cases involving the public interest,<sup>40</sup> was overruled by *Lopp*. In its place, the

---

31. 458 F.2d 1323 (4th Cir.), cert. denied, 409 U.S. 1000 (1972).

32. The *Arlington Coalition* court did not indicate what weight it gave to the fact that this was a public, not a private, project. For a discussion of how public and private projects might be distinguished in this context in Washington, see notes 51–53 and accompanying text *infra*.

33. The *Arlington Coalition* court indicated that it would apply laches when the project had progressed to the point where the costs of altering or abandoning it did outweigh the benefits of considering potential environmental problems. 458 F.2d at 1330.

34. The *Leschi* plurality's discussion of laches is unclear. For a discussion of this lack of clarity, see note 46 *infra*.

35. 90 Wn. 2d 754, 585 P.2d 801 (1978).

36. WASH. REV. CODE ch. 42.30 (1979).

37. 90 Wn. 2d at 759, 585 P.2d at 804.

38. *Id.*

39. *Id.* at 761–62, 585 P.2d at 805.

40. See notes 25–28 and accompanying text *supra*.

*Lopp* court adhered to the balancing approach discussed in *Leschi*;<sup>41</sup> the public interest was “simply another factor”<sup>42</sup> for the court to balance.

### B. *The Hayden Decision*

The *Hayden* court found that the three traditional elements of laches were established by the defendants.<sup>43</sup> Despite this finding, the court refused to apply laches because the case presented an environmental question which concerned the entire community.<sup>44</sup> Thus, in a case with an environmental question, the court has added another step to establishing laches.

Although the *Hayden* court cited *Lopp*,<sup>45</sup> it did not consider the nature of the case as simply another element to be balanced,<sup>46</sup> but as an element

---

41. See notes 29 & 30 and accompanying text *supra*.

42. *Lopp*, 90 Wn. 2d at 759, 585 P.2d at 804.

43. *Hayden v. City of Port Townsend*, 93 Wn. 2d 870, 874–76, 613 P.2d 1164, 1167–68 (1980).

44. *Id.* at 876, 613 P.2d at 1168.

45. *Id.*

46. In *Lopp v. Peninsula School Dist.*, 90 Wn. 2d 754, 759, 585 P.2d 801, 804 (1978), the court expressly approved of the case-by-case approach to the laches question that the court described in *Leschi Improvement Council v. Washington State Highway Comm'n*, 84 Wn. 2d 271, 275, 525 P.2d 774, 779 (1974). The issue in *Leschi* was a challenge under SEPA and WASH. REV. CODE ch. 47.52 (Public Highways—Limited Access Facilities) of procedures followed in a hearing on the limited access and design of Interstate Highway 90 between the west shore of Mercer Island and Seattle. 84 Wn. 2d at 272, 525 P.2d at 777. The *Leschi* court noted the approach taken in *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972), where the court “sought to balance the public interest in the outcome of the suit against the harm caused by delay in bringing the suit.” 84 Wn. 2d at 275, 525 P.2d at 779.

The issue before the court in *Arlington Coalition*, as in *Leschi*, was the placement of an interstate highway. The plaintiffs in *Arlington Coalition* delayed almost 14 months before bringing suit. The court indicated that it would permit the laches defense to bar the plaintiffs’ claim only when the project had “progressed to the point where the costs of altering or abandoning the proposed route would *certainly* outweigh the benefits that might accrue therefrom to the general public.” 458 F.2d at 1330. The court determined that the project in *Arlington Coalition* had not yet progressed to that point. *Id.* at 1329–30. The *Leschi* court apparently approved of this balancing approach, a predictable result under SEPA.

The *Leschi* court’s view of the role of laches in environmental litigation is unclear in part because the issue is discussed only by a plurality of the court. A more significant reason, however, for the lack of clarity in the laches discussion is the plurality’s casual treatment of the issue. The plurality interrupts a discussion of standing to insert two paragraphs on laches. After this insertion, the standing discussion resumes. 84 Wn. 2d at 274–75, 525 P.2d at 778–79. The laches insertion is tangential to the discussion of standing. Further, the insert discusses laches only in a general way, without relating it to the *Leschi* case. Since the plurality emphasizes the balancing approach of *Arlington Coalition*, it probably meant to suggest that it would adopt this approach when faced with that issue; however, until *Lopp*, where the court did follow *Arlington Coalition*, this was mere conjecture. For a discussion of *Lopp*, see notes 35–39 and accompanying text *supra*.

*Lopp* reiterated the *Leschi* position that the public interest is not elevated to a special status in making these balancing decisions. 90 Wn. 2d at 759, 585 P.2d at 804. The *Leschi-Lopp* approach is superseded by the *Hayden* changes. See notes 49–55 and accompanying text *infra*.

which could totally override the others. The court explained: "We are reluctant to rest a decision in an environmental matter affecting an entire community on laches. . . . [T]o estop a community from challenging that action . . . causes us some hesitation."<sup>47</sup> The court hesitated to apply laches because of several practical problems a plaintiff might face in environmental litigation. The plaintiff's delay could be caused by an administrative problem such as organizing the protest, raising money, or finding an attorney. The court recognized that in determining whether a plaintiff's delay has been excessive, a developer's ability to move quickly should not be compared to a plaintiff's administrative inability to move quickly.<sup>48</sup>

### C. Analysis

The laches discussion in *Hayden* focused on the nature of the case. Specifically, the court established that in the future the trial court must determine whether the environmental effects of a project are of such widespread concern to the public and have such an impact on the environment that the merits of the case should be reached, even though the traditional elements of the laches defense are present. The sole reason the *Hayden* court refused to apply laches was the widespread concern over the environmental issue.<sup>49</sup>

The *Hayden* court neither explained the rationale for departing from the *Lopp* balancing approach nor indicated how the two cases should be reconciled. While *Hayden* does not overrule *Lopp* expressly, *Lopp* does not survive *Hayden* fully intact. The *Hayden* court created an exception to the *Lopp* balancing test for those environmental issues which have potentially broad impact.<sup>50</sup> This restriction on the application of laches must be examined more closely.

---

47. *Hayden v. City of Port Townsend*, 93 Wn. 2d 870, 876, 613 P.2d 1164, 1168 (1980).

48. *Id.*

49. *Id.*

50. In creating this exception to the *Lopp* balancing test, *Hayden* seems to revive *Mason* in part. The *Mason* exception to the laches defense was for matters "of public concern and public right." *State ex rel Mason v. Board of County Comm'rs of King County*, 146 Wash. 449, 455, 263 P. 735, 737 (1928), *overruled by Lopp v. Peninsula School Dist.*, 90 Wn. 2d 754, 585 P.2d 801 (1978). See notes 25-28 and accompanying text *supra*. The *Hayden* exception is not so broadly phrased; it concerns "environmental matter[s] affecting an entire community." 93 Wn. 2d at 376, 613 P.2d at 1168 (emphasis added). Thus, *Hayden* does not encompass the range of public concerns which *Mason* did. Indeed, the concern in *Mason*—election redistricting—is not within *Hayden's* compass.

Furthermore, the *Hayden* exception is not phrased as strongly as that of *Mason*. The *Hayden* court wrote, "[W]e are *reluctant* to rest a decision in an environmental matter affecting an entire community on laches." *Id.* (emphasis added). The *Hayden* court's use of the word "reluctant" suggests that the court has not determined the contours of the partial revival of *Mason*, and that there may be

One distinction between *Lopp* and *Hayden*, the identity of the defendants, suggests a possible limit on the *Hayden* approach to laches analysis. In *Lopp*, the defendant was a public body, a school district. By allowing the laches defense, the court enabled the general public in that school district to retain the benefit of a favorable bond issue.<sup>51</sup> In *Hayden*, the two defendants with substantial financial interests were private businesses.<sup>52</sup> Consequently, the court's decision not to allow the laches defense did not subject the general public to direct financial loss.<sup>53</sup> This difference suggests that in an environmental suit where public funds are directly involved, the court might follow *Lopp* and examine the nature of the case.

Furthermore, language in the *Hayden* opinion suggests that this restriction to laches would not apply in all environmental suits. The court stated: "Often what is everybody's business is nobody's business."<sup>54</sup> Although this adage is vague and therefore difficult to apply, it suggests that the court is taking judicial notice of a quality of human nature: people will not get involved in a controversy if they think their interests will be upheld by others. The court implicitly recognized that delay by a plaintiff in an environmental protest was likely when the project proposal did not affect an identifiable group in a unique or particularly odious way. People will be slower to support a cause that does not directly protect a personal interest. Given these assumptions, if an environmental action did affect someone directly, the court might be more willing to apply laches because that person should have known to respond more punctually.<sup>55</sup> The fact that a

---

situations in which the court will not impose laches in an "environmental matter affecting an entire community." For a discussion of an example of how the court might make this decision, see note 46 *supra*.

The 1981 Washington Legislature threatened to restrict the court's ability to define further the contours of the *Hayden* exception with legislation which would have severely restricted judicial review of SEPA compliance. For a discussion of this ultimately unsuccessful legislative effort, see note 108 *infra*.

51. *Lopp v. Peninsula School Dist.*, 90 Wn. 2d 754, 761, 585 P.2d 801, 805 (1978).

52. *Safeway Stores, Inc. and Swains*. The third defendant, the City of Port Townsend, was keenly interested in the outcome of the case, but it did not have an identifiable, direct financial interest at stake. *Hayden*, 93 Wn. 2d at 872, 613 P.2d at 1165-66.

53. Clearly the Port Townsend public would pay for at least some of the cost generated by the delay imposed on Safeway in the form of higher prices. It is likely, however, that the losses on this particular misadventure would be distributed throughout the nationwide grocery chain, spreading the cost among more people and decreasing the size of the burden which would be borne by Port Townsend residents.

54. 93 Wn. 2d at 876, 613 P.2d at 1168.

55. One commentator concluded that under the National Environmental Policy Act, prospective environmental plaintiffs must act quickly to protect against a laches defense. Note, *Laches Bars Environmentalists' Challenge*, 19 NAT. RESOURCES J. 929, 930 (1979). This conclusion is based on a federal district court case, *Environmental Defense Fund, Inc. v. Alexander*, 467 F. Supp. 885 (N.D. Miss. 1979), *aff'd*, 614 F.2d 474 (5th Cir.), *cert. denied*, 101 S. Ct. 316 (1980), but it is not sup-

developer promptly began a project may not shield him from a somewhat belated protest from a citizen's group, given the *Hayden* court's understanding of the problems such groups traditionally face.<sup>56</sup>

While the *Hayden* limit to laches is a gain for environmentalists, it will not prove decisive in their struggle against developers' environmental insensitivity. Developers have another means of preventing environmental suits. The State Environmental Policy Act provides that once the developer has obtained the approval to proceed, she can at her option give notice of her plans and thereby commence the running of a thirty-day period during which any environmental challenge must be brought or be barred.<sup>57</sup> Because the laches defense has been circumscribed by the *Hayden* court, developers will probably make more use of this statutory provision to foreclose litigation.<sup>58</sup>

---

ported by the facts of the case. In *Alexander*, the plaintiffs had waited nine years to challenge the widening of a channel in a navigation project on which \$600 million of the estimated \$1 billion total cost had already been spent. Clearly plaintiff's delay was excessive and defendant's potential loss, without the protection of laches, was also excessive.

56. The court may be less tolerant of delays by a more organized group. One such group, the United South Slopes Residents (USSR) on Queen Anne Hill in Seattle, was involved in the landmark decision in 1978 forbidding the construction of a high-rise apartment building at the foot of Queen Anne Hill. *Polygon Corp. v. City of Seattle*, 90 Wn. 2d 59, 62, 578 P.2d 1309, 1311 (1978). If a future threat to the interests of the USSR arises, this organized group would not face all of the difficulties the *Hayden* court enumerated. This and similarly situated groups should be expected to respond more quickly to threats to its interests than should a group of citizens responding for the first time to a common threat.

57. WASH. REV. CODE § 43.21C.080 (1979). According to Mr. Peter Buck, past chairman of the Washington Bar Association Land Use and Environmental Law Section, this provision "has been used fairly frequently by developers, both before and after *Hayden*. I am not aware that *Hayden* has made a difference in anyone's thoughts on this. It is not always used, however, since developers simply are not aware of it." Mr. Buck doubts that utilizing the provision draws attention to a project and invites litigation. Letter from Peter Buck to author (Feb. 19, 1981) (on file with the *Washington Law Review*). This view is at odds with the conclusions of Mr. Dale Foreman, a Wenatchee attorney. Mr. Foreman claims: "The provision was the product of intense lobbying efforts by financial institutions and other commercial and development interests" to put to rest the fear that environmentalists would use SEPA to tie up major projects through protracted litigation. Foreman, *Cutting Off Challenges Under SEPA*, in 1979 Washington State Bar Convention Reference Notebook for Legal Institutes, 927. The provision is not used more frequently because "you [*i.e.*, the developer] . . . give notice to the world of your project and invite a lawsuit. . . . Whether to use [WASH. REV. CODE § 43.21C].080 depends in large part on the strength, resources and continuity of the potential opposition." *Id.* at 929.

58. The plaintiffs in *Hayden* raised an issue with regard to this provision. They argued that because the defendants could use the SEPA statute of limitations to foreclose all challenges to their developments, the defendants should not be allowed to use the equitable defense of laches as well. Brief for Appellants at 19-22, *Hayden v. Port Townsend*, 93 Wn. 2d 870, 613 P.2d 1164 (1980). The court did not address this issue.

The plaintiffs argued persuasively that "[l]imiting SEPA limitation defenses to the statutory provisions of RCW 43.21C.080 is consistent with the rule that 'equitable relief is not available if there is a plain, adequate and complete remedy at law.'" *Id.* at 21 (citing *Smith v. Smith*, 4 Wn. App. 608,

## Threshold Determination/Laches

### D. Summary

The scope of the *Hayden* restriction on the laches defense is not yet clear. After *Hayden*, plaintiffs in similar cases will have less reason to fear the successful application of laches against them. However, given the statutory provision which enables a developer to preclude protest after a specified period, developers will be able to lessen the impact on this gain for environmentalists.

## III. THE THRESHOLD DETERMINATION

### A. Background

The chief purpose of the State Environmental Policy Act<sup>59</sup> is to prevent environmental damage caused by land development.<sup>60</sup> The Act's most

---

613, 484 P.2d 409, 412 (1971)). Although *Smith* involved a property settlement agreement incorporated into a divorce decree, 4 Wn. App. at 609, 484 P.2d at 410, the general principle applies in *Hayden*.

The SEPA statute of limitations has been invoked successfully in recent years. It barred a claim of inverse condemnation brought two years after the defendant published a "Notice of Action" in *Dunstan v. City of Seattle*, 24 Wn. App. 265, 600 P.2d 674 (1979), *review denied*, 93 Wn. 2d 1013 (1980).

The court of appeals held recently that WASH. REV. CODE § 43.21C.080 does not apply to proponents of an agency action. *Oden Investment Co. v. City of Seattle*, 28 Wn. App. 161, 622 P.2d 882 (1981). *Oden*, the project proponent, wanted to take advantage of the SEPA statute of limitations because it was longer than the appeal period provided by the city ordinance. Relying heavily on the trial court's reasoning, the *Oden* court found that WASH. REV. CODE § 43.21C.080 "is primarily a means of providing constructive notice to the populace at large" and is the means "of putting to a resolute end protests against the proposed project." 28 Wn. App. at 164-65, 622 P.2d at 884 (emphasis added). The court concluded: "Because the parties involved will necessarily have had notice, it makes no sense to extend the length of time within which they can seek review to the time allowed to those [third parties] with only constructive notice." *Id.* at 165, 622 P.2d at 884. The court's view assumes that the policy behind the constructive notice is to put an end to citizen interference in the decision-making process. The court does not discuss a second policy behind the provision: to give actual as well as constructive notice to interested parties. Indeed, in *Oden*, the United South Slopes Residents (USSR) on Queen Anne Hill, an organized citizens group, became involved in the litigation at an early stage, a demonstration of this second policy. *Id.* at 163, 622 P.2d at 883.

For a discussion of the USSR, see note 56 *supra*.

59. WASH. REV. CODE ch. 43.21C (1979).

60. The full statement of the purpose of SEPA is set out in WASH. REV. CODE § 43.21C.010 (1979):

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

The court of appeals called SEPA "the State of Washington's most fundamental expression of environmental policy." *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wn. App. 59, 63, 510 P.2d 1140, 1144, *review denied*, 83 Wn. 2d 1002 (1973).

important tool<sup>61</sup> for evaluating the potential environmental effects of a proposed project is the Environmental Impact Statement (EIS), a detailed report compiled before the start of the project.<sup>62</sup> An EIS must be compiled "for legislation and other major actions<sup>63</sup> significantly affecting the quality of the environment."<sup>64</sup> The decision by the "lead agency"<sup>65</sup> whether to require preparation of an EIS is called the "threshold determination."<sup>66</sup> With two exceptions not pertinent to *Hayden*,<sup>67</sup> a threshold

61. See *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wn. App. 59, 68, 510 P.2d 1140, 1146 (1973) (describing the EIS as "particularly important").

62. The EIS is described in WASH. REV. CODE § 43.21C.030(2)(c) (1979):

(2) all branches of government of this state, including . . . municipal . . . corporations . . . shall:

. . . .

(c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:

(i) the environmental impact of the proposed action;  
 (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;  
 (iii) alternatives to the proposed action;  
 (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and  
 (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

. . . .

63. A governmental act which is "discretionary and nonduplicative" is a major action for purposes of SEPA. *Eastlake Community Council v. Roanoke Assocs.*, 82 Wn. 2d 475, 491, 513 P.2d 36, 46 (1973). A "major action" is any "action" not exempted by the Guidelines. WASH. ADMIN. CODE § 197-10-040(24) (1977). One of the three subcategories of "action" listed in the Guidelines is "[g]overnmental licensing of activities involving modification of the physical environment." WASH. ADMIN. CODE § 197-10-040(2)(a) (1977).

64. WASH. REV. CODE § 43.21C.030(2)(c) (1979). If a series of projects, considered cumulatively, constitutes a major action significantly affecting the quality of the environment, an EIS must be prepared at the outset. *Downtown Traffic Planning Comm. v. Royer*, 26 Wn. App. 156, 164, 612 P.2d 430, 435 (1980).

65. The lead agency is defined by the Guidelines. WASH. ADMIN. CODE §§ 197-10-200 to 270, 345 (1977). "The lead agency is responsible for making the threshold determination and preparing or supervising preparation of the draft and final environmental impact statements." WASH. ADMIN. CODE § 197-10-040(19) (1977). The City of Port Townsend was the lead agency and the city engineer was the city's designated SEPA official. The SEPA official's duty is to advise the lead agency, leaving the final decision to that body. *D.E.B.T., Ltd. v. Board of Clallam County Comm'rs*, 24 Wn. App. 136, 140-41, 600 P.2d 628, 632 (1979).

66. WASH. ADMIN. CODE § 197-10-040(33) (1977). Prior to the enactment of the SEPA Guidelines in 1976, the Washington Court of Appeals introduced the concept of the negative threshold determination in *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wn. App. 59, 510 P.2d 1140, *review denied*, 83 Wn. 2d 1002 (1973):

[SEPA] necessarily requires the *consideration* of environmental factors [before determining] whether or not an Environmental Impact Statement must be prepared. Thus, SEPA requires that a decision *not* to prepare an Environmental Impact Statement must be based upon a determination that the proposed project is *not* a major action significantly affecting the quality of the environment. . . . [The lead agency] must be able to demonstrate that environmental factors

determination must be made for every proposed major action.<sup>68</sup> If the lead agency determines that a proposal will not have a significant adverse impact<sup>69</sup> on the environment, it issues a negative threshold determination.<sup>70</sup>

The SEPA Guidelines set forth the procedures the lead agency<sup>71</sup> must follow when making a threshold determination. First, the project proponent must complete an environmental checklist.<sup>72</sup> If the checklist contains sufficient information from which the lead agency can determine the environmental impact of the proposal, it then makes a threshold determination.<sup>73</sup> If the agency needs further information before making a decision, the Guidelines authorize the agency to demand more information from the applicant, conduct further studies itself, or consult with other agencies that have expertise in the field.<sup>74</sup> The Guidelines do not authorize the

---

were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA.

*Id.* at 73, 510 P.2d at 1149. The Washington Supreme Court adopted the *Juanita Bay* concept of the negative threshold determination in *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn. 2d 267, 272-73, 552 P.2d 674, 677-78 (1976). The court later wrote: "This threshold determination is critical for full implementation of SEPA's mandate. . . . It must precede governmental action. . . . [T]he policy of the act [is] thwarted when the governmental body fails to make any threshold determination whatsoever." *Lassila v. City of Wenatchee*, 89 Wn. 2d 804, 813-14, 576 P.2d 54, 59 (1978).

67. WASH. ADMIN. CODE § 197-10-300(2) (1977) provides:

The threshold determination requirement may be omitted when: (a) Both the responsible official and the sponsor (public or private) of a proposal agree that an EIS is required, or (b) The sponsor of the proposal and the lead agency are the same entity and decides that an EIS is required.

68. WASH. ADMIN. CODE § 197-10-300(1) (1977).

69. The Washington Supreme Court adopted initially a federal court's definition of "significant impact":

The use of the term "significantly" has been defined to include the examination of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.

*Narrowsview Preservation Ass'n v. City of Tacoma*, 84 Wn. 2d 416, 423, 526 P.2d 897, 902 (1974) (quoting *Hanly v. Kleindienst*, 471 F.2d 823, 828 (2d Cir. 1972)). Later, in *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wn. 2d 267, 552 P.2d 674 (1976), the Washington court adopted a slightly different definition of "significant impact": "whenever more than a moderate effect on the quality of the environment is a reasonable probability." 87 Wn. 2d at 278, 552 P.2d at 680 (emphasis added). See notes 82-85 and accompanying text *infra*.

70. WASH. ADMIN. CODE § 197-10-340(1) (1977). See generally note 66 *supra*.

In *Hayden v. City of Port Townsend*, the city council made separate negative threshold determinations before approving the rezone application and the building permit. 93 Wn. 2d 870, 873-74, 613 P.2d 1164, 1167-70 (1980).

71. For a discussion of the duties of the lead agency, see note 8 *supra*.

72. WASH. ADMIN. CODE § 197-10-310(1) (1977).

73. WASH. ADMIN. CODE § 197-10-330(2) (1977).

74. WASH. ADMIN. CODE § 197-10-330(1) (1977) lists the three ways the agency can supplement the environmental checklist: (a) the lead agency can require the applicant to furnish further



agency to inform a project proponent of revisions required before a project can be given a negative threshold determination.<sup>75</sup>

Environmental litigation often focuses on the language in SEPA that triggers the EIS requirement: Is the proposal a major action “significantly affecting the quality of the environment”?<sup>76</sup> In *Norway Hill Preservation & Protection Association v. King County Council*,<sup>77</sup> the Washington Supreme Court addressed this question in reviewing the King County Council’s approval of a preliminary plat application for a housing subdivision without first requiring an EIS.<sup>78</sup> The council had given its approval subject to conditions recommended to it by the Land Use Management Division of the County Department of Planning.<sup>79</sup> The court described the proposed project as one which would “transform a heavily wooded and unpopulated area into a residential suburban neighborhood.”<sup>80</sup>

In order to resolve the dispute in *Norway Hill*, the court first interpreted the statutory term “significant.”<sup>81</sup> Initially, the court cautioned that “a precise and workable definition is elusive because judgments in this area are particularly subjective—what to one person may constitute a significant or adverse effect on the quality of the environment may be of little or no consequence to another.”<sup>82</sup> The court then noted that SEPA was enacted to give full consideration to environmental values in government decision-making.<sup>83</sup> The court consequently set forth the following stan-

---

information on topics covered in the environmental checklist; (b) the lead agency may conduct further studies, including on-site investigations, of the impact of the proposal; and (c) the lead agency can consult with other agencies with jurisdiction when those other agencies have expertise in the matter discussed.

75. For the provisions governing threshold determination procedures, see WASH. ADMIN. CODE §§ 197-10-300 to 400 (1977).

The Guidelines provide for the proponent to modify his proposal in certain circumstances:

If at any time after the issuance of a declaration of significance, the proponent modifies the proposal so that, in the judgment of the lead agency, all significant adverse impacts which might result are eliminated, the declaration of significance shall be withdrawn and a declaration of nonsignificance issued instead.

WASH. ADMIN. CODE § 197-10-370 (1977). This provision does not cover the *Hayden* situation, where Safeway modified its project *before* the issuance of a declaration of significance. Safeway’s modifications were in response to a series of meetings held between May 6, 1977, when the store submitted its environmental checklist, and October 14, 1977, when it submitted the building permit application. (Letters pertaining to those meetings are on file with the *Washington Law Review*.) The city engineer issued the proposed negative threshold determination later, on October 17, 1977.

76. WASH. REV. CODE § 43.21C.030(2)(c) (1979).

77. 87 Wn. 2d 267, 552 P.2d 674 (1976).

78. *Id.* at 268-69, 552 P.2d at 675.

79. *Id.* at 270-71, 552 P.2d at 676.

80. *Id.* at 278, 552 P.2d at 680.

81. *Id.* at 276-78, 552 P.2d at 680-81. See WASH. REV. CODE § 43.21C.030(2)(c) (1979), reprinted in part in note 62 *supra*.

82. 87 Wn. 2d at 277, 552 P.2d at 680.

83. *Id.* at 277-78, 552 P.2d at 680. For the purposes of SEPA, see note 60 *infra*.

dard: “Generally, the procedural requirements of SEPA, which are merely designed to provide full environmental information, should be invoked whenever more than a *moderate* effect on the quality of the environment is a *reasonable* probability.”<sup>84</sup> Implementing this standard in

84. 87 Wn. 2d at 278, 552 P.2d at 680 (emphasis added). For a discussion of the *Norway Hill* case and an analysis of issues involved in every threshold determination, see Comment, *Progress Toward a Coherent Standard for the Negative Threshold*, 54 WASH. L. REV. 159 (1978).

The Washington Supreme Court explained in a case after *Norway Hill* that the policy behind the close scrutiny of the negative threshold determination was “to ensure that an agency, in considering the need for an EIS, does not yield to the temptation of expediency thus short-circuiting the thoughtful decision-making process contemplated by SEPA.” *ASARCO, Inc. v. Air Quality Coalition*, 92 Wn. 2d 685, 700–01, 601 P.2d 501, 512 (1979).

The appellate courts of Washington have had several opportunities to apply the *Norway Hill* standard. In *ASARCO*, the Washington Supreme Court found a reasonable probability of significant environmental impact in a proposal that caused severe air pollution. Washington courts also required an EIS under the *Norway Hill* standard in a proposal that endangered a wildlife habitat, *Swift v. Island County*, 87 Wn. 2d 348, 552 P.2d 175 (1976), and in two proposals that presented radical changes from existing land uses, *Sisley v. San Juan County*, 89 Wn. 2d 78, 569 P.2d 712 (1977) (a building permit and substantial development permit for a marina and boat moorage), and *Newaukum Hill Protective Ass’n v. Lewis County*, 19 Wn. App. 162, 574 P.2d 1195 (1978) (a plan to convert farmland into 95 mobile home lots).

No environmental impact was found, however, in several cases where the proposal to rezone the land did not include any specific plans for development. *Carpenter v. Island County*, 89 Wn. 2d 881, 577 P.2d 575 (1978) (annexation of land into different sewer district); *Lassila v. City of Wenatchee*, 89 Wn. 2d 804, 576 P.2d 54 (1978) (rezone was only an initial step taken as part of a potential government development); *Marino Property Co. v. Port of Seattle*, 88 Wn. 2d 822, 567 P.2d 1125 (1977) (ownership of land changed hands without any intention of developing the property); *Short v. Clallam County*, 22 Wn. App. 825, 593 P.2d 821 (1979) (a rezone of land for which there was no plan for future building construction).

The proposal for an 83-unit apartment complex in an urban area presented a closer question of the probability of a significant environmental impact. In *Richland Homeowner’s Preservation Ass’n v. Young*, 18 Wn. App. 405, 568 P.2d 818 (1977), the court of appeals upheld a negative threshold determination after it examined the environmental impacts that were disclosed in the process of making that decision. *Id.* at 407–08, 568 P.2d at 819. (A zoning change was later imposed by the city to permit only single family units. This change did not affect the court’s disposition of the case.) Four of the impacts discussed by the *Richland Homeowner’s* court were predictable, quantifiable additions to existing impacts on human services. Specifically, the court found that these services would have increased use to the following extent:

- (1) water: less than a ½<sup>0</sup>th increase in demand;
- (2) traffic: a ½<sup>0</sup>th increase on closest arterial;
- (3) sewer: less than a ½<sup>0</sup>th increase in use; and
- (4) schools: about a ½<sup>0</sup>th increase in enrollment.

*Id.* at 411–12, 568 P.2d at 821–22. The court found that the burden of these additional uses was “not negligible, [but] certainly less than moderate.” *Id.* at 415, 568 P.2d at 823.

The court’s ability to quantify the effects of the development in *Richland Homeowner’s* distinguishes the case from those in which the development represented a significant departure from previous uses. In those cases, the court has required an EIS to determine the effect of the newly introduced environmental problem. The *Richland Homeowner’s* court recognized a distinction between small increases in already existing impacts and newly introduced impacts. The court distinguished the case from *Norway Hill* on the basis that the *Norway Vista* development was a large-scale project involving a complete change of land use. *Id.* at 415 n.5, 568 P.2d at 823 n.5. It concluded that the city’s decision-making process did comply with the SEPA mandate. *Id.* at 416, 568 P.2d at 824.

For discussion of the fifth impact, dust, see note 107 *infra*.

*Norway Hill*, the court held that a preliminary plat application presented a reasonable probability of having more than a moderate effect on the environment, and that an EIS was required before the agency could consider approving the preliminary plat.<sup>85</sup>

The *Norway Hill* court determined that the SEPA official's decision not to require an EIS was wrong.<sup>86</sup> Instead of requiring an EIS originally when he noticed the potential environmental problems, the SEPA official informally suggested project revisions and recommended to the county council that the application be approved subject to the protective conditions.<sup>87</sup> The Guidelines require an EIS whenever the lead agency cannot gather enough information through the preliminary Guideline procedures to make an informed decision.<sup>88</sup> Although the Guidelines were not in effect at the time of *Norway Hill*, the court cited them<sup>89</sup> and emphasized the importance of an EIS if the environmental effect was uncertain.<sup>90</sup> The court noted that the purpose of the EIS was to provide complete information "to help the agency decide what protective conditions are needed."<sup>91</sup> Under the *Norway Hill* rule, after a project proposal was submitted, if it required changes in order to receive a negative threshold determination, then the SEPA official was required to order an EIS to determine "what protective conditions are needed."<sup>92</sup>

*Norway Hill* required strict adherence to the Guidelines, which permit the lead agency to seek further information but do not provide for the

---

85. 87 Wn. 2d at 279, 552 P.2d at 680-81. Approval of the preliminary plat permitted the developer to prepare the heavily wooded tract for construction of single-family dwellings including removing the trees, grading the land, and installing paved streets. In effect, the significant environmental impact would occur before the developer's submission of a building permit application. The area would be an eyesore and the land's value as a watershed would be destroyed; there would be little reason to stop the developer from building houses. The supreme court opinion noted that the project would completely change the area. *Id.* at 269, 552 P.2d at 675-76. The court did not explain why it was critical to draft the EIS at the preliminary plat stage, but the court's list of the significant environmental impacts permitted at this stage indicates that the EIS had to be drafted then, and not later, in order to address fully the project's environmental impacts.

86. "[T]he Norway Vista project on its face involves the size and type of environmental change to which the full information requirement of SEPA was obviously meant to apply. . . ." 87 Wn. 2d at 279, 552 P.2d at 681.

87. *Id.* at 270-71, 552 P.2d at 676.

88. WASH. ADMIN. CODE § 197-10-330(2) (1977).

89. 87 Wn. 2d at 277 n. 7, 552 P.2d at 680 (1977) n. 7.

90. The *Norway Hill* court established the standard that SEPA's procedural requirements "should be invoked whenever more than a moderate effect on the quality of the environment is a reasonable probability." 87 Wn. 2d at 278, 552 P.2d at 680 (emphasis added). This standard is not found in the Guidelines, which require an EIS whenever "a proposal will or could have a significant adverse environmental impact. . . ." WASH. ADMIN. CODE § 197-10-040(10) (1977). For examples of the application of the *Norway Hill* standard, see note 84 *infra*.

91. 87 Wn. 2d at 279, 552 P.2d at 681.

92. *Id.*

agency and the developer to discuss possible alterations in the project to avoid preparation of an EIS.<sup>93</sup> This rule has been changed by *Hayden*, which approved of discussion between agency and developer.<sup>94</sup> The *Norway Hill* standard for determining when an EIS will be required—when ever the proposed action presents a reasonable probability of moderate impact<sup>95</sup>—has not been altered by *Hayden*.

### B. *The Court's Decision in Hayden*

*Hayden* presented the court with an opportunity to apply the *Norway Hill* rule, but *Hayden* rejected the *Norway Hill* court's rigid approach. In *Norway Hill*, the developer had submitted an application for a preliminary plat for a new subdivision before the King County Council informally imposed conditions and issued the negative threshold determination.<sup>96</sup> In *Hayden*, defendant Safeway did not submit a building permit application until after the city engineer told it what changes were required in order to obtain a negative threshold determination.<sup>97</sup> Safeway then made those changes before submitting the building permit application.<sup>98</sup> The *Norway Hill* court objected to the SEPA official's approval of the proposal before all environmental questions had been answered.<sup>99</sup> This objection would seem to apply with greater force to the *Hayden* case, where the SEPA official approved of the project before the developer submitted his formal application.<sup>100</sup> In *Hayden*, the SEPA official imposed the conditions at an even earlier point in the application process, when there had been even less chance for a reasoned analysis of all possible environmental effects of the proposed project.

Instead of applying the *Norway Hill* rule, however, the *Hayden* court applauded the "eminently sensible"<sup>101</sup> procedure of the city engineer: "Where it is feasible, it appears reasonable to resolve potential environ-

93. See WASH. ADMIN. CODE § 197-10-330(2) (1977).

94. *Hayden v. City of Port Townsend*, 93 Wn. 2d 870, 880, 613 P.2d 1164, 1170 (1980). See generally notes 20 & 21 and accompanying text *supra*.

95. 87 Wn. 2d at 278, 552 P.2d at 680.

96. *Id.* at 269, 552 P.2d at 676.

97. *Hayden v. City of Port Townsend*, 93 Wn. 2d 870, 880, 613 P.2d 1164, 1170 (1980). Safeway demonstrated early that it desired to cooperate with Port Townsend officials. On April 7, 1977, Safeway gave the city engineer a questionnaire concerning environmental problems he could foresee. After the city engineer returned the questionnaire, Safeway asked for a preliminary review of its environmental checklist. Letters from Safeway officials to Port Townsend city engineer (Apr. 7, 1977 & May 6, 1977) (on file with the *Washington Law Review*).

98. 93 Wn. 2d at 880, 613 P.2d at 1170.

99. *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn. 2d 267, 279, 552 P.2d 674, 681 (1976).

100. See note 97 *supra*.

101. 93 Wn. 2d at 880, 613 P.2d at 1170.

mental problems before a formal application is made for a building permit. The pertinent question is whether environmental factors were adequately considered before a final decision was made."<sup>102</sup> The opinion describes the discussions held by Safeway officials and the Port Townsend city engineer<sup>103</sup> but does not provide any other reasons for the decision. Apparently, the court recognized the adverse practical consequences of the inflexible *Norway Hill* rule.<sup>104</sup>

### C. Analysis

The *Norway Hill* rule effectively deprived the SEPA official of much potential discretion by foreclosing his opportunity to substitute protective conditions for an EIS. The SEPA official could require changes before granting approval, but the proponent's compliance with those recommendations would not alleviate the duty to prepare an EIS. Thus, there was little incentive for a project proponent to mitigate effects by cooperating with the SEPA official at an early stage.

The *Hayden* decision creates this incentive to cooperate at an early stage. The decision is consistent with the court's many previous efforts to ensure that the ultimate purpose of SEPA is achieved by full consideration of ways to reduce a project's effect on the environment.<sup>105</sup> The *Hayden* court's endorsement of a more flexible approach to preliminary nego-

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

103. *Id.*

104. Mr. Peter Buck, past chairman of the Washington State Bar Association Land Use and Environmental Law Section, thinks the *Norway Hill* rule was "contrary to good day-to-day decision-making." He feels that environmental decision-making is improved by encouraging project proponents to mitigate adverse environmental effects by either modifying a project proposal or imposing conditions; these mitigation techniques were discouraged under the *Norway Hill* rule, but they are encouraged by the *Hayden* decision. He also adds:

Sensible and responsible project proponents try to identify [ways to mitigate adverse environmental impacts] as early as possible and incorporate them into their original proposal. Often the actual proposal may include such measures and as a practical result may eliminate the potential for adverse environmental effects. The resulting potential avoidance of the cost and delay of preparation of an impact statement can serve as motivation for project proponents to incorporate such mitigating measures. *Hayden* seems to allow for this while *Norway Hill* did not.

Letter from Peter Buck to author (Feb. 19, 1981) (on file with the *Washington Law Review*).

105. For example, in *Leschi Improvement Council v. Washington State Highway Comm'n*, 84 Wn. 2d 271, 279-80, 525 P.2d 774, 781 (1974), a plurality of the court commented:

The right . . . to a "healthful environment" is expressly recognized as a "fundamental and inalienable" right by the language of SEPA. The choice of this language in SEPA indicates in the strongest possible terms the basic importance of environmental concerns to the people of this state. It is a far stronger policy statement than that found in the National Environmental Policy Act which reads only that "The Congress recognizes that each person should enjoy a healthful environment . . ." 42 U.S.C. § 4331(c).

tiation between developer and lead agency merely gives the lead agency's SEPA official more discretion in achieving this ultimate purpose.

The *Hayden* decision has expanded the discretionary powers of the SEPA official by including at the negative threshold determination stage more than the information gathering procedures outlined in the Guidelines.<sup>106</sup> In addition to these procedures, the agency can now ask the project proponent to make adjustments if the agency detects objectionable aspects of the project which would make a negative threshold determination impossible. The court is correct to call the new procedure "eminently sensible."<sup>107</sup> The procedure is sensible economically and politically. Economically, the inflexibility of the *Norway Hill* rule led to unnecessary EIS preparation, an expense borne ultimately by the general public. Politically, the inflexibility of the *Norway Hill* court's interpretation of SEPA in this critical area has caused disenchantment with the Act and could have led to its repeal.<sup>108</sup> The *Hayden* court's response to these economic and political concerns is not explicit in the opinion. In any case, the re-

---

After discussing the facts of the case, the court continued in the same vein:

The comprehensive review envisioned by SEPA is to be "detailed" and does not invite a lackadaisical approach." [Citation omitted.] We cannot agree with respondents' contention that SEPA is to be construed *less strictly* than NEPA. . . . This state's act is far more emphatic than NEPA in its legislative statement of purpose of the importance to this state's citizens of a healthful environment . . . . We cannot, consistent with legislative intent, give SEPA a less restrictive interpretation.

*Id.* at 280, 525 P.2d at 781.

106. For a discussion of the Guideline procedures for making a threshold determination, see notes 71–74 and accompanying text *infra*.

107. In *Richland Homeowner's Preservation Ass'n v. Young*, 18 Wn. App. 405, 568 P.2d 818 (1977), decided seven weeks after *Norway Hill*, the court of appeals affirmed the city's negative threshold determination even though the city had informally arranged with the applicant during the threshold determination process to control dust during construction (dust control during construction was the only environmental problem the city official foresaw). *Id.* at 407, 568 P.2d at 822. This case is an anomaly for in it the court of appeals violated the letter of the *Norway Hill* "law." The violation is quite insignificant: The only evidence that there was a dust problem came from a complaint lodged by a nearby homeowner—who also was president of the plaintiff organization!

108. Disenchantment with the EIS requirement of SEPA led to the passage of Substitute Senate Bill No. 4036 in the 1981 Regular Session of the Washington State Legislature. See Leed, *SEPA and Endangered Species*, Seattle Post-Intelligencer, Mar. 23, 1981, § A, at 9 (president of the Washington Environmental Council criticizes the "short-sighted" efforts by the "foes of SEPA," who seek to destroy SEPA's "rule of reason" without realizing that the consequence will be "rigidity, hardship, and unreasonable restrictions"). On May 18, 1981, Governor John Spellman vetoed this proposed amendment to WASH. REV. CODE ch. 43.21C.

Representative Raymond Issacson of Richland, who co-sponsored Substitute House Bill No. 429, the House equivalent of Substitute Senate Bill No. 4036, claims that the effect of the law would have been to eliminate frivolous challenges to satisfactory EIS's. A cursory review of the bill, however, undermines Representative Issacson's claim. Section 1 reads in part:

A final detailed statement prepared under rules and procedures established by the department of ecology shall be considered adequate for the purpose of this chapter *seven days* after the date of publication of the final detailed statement. *The adequacy of a final detailed statement shall not be subject to judicial review if a procedure for administrative appeal is available.*

sponse is not at the expense of SEPA's core purpose.<sup>109</sup> Far from conflicting with that purpose, the court's decision will facilitate a more efficient and continuing responsiveness to that purpose.

Narrowly construed, the *Norway Hill* rule<sup>110</sup> forbade informal suggestion or imposition of revisions after the project application was submitted.<sup>111</sup> However, the public policy considerations of *Norway Hill*—to ensure full consideration of environmental values<sup>112</sup>—would seem to apply with even more force to *Hayden*. Because the contact between Safeway and the city engineer in *Hayden* was not within the Guideline procedures,<sup>113</sup> abuse of the SEPA mandate could occur without detection.<sup>114</sup> Furthermore, although there are chronological differences between *Norway Hill* and *Hayden*,<sup>115</sup> they are insignificant in light of an overriding similarity: In both cases the challenged applications represented the last opportunity to study the environmental effects of the project. Despite this compelling similarity, the *Hayden* court does not follow

---

Substitute Senate Bill No. 4036, § 1 (emphasis added). This section would have severely limited citizen participation in environmental decision-making in two ways. First, a person challenging the adequacy of an EIS would have been required to file the appeal within seven days of the publication of the EIS. This short appeal period would have cut off valid challenges by concerned citizens who delayed only a short time.

Second, and more important, this section would have eliminated judicial review if an administrative appeal procedure was available. Administrative procedures would not have provided adequate review because the appeal procedure did not need to be undertaken by an independent body. If the review procedure were conducted by the department which authorized the allegedly inadequate EIS, the initial decision regarding the adequacy of the EIS would have been accorded excessive deference by these self-interested reviewers.

Section 2 of Substitute Senate Bill No. 4036 was a more direct attack on SEPA. The purpose of this section was to promote land development by exempting from the EIS requirement for the next two years residential developments containing no more than one hundred lots or three hundred "attached dwelling units." The exemption would have applied only in King, Spokane, Pierce, and Snohomish Counties, the state's four most populous counties. The attempt to exempt projects of this magnitude from the EIS requirement directly contradicts the environmental values at the core of SEPA. A *Seattle Post-Intelligencer* editorial condemned these "haphazard exemptions from land development laws" and praised State Land Commissioner Brian Boyle for urging Governor John Spellman to veto the bill. *Seattle Post-Intelligencer*, May 11, 1981, § A, at 8.

109. See note 60 *supra*.

110. The *Norway Hill* rule and *Norway Hill* standard are different and distinct concepts. See notes 93–95 and accompanying text *supra*.

111. *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wn. 2d 267, 279, 552 P.2d 674, 681 (1976).

112. *Id.* at 272, 552 P.2d at 677. The Washington Reports version of this passage reads: "The mechanism through which this environmental consideration is accomplished is the detailed [EIS]." The version is an improvement over that which appears in the Pacific Reporter: "the [*sic*] basis upon which the responsible environmental [*sic*] consideration is accomplished is the detailed [EIS]."

113. See notes 71–74 and accompanying text *supra*.

114. The supreme court opinion does not suggest any impropriety on the part of Safeway. For discussion of possible abuse which could occur, see notes 118 & 119 and accompanying text *infra*.

115. For a discussion of these chronological differences, see notes 96–100 and accompanying text *supra*.

the *Norway Hill* rule. As a result, the *Norway Hill* rule retains little, if any, practical force. Developers will avail themselves of the informal opportunities which were approved in *Hayden*.<sup>116</sup> The *Hayden* court abandons the *Norway Hill* rule sub silentio.

The *Norway Hill* rule was inadequate because it inflexibly required the preparation of environmental impact statements in circumstances where they could and should have been avoided by minor preliminary adjustments.<sup>117</sup> The *Hayden* rule, on the other hand, may prove unworkable if SEPA officials do not responsibly use their discretionary powers.<sup>118</sup> The new rule may also prove inadequate when an inexperienced SEPA official with limited resources deals with a developer who is well versed in the Act's intricacies. In such circumstances, the developer's superior resources and expertise might allow him to gain approval of a project by concealing or misrepresenting potential impacts from the SEPA official. This pessimistic scenario is unlikely to be repeated often, however, given society's concern for environmental values.<sup>119</sup>

#### D. Summary

The new *Hayden* rule returns a greater degree of control to local government and will more efficiently serve to protect the environment. If the *Hayden* rule leads to results contrary to the mandate of SEPA, however, we can expect a return to a less flexible rule with the attendant wasteful preparation of unnecessary environmental impact statements.

## IV. CONCLUSION

The two holdings of *Hayden* discussed in this note balance a gain for environmentalists against a gain for developers. The laches doctrine will be less of a threat to environmental groups who have reasonable excuses for delay.<sup>120</sup> The discretionary powers vested in SEPA officials will result in fewer unnecessary environmental impact statements.

Although the court is not directly reversing itself on either of these issues, it is puzzling that it does not acknowledge in *Hayden* that it is signi-

---

116. *Hayden v. City of Port Townsend*, 93 Wn. 2d 870, 880-81, 613 P.2d 1164, 1170 (1980).

117. See note 104 *supra*.

118. This kind of impropriety did not occur in *Hayden*, according to the supreme court opinion.

119. But see note 108 *supra* (discussion of a recent unsuccessful effort in the state legislature to repudiate the values of SEPA).

120. Developers can circumscribe the environmentalists' gain by utilizing SEPA's notice procedure. WASH. REV. CODE § 43.21C.080 (1979). This section allows developers to commence a thirty-day statute of limitations on suits against a private development. See notes 57 & 58 and accompanying text *supra*.



ificantly modifying the rules established in forceful language in *Lopp*<sup>121</sup> and *Norway Hill*.<sup>122</sup> Perhaps this omission indicates a feeling of the court that those prior positions are best forgotten. Indeed, they probably are best ignored, as the new approaches to the laches doctrine and the negative threshold determination are positive steps towards a more reasonable—while still responsive—policy of environmental protection.

*Deane W. Minor*

---

121. *Lopp v. Peninsula School Dist.*, 90 Wn. 2d 754, 759, 585 P.2d 801, 804 (1978).

122. *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wn. 2d 267, 279, 552 P.2d 674, 681 (1976).