

# Washington Law Review

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Volume 53 | Number 3

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5-1-1978

## Protection of Recreation and Scenic Beauty Under the Washington Forest Practices Act

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### Recommended Citation

Brian L. Hansen, Comment, *Protection of Recreation and Scenic Beauty Under the Washington Forest Practices Act*, 53 Wash. L. Rev. 443 (1978).

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## COMMENTS

### PROTECTION OF RECREATION AND SCENIC BEAUTY UNDER THE WASHINGTON FOREST PRACTICES ACT

State regulation of forest practices<sup>1</sup> is a complex issue because of the competition between growing demands for outdoor recreation and environmental protection on the one hand, and for forest products on the other. The conflict is exacerbated by the marginal economic status of many forest operations. The history of forest practices regulation in Washington reflects the tension between protecting aesthetic and recreational forest uses and preserving the forest products industry. The Washington Forest Practices Act of 1974<sup>2</sup> represents a compromise between environmental and timber production concerns, but the compromise has not been implemented. Although regulations promulgated under the Act have provided some protection for fish, wildlife, and water quality,<sup>3</sup> these regulations do not address recreation or sce-

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1. WASH. REV. CODE tit. 76 (1976 & Supp. 1977) (§ 76.09.020(8)) defines the term "forest practices".

2. WASH. REV. CODE ch. 76.09 (1976). Other states passed or revised forest practices acts during the same period. California enacted a new forest practices act after its old act was invalidated on constitutional grounds in *Bayside Timber Co. v. Board of Supervisors*, 20 Cal. App. 3d 1, 97 Cal. Rptr. 431 (1971). See CAL. PUB. RES. CODE §§ 4511-4628 (West Supp. 1977); Comment, *Regulation of Private Logging in California*, 5 ECOLOGY L.Q. 139 (1975). Idaho and Oregon also enacted forest practices acts during the early 1970's. See IDAHO CODE §§ 38-1301 to -1312 (1977); OR. REV. STAT. §§ 527.610-730 (1975). Nevada extensively amended its act during this period. See NEV. REV. STAT. §§ 528.010-.090 (1973).

3. WASH. ADMIN. CODE ch. 222 (1976), promulgated pursuant to WASH. REV. CODE § 76.09.040 and ch. 34.04 (1976). These regulations were filed with the Code Reviser on June 16, 1976, but have not appeared in the bound code. They are available from the Washington Forest Practices Board, Olympia, Washington. Examination of the effect of these forest practices regulations on elements of the environment other than recreation and scenic beauty is beyond the scope of this comment. However, the forest practices regulations do address protection of fish, water quality, and wildlife. For a variety of views on the protection afforded, see the Comments to WASHINGTON FOREST PRACTICES BOARD, DEPARTMENT OF NATURAL RESOURCES, & WASHINGTON DEPARTMENT OF ECOLOGY, DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR PROPOSED FOREST PRACTICES REGULATIONS (1976) (Comments incorporated as Final EIS) [hereinafter cited as DRAFT EIS]. As to the impact of forest practices on water quality, fish, soils, and wildlife, see, e.g., MANAGEMENT AND RESEARCH DIVISION, WASHINGTON DEPARTMENT OF FISHERIES, A REPORT ON SILTATION IN STEQUALEHO CREEK (1971); OREGON STATE GAME COMMISSION, GUIDELINES FOR STREAM PROTECTION IN LOGGING OPERATIONS (1971).

nic beauty.<sup>4</sup> More important, the Act to a large extent preempts other laws which could protect these values. As a result, recreation and scenic beauty are afforded little protection from poorly planned and executed forest practices.

This comment examines Washington's failure to adequately protect recreation and scenic beauty from the adverse effects of forest practices. It first describes the Forest Practices Act, then discusses the absence of Forest Practices Board regulations protecting scenic beauty and recreation. It then analyzes the preemptive effect of the Forest Practices Act and its interrelationship with other laws and regulations such as the State Environmental Protection Act (SEPA) and SEPA guidelines,<sup>5</sup> the Shoreline Management Act,<sup>6</sup> and local regulations. The comment concludes that further administrative and legislative action is necessary to protect recreation and scenic beauty in Washington's forests.

## I. WASHINGTON FOREST PRACTICES LEGISLATION

### A. *History of Forest Practices Legislation in Washington*

Washington's first forest practices act, enacted in 1945, required

4. See Part II—*A infra*.

The particular effects on the environment of clearcutting and other techniques which result in "even-age" tree stands are discussed in N. WOOD, *CLEARCUT: THE DEFORESTATION OF AMERICA* (1971). See Comment, *Trees, Earth, Water and Ecological Upreaval: Logging Practices and Watershed Protection in California*, 54 CALIF. L. REV. 1117 (1966); Comment, *Clearcutting: Can You See the Forest for the Trees?*, 5 ENV. L. 85 (1974); Comment, *Man's Activities in Watershed Areas—A Need for Planning*, 4 ENV. L. 229, 238–46 (1974). See also SCHOOL OF FORESTRY, OREGON STATE UNIVERSITY, *EVEN-AGE MANAGEMENT* (proceedings of a Symposium held Aug. 1, 1972) (Hermann & Lavender eds. 1973); Evans, *High Yield Forestry*, SIERRA CLUB BULL., Mar. 1972, at 10; Palmer, *A Forest Practices Primer*, FARTHEST CORNER, March-April 1977, at 5 (the Washington Environmental Council newsletter).

A federal ruling that clearcutting on Forest Service lands violated the 1897 Forest Service Organic Act, West Va. Div. of the Isaak Walton League v. Butz, 522 F.2d 945 (4th Cir. 1975), sparked a national debate over forest management practices on public lands. This controversy led to the enactment of the National Forest Management Act of 1976. Pub. L. No. 94-588, 90 Stat. 2949 (codified at 16 U.S.C. §§ 1600-1614 (1976)), discussed in Pardo, *Forestry Law and Policy*, 7 U. TOL. L. REV. 999 (1976). See also Federal Land Policy and Management Act of 1976, 43 U.S.C.A. §§ 1701-1782 (West Supp. 1977) (concerning federal lands administered by the Secretary of the Interior through the Bureau of Land Management); Comment, *Monongahela and the National Forest Management Act of 1976*, 7 ENV. L. 345 (1977); Comment, *National Forest Management Act of 1976—What Impact on Federal Timber Management*, 13 IDAHO L. REV. 263 (1977).

5. WASH. REV. CODE ch. 43.21C (1976 & Supp. 1977); WASH. ADMIN. CODE ch. 197-10 (1976).

6. WASH. REV. CODE ch. 90.58 (1976 & Supp. 1977).

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forest landowners and logging operators to reforest logged lands as a cost of doing business.<sup>7</sup> Under this act, the constitutionality of compelling the forest industry to protect forest resources was established.<sup>8</sup> The primary purpose of this act, however, was to ensure continuous production of timber, not to protect the environment.<sup>9</sup> The 1945 act did not address environmental values affected by forest practices, such as fisheries, wildlife, water quality, recreation, and scenic beauty.

During the following years, the public's burgeoning interest in recreation and the environment had to compete with the demands of an expanding forest industry.<sup>10</sup> Environmental protection effected

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7. Act of Mar. 15, 1945, ch. 193, 1945 Wash. Laws 556 (repealed 1974). The Act was based on the Oregon Forest Conservation Act of 1941, ch. 237, 1941 Or. Laws 371 (current version at OR. REV. STAT. §§ 527.610--730 (1975)). The connection between Washington's law and the Oregon statute is described in Stacer, *The Oregon Forest Conservation Act*, 2 WILLAMETTE L. J. 268, 282 (1962). Enforcement provisions and sanctions under the 1945 Washington act are found at Act of Feb. 23, 1953, ch. 44, § 3, 1953 Wash. Laws 60 (repealed 1974).

Prior to 1945, logged land was converted to other uses or left to escheat to county governments for nonpayment of taxes. See *State v. Dexter*, 32 Wn. 2d 551, 555-56, 202 P.2d 906, 908, *aff'd*, 338 U.S. 863 (1949). In the 1920's the state was sufficiently concerned about deforestation and soil erosion to enact a provision whereby lands which had escheated to the counties could be deeded to the state for reforestation at state expense. Act of Mar. 21, 1927, ch. 288, § 3-b, 1927 Wash. Laws 704 (current version at WASH. REV. CODE § 76.12.030 (1976)). The now abolished State Forest Board had general power over state forest lands acquired for reforestation from counties and other sources. The functions of the State Forest Board and the Division of Forestry of the now abolished Department of Conservation and Development (which administered the 1945 Forest Practices Act) have been consolidated in the Department of Natural Resources. WASH. REV. CODE § 43.30.010 (1976).

8. *State v. Dexter*, 32 Wn. 2d 551, 202 P.2d 906, *aff'd*, 338 U.S. 863 (1949).

9. Section 1 of the act enunciated the statutory policy of keeping the forest land of this state continuously and fully productive by means of "continuous growth of timber on all lands suitable for such purposes." Act of Mar. 15, 1945, ch. 193, § 1, 1945 Wash. Laws 556 (repealed 1974). Although the act required reforestation, it did not ensure that reforestation would be as rapid as the removal of trees. For example, there was no inducement to forest landowners to keep land in production and to ensure future supplies of timber. It was not until the National Forest Management Act of 1976 that any legislative body clearly directed that the even flow approach to the sustained yield management concept be followed on national forest lands. 16 U.S.C. §§ 1600-1614 (1976).

Under the 1945 law, permittees were not required to restock the land or otherwise ensure future growth if they were removing diseased or dying trees or clearing the land for other "bona fide" purposes. Act of Mar. 15, 1945, ch. 193, § 9, 1945 Wash. Laws 556 (repealed 1974). See also Oregon Forest Conservation Act of 1941, ch. 237, § 8, 1941 Or. Laws 371 (repealed 1971). However, Washington has encouraged reforestation over the years through favorable tax policies for property undergoing regeneration. See *State ex rel. Mason County Logging Co. v. Wiley*, 177 Wash. 65, 31 P.2d 539 (1934); WASH. REV. CODE chs. 84.28, 84.33, 84.34 (1976 & Supp. 1977). For a discussion of the need for reforestation, see note 34 *infra*.

10. Increasing recreational demands are a product of increased population com-

through local controls and piecemeal state programs<sup>11</sup> was supplemented in 1971 by legislative enactment of SEPA<sup>12</sup> and the Shoreline Management Act.<sup>13</sup> Despite their increasing concern over environmental degradation caused by some forest practices, environmental groups were not the primary impetus behind the adoption of a new Forest Practices Act in 1974.<sup>14</sup> The legislation was introduced by the

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bined with increased environmental awareness.

Increased population, and especially increased population density in the urban areas, coupled with escalating public interest in outdoor recreation and the aesthetic and natural qualities of open space, have resulted in a dramatic increase in the use of all forms of outdoor recreational facilities. Between 1960 and 1975, attendance at State parks alone increased over 320 percent, while the State population increased by only 23 percent during the same period.

OFFICE OF THE GOVERNOR, STATE OF WASHINGTON, STATE POLICIES FOR LAND USE AND NATURAL RESOURCE MANAGEMENT 25 (1977). Estimates indicate a three-fold increase above 1973 levels by the year 2020 in use of the Alpine Lakes Wilderness Area in the Cascade mountains. U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, REPORT ON THE PROPOSED ALPINE LAKES WILDERNESS, WASHINGTON 10 (1975).

The degree of environmental concern in Washington is reflected in the results of the Alternatives for Washington program. 1 WASHINGTON STATE OFFICE OF PROGRAM PLANNING AND FISCAL MANAGEMENT, ALTERNATIVES FOR WASHINGTON 3, 13-14, 22 (1976); 9 *id.* at 10.

11. County land use planning and zoning have been attempted with regard to forest practices. Under the Washington Planning Enabling Act, WASH. REV. CODE ch. 36.70 (1976 & Supp. 1977), a county's comprehensive plan should designate the proposed distribution, location, and extent of land set aside for agricultural, industrial, recreational, and other categories of public and private land use. *Id.* §§ 36.70.320-330 (1976). The comprehensive plan may include a "conservation element" and a "recreation element." *Id.* § 36.70.350(1)-(2). Specific regulations may be adopted by county ordinance to carry out the comprehensive plan. *Id.* §§ 36.70.550-.570. County planning authority under R.C.W. ch. 36.70 is now restricted with regard to forest practices by the Washington Forest Practices Act. *See* Part II-D *infra*.

Although state and county parks satisfy some recreational, scenic, and other environmental needs, costs of acquisition and maintenance are significant restraints. One state program which affected the conduct of forest practices was the Hydraulics Act, enacted in 1955 as a section of the Fisheries Code to protect fish from timber harvesting and other activities in the near streams. Food Fish and Shellfish—Fisheries Code, ch. 12, § 75.20.100, 1955 Wash. Laws 22 (current version at WASH. REV. CODE § 75.20.100 (1976)). *See* note 98 *infra*. Evidence pointed to a connection between logging and declining fish runs. *See* authorities cited at notes 3 & 4 *supra*. Authority under the Act was limited, however, and the Washington State Departments of Fisheries and Game were not able to police all violations which occurred.

12. State Environmental Policy Act of 1971, ch. 109, 1971 Wash. Laws 1st Ex. Sess. 623 (codified at WASH. REV. CODE ch. 43.21C (1976 & Supp. 1977)).

13. Shoreline Management Act of 1971, ch. 286, 1971 Wash. Laws 1st Ex. Sess. 1496 (codified at WASH. REV. CODE ch. 90.58 (1976 & Supp. 1977)). At least one county has attempted to use its powers under the Shoreline Management Act to control logging practices and road construction in shoreline areas. *Weyerhaeuser v. King County*, No. 52179 (Wash. Super. Ct., Thurston County, Feb. 7, 1977), *review granted*, Washington Supreme Court, No. 44770, Mar. 3, 1977 (appeal from decision of the Shorelines Hearings Board, SBH No. 155, March 10, 1975, *reprinted in* 2 WASH. STATE ENVIR. REP. (BPC) No. 155). *See* Layton, *Cooking on All Burners: The Forest Practices Act*, Seattle Post-Intelligencer, May 29, 1975, § A, at 4, col. 1.

14. Ch. 137, 1974 Wash. Laws 1st Ex. Sess. 401.

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forest industry in reaction to environmental legislation.<sup>15</sup> As enacted, however, the language of the Act reflects a compromise between competing demands on the forest resource.<sup>16</sup>

The Act created a Forest Practices Board (FPB) to promulgate regulations to implement the Act's purposes and policies.<sup>17</sup> Promulgation of such regulations was a difficult and time-consuming task because

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15. D. Syrdal & J. Keegan, *The Washington Forest Practices Act of 1974, Part I*, at 3-4 (May 21, 1975) (unpublished manuscript in Univ. of Washington Law School Library) [hereinafter cited as Syrdal & Keegan]. See Brewer, *Our Environment and the Economics of the Forest*, 33 FED. BAR J. 126 (1974); Miskovsky & Van Hook, *Regulation of Forestry Related Nonpoint Source Pollution Under the Federal Water Pollution Control Act Amendments of 1972*, 9 NAT. RESOURCES LAW. 645 (1976) statement by Theodore R. Rogowski, Regional Counsel for Region X of the EPA, before the Washington State House of Representatives, Nat. Resources Committee, Olympia, Wash., June 1, 1973) (on file with the *Washington Law Review*). See generally Comment, *The National Forest Service and the Forest and Rangeland Renewable Resources Planning Act of 1974*, 15 NAT. RESOURCES J. 603, 611 (1975).

The State Environmental Policy Act of 1971 (SEPA), WASH. REV. CODE ch. 43.21C (1976 & Supp. 1977), also had potential application to state forest practices. Timber sales and harvesting on federal lands had been held to be subject to the National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321-4361 (West 1977), on which SEPA is based. See, e.g., Forest Resources Commission of ABA Nat. Resources Law Section, *Annual Review of Significant Legislative, Administrative and Judicial Activities During 1974*, 8 NAT. RESOURCES LAW. 103, 103-05 (1975). The permit process under the Washington Forest Practices Act of 1945, however, provided insufficient information regarding environmental impacts of forest practices to enable the Department of Natural Resources to comply with SEPA. See Syrdal & Keegan, *supra* at Part I n.11.

16. This compromise is reflected in § 1 of the 1974 Act, R.C.W. § 76.09.010, which states: "coincident with maintenance of a viable forest products industry, it is important to afford protection to forest soils, fisheries, wildlife, water quantity and quality, air quality, recreation and scenic beauty." As originally introduced, the forest practices legislation seemed designed to protect the forest industry from those environmental laws which could have impeded harvesting. Wash. H.B. 637, 43d Legis. (1973), required only that notification be sent to the Department of Natural Resources before commencement of forest practices, and even this requirement could be dispensed with if the regulations so provided. *Id.* § 4, ¶ (1). Under this proposal, the Department of Natural Resources did not have to approve the proposed operation or issue a permit; therefore SEPA would not have applied. The bill largely eliminated the authority of the Departments of Fisheries and Game under the Hydraulics Act, WASH. REV. CODE § 75.20.100 (1976), discussed at Part II-C *infra*. Wash. H.B. 637, § 18, 43d Legis. (1973). Section 10 of H.B. 637 limited regulation of forest practices by local government under land use and zoning powers, but Shoreline Management Act authority was expressly preserved for local governments. Wash. H.B. 637, § 10(d), 43d Legis. (1973).

This bill did not pass in 1973 because conflicts between the affected industry, county governments, environmental groups, and the Department of Natural Resources necessitated nine redrafts of the legislation. See Syrdal & Keegan, *supra* note 15, at 4-10. Ultimately, county governments won limited recognition for land use planning and zoning authority. WASH. REV. CODE §§ 76.09.050(5)-(11), .060(3), .140(2), .180, .240 (1976). The provisions of the Hydraulics Act were preserved. *Id.* § 76.09.910. *But see* discussion of the Hydraulics Act at Part II-C *infra*. In addition, a permit issuance system was adopted, making SEPA applicable in part. WASH. REV. CODE § 76.09.050(1)(d) (1976). See discussion of SEPA at Part II-B *infra*.

17. WASH. REV. CODE §§ 76.09.010, .030, .040 (1976).

of the divergent views of Board members and the lack of substantive guidance in the Act.<sup>18</sup> Before final regulations were issued, organized opposition from timberland owners and contract loggers resulted in substantial amendments to the law.<sup>19</sup> These 1975 amendments largely eliminated the possibility of environmental protection from sources other than regulations under the Forest Practices Act.<sup>20</sup>

### B. *General Provisions of the Forest Practices Act*

The Forest Practices Act applies to forest practices on all non-federal forest land in Washington<sup>21</sup>—approximately 11,168,000 acres.<sup>22</sup> Federal forest lands are managed independently under federal laws.<sup>23</sup> Regulations issued by the FPB contain the substantive require-

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18. Interview with Polly Dyer, original member of the FPB, in Seattle (Nov. 23, 1976). Interview with Dave Knibb, original member of the FPB, in Seattle (Jan. 10, 1977). A number of groups contributed advance work for the FPB. A "Forest Practices Ad Hoc Committee" was appointed by the Commissioner of Public Lands in July 1973 in anticipation of passage of the 1974 Act. DRAFT EIS, *supra* note 3, at 1-2. The Ad Hoc Committee's Field Guide to Washington Forest Practices was used by the Forest Practices Advisory Committee in drawing up proposed regulations. Washington State Department of Natural Resources, Field Guide to Washington Forest Practices Guidelines for 1974 (on file with the *Washington Law Review*). The Forest Practices Advisory Committee was established to aid the FPB in promulgating regulations. WASH. REV. CODE § 76.09.200 (1976). Two committees, representing western and eastern Washington, held statewide public hearings and presented proposed regulations to the FPB, based largely on Forest Practices Ad Hoc Committee drafts. The Advisory Committee was assisted by the Washington Forest Protection Association, an industry trade organization which represents large forest products firms. Syrdal & Keegan, *supra* note 15, at Part I n.17. See also DRAFT EIS, *supra* note 3, at 5-6 (outlining concurrent activities by the Department of Ecology pertaining to forest practices regulation and water quality standards).

19. See Act of June 16, 1975, ch. 200, 1975 Wash. Laws 1st Ex. Sess. 665. A legislative history of industry opposition to the Act and subsequent amendments is contained in B. Hansen, Protection of Recreation and Scenic Beauty under Washington's Forest Practices Act 7-12 (June 1977) (unpublished manuscript in Univ. of Washington Law School Library).

20. See Part II *infra*.

21. State forest land is defined as "all land which is capable of supporting a merchantable stand of timber and is not being actively used for a use which is incompatible with timber growing." WASH. REV. CODE § 76.09.020(6) (1976).

22. Forest and alpine land accounts for 54.2% of the state's total 42,605,000 acres. Of this, 68.7%, or 11,168,000 acres, are state, county, municipal, or private commercial forest lands, subject to the Forest Practices Act. DRAFT EIS, *supra* note 3, at 56-57.

23. The 5,424,000 acres of the national forest system in Washington are administered under the Multiple Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (1976); the National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321-4361 (1977); and the National Forest Management Act of 1976, 16 U.S.C. §§ 1601-1614 (1976). The National Forest Management Act requires development and implementation of land management plans for the National Forests, with criteria for the protec-

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ments for forest practices.<sup>24</sup> The Act establishes four classes of forest practices, based upon the impact that a proposed forest operation may have on the environment. The assigned class determines the degree of involvement by the Department of Natural Resources (DNR) and other state agencies.

Class I activities include “[m]inimal or specific forest practices that have no direct potential for damaging a public resource.”<sup>25</sup> Activities designated Class I may be conducted without notifying or applying to the DNR.<sup>26</sup> Class II forest practices are those which have “less than [an] ordinary potential for damaging a public resource.”<sup>27</sup> These also do not require an application to or approval by the DNR. Any person planning to engage in a Class II practice need only notify the DNR in writing prior to commencing operations. Class III and Class IV forest practices require an application and DNR approval.<sup>28</sup> Class III is defined as any forest practice other than Class I, Class II, or Class IV. Class IV includes any forest practice other than those contained in Class I or Class II on lands which will become or which are subject to local land use control under R.C.W. § 76.09.240 and any forest practice which should be assessed for its environmental im-

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tion and use of forest resources. The Act requires the U.S. Forest Service to coordinate land management plans with state and local governments and other federal agencies. The Washington State Board of Natural Resources has appointed a Forest and Range Advisory Council to provide input into this planning process. See Washington State Department of Natural Resources, State of Washington, A Forest and Range Program for Washington State (Sept. 1, 1977) (on file with the *Washington Law Review*).

The federal act is reviewed in Pardo, *Forestry Law and Policy*, 7 U. Tol. L. Rev. 999, 1005-12 (1976). See also Comment, *Monongahela and the National Forest Management Act of 1976*, 7 Env. L. 345 (1977); note 34 *infra*. Other federal lands are administered by the Bureau of Land Management under the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. §§ 1701-1782 (West Supp. 1977).

24. WASH. ADMIN. CODE ch. 222-46 (1976).

25. WASH. REV. CODE § 76.09.050(1) (1976). Public resources include water, fish, wildlife, and capital improvements of the state and local governments. *Id.* § 76.09.020(13).

26. The notification and approval requirements in R.C.W. § 76.09.050(2) apply only to Class II, Class III, or Class IV practices.

27. WASH. REV. CODE § 76.09.050(1) (1976). This section further provides:

Class II shall not include forest practices:

(a) On lands platted after January 1, 1970, or being converted to another use;

(b) Which require approvals under the provisions of the hydraulics act, RCW

75.20.100;

(c) Within “shorelines of the state” as defined in RCW 90.58.030; or

(d) Excluded from Class II by the board;

28. *Id.* § 76.09.050(2).



pact prior to approval.<sup>29</sup> Forest practices regulations determine the classification of a given forest practice.<sup>30</sup>

The Forest Practices Act specifically requires reforestation of logged areas.<sup>31</sup> There is, however, no requirement that lands be kept in production.<sup>32</sup> Indeed, the FPB is given power to modify or eliminate reforestation requirements on land identified as potentially convertible to urban development, if such a classification is consistent with local land use policies.<sup>33</sup> In addition, there is no requirement that the rate of cut on all lands be equal to or less than the rate of overall tree growth. In the future, however, reforestation requirements may become more stringent in light of a projected timber shortage.<sup>34</sup> Another problem is the rapid eradication of old growth timber stands,

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29. Class IV specifically includes those forest practices not included in Classes I or II which take place:

(a) on lands platted after January 1, 1960, (b) on lands being converted to another use, (c) on lands which, pursuant to RCW 76.09.070 . . . are not to be reforested because of the likelihood of future conversion to urban development, and/or (d) which have a potential for a substantial impact on the environment and therefore require an evaluation by [DNR] as to whether or not a detailed statement must be prepared pursuant to the state environmental policy act.

*Id.* § 76.09.050(1) (1976).

30. WASH. ADMIN. CODE § 222-16-050 (1976).

31. Compare WASH. REV. CODE § 76.09.070 (1976) and WASH. ADMIN. CODE ch. 222-34 (1976) with Act of Mar. 15, 1945, ch. 193, §§ 5, 6, 1945 Wash. Laws 556 (repealed 1974).

32. The reforestation requirement applies, under the statute and regulations, whether or not removal of trees was pursuant to an application. If the removal originally involved an application, however, additional duties are imposed. The applicant is required to indicate whether the land will be taken out of commercial timber production within three years after completion of the described forest practice. WASH. REV. CODE § 76.09.060(3) (1976).

The reforestation requirement does not apply, however, if the land is converted to a use other than commercial timber production within three years following the completion of harvest. *Id.* § 76.09.060(3)(a). See also WASH. ADMIN. CODE § 222-34-050 (1976). Termination of forest practices will result in the loss of the favorable tax treatment given timberlands under state law unless the conversion is to a use permitted under a current use tax agreement pursuant to R.C.W. ch. 84.34. WASH. REV. CODE § 76.09.060(3)(a)(ii) (1976). In such cases, local land use and zoning authority is the only statutory means by which conversion to a use other than timber production may be controlled. *Id.* § 76.09.060(3)(a)(iii).

33. WASH. REV. CODE § 76.09.070 (1976); WASH. ADMIN. CODE § 222-34-050(2) (1976).

34. If timber is to be removed at the same rate as it is to be replaced by new growth, the two areas for regulation are the rate of harvest and the rate of new growth. Compare the Washington Act, which does not attempt to supervise the rate of removal, but only to ensure growth after removal, WASH. REV. CODE § 76.09.070 (1976), with the sustained-yield approach of the National Forest Management Act of 1976, which restricts the rate of harvest, 16 U.S.C.A. § 1611(a) (West Supp. 1977). The latter approach, and alternatives to it, are discussed in Comment, Monogahela and the National Forest Management Act of 1976, 7 ENV. L. 345 (1977). This comment advocates a national removal and reforestation policy for forest lands. Such a policy

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particularly prized for their recreation opportunities and scenic beauty. It is estimated that in fifteen years, all the old growth timber (over 160 years old) on private and state trust lands will be gone.<sup>35</sup> The Act does not specifically address the problem.

Administrative and enforcement powers under the Act are vested in the DNR.<sup>36</sup> Its primary administrative task involves reviewing the applications and notifications required of logging operations and forest landowners prior to commencing operations.<sup>37</sup> Enforcement mechanisms include inspections,<sup>38</sup> advisory supplemental directives,<sup>39</sup> stop

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would help to resolve the conflict between the rising demand for timber and the projected shortage of supply. U.S. FOREST SERVICE, DEPARTMENT OF AGRICULTURE. TWO PROJECTIONS OF TIMBER SUPPLY IN THE PACIFIC COAST STATES 8-13 (USDA For. Serv. Resource Bull. PNW-60 (1975)); Congressional Research Service, Library of Congress, The Douglas Fir Region Timber Supply Situation and Log Export Regulation as Proposed by H.R. 5544 (May 1975). The Washington Department of Natural Resources maintains a more optimistic position on timber supply. Department of Natural Resources, State of Washington, Washington Forest Productivity Study: Phase I Report (June 1975).

35. Andrews, *Clearcutting: Efficient Practice or Wasteful Blight?*, The Seattle Times, Oct. 9, 1977, § E, at 2, col. 1. See also authorities cited at note 34 *supra*.

36. WASH. REV. CODE §§ 76.09.020(5), .040(1) (1976). The FPB has also established a policy for a continuing program of orientation and training to be conducted by the DNR with relation to forest practices and their regulation under the Act. *Id.* § 76.09.250. The Department, along with other affected agencies and institutions, must annually determine the state's needs for research in forest practices and the impact of forest practices on "public resources," *id.* § 76.09.020(13), and recommend needed projects to the Governor and the legislature, *id.* § 76.09.270.

37. *Id.* §§ 76.09.050-.060 (1976). The classes of forest practices and the degree of DNR review afforded are discussed at text accompanying notes 25-30 *supra*. The statute sets forth the length of time for which notification or approval is effective, WASH. REV. CODE § 76.09.060(6) (1976), the number of forest practices which may be covered by each application or notification, *id.* § 76.09.060(2), and when a practice is sufficiently different from an approved practice that a new application or notification must be made, *id.* § 76.09.060(5).

In its discretion, the DNR may request notification from Class III and IV applicants two days before commencement of actual operations if the forest practice has a potential for causing material damage to a public resource because of soil conditions, proximity to water, or some other "unusual" factor. *Id.* § 76.09.060(4). This allows DNR representatives to be on site during operations to assist in preventing damage. No prior application or notification is required for emergency forest practices. *Id.* § 76.09.060(7); WASH. ADMIN. CODE § 222-20-070 (1976).

38. The DNR is required to make any necessary inspections before, during, and after forest practices are conducted, to ensure that no material damage occurs to the natural resources of the state from such practices. WASH. REV. CODE § 76.09.150 (1976). Representatives of the Department of Ecology may also inspect operations. *Id.* § 76.09.160.

39. Supplemental directives are issued to recommend "an alternate preferred course of action or a minor change in the operation, which the Department believes would provide greater assurance that the purposes and policies set forth in RCW 76.09.010 will be met." WASH. ADMIN. CODE § 222-12-060 (1976).

work orders,<sup>40</sup> and notices of failure to comply.<sup>41</sup> Enforcement actions and penalties are appealable to a special tribunal, the Forest Practices Appeals Board.<sup>42</sup> The speed and scope of an enforcement action depends upon the gravity of the threat to "public resources." The time allowed for compliance depends upon whether a stop work order or notice of failure to comply is issued by the DNR.<sup>43</sup> Violations of the Act or its regulations may subject operators to civil and

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40. WASH. REV. CODE § 76.09.080 (1976). Stop work orders may be issued to "operators" whether or not they are required to submit an application or notification. An "operator" is defined as "any person engaging in forest practices except an employee with wages as his sole compensation." *Id.* § 76.09.020(11). The DNR may serve the operator with a stop work order for violating the Act or regulations, for deviating from an approved application, or when immediate action is necessary to avoid material damage to a public resource. *Id.* § 76.09.080(1). The order is reviewable before the Forest Practices Appeals Board. *Id.* § 76.09.080(2)(d).

41. "If a violation, a deviation, material damage or potential for material damage to a public resource has occurred and the department determines that a stop work order is unnecessary, then the department shall issue and serve upon the operator" a notice, which does not require immediate compliance. *Id.* § 76.09.090.

Stop work orders are, and notices of failure to comply become, final orders of the Department. *Id.* § 76.09.080(1). Along with final decisions of the Forest Practices Appeals Board, they are binding on all parties unless declared invalid on appeal. *Id.* § 76.09.110. The DNR is authorized to enforce such final orders and final decisions through the Attorney General, and may enjoin forest practices by any person for one year after such person has failed to comply with an order or decision. *Id.* § 76.09.140 (1). See *id.* §§ 76.09.120, .170 (additional remedies available to the DNR).

42. The Forest Practices Appeals Board consists of three gubernatorial appointees "qualified by experience and training in pertinent matters pertaining to the environment." WASH. REV. CODE § 76.09.210(2) (1976). This Board has exclusive jurisdiction to hear appeals from actions and determinations by the DNR. *Id.* § 76.09.220(8).

Any person aggrieved by DNR approval or disapproval of an application may seek review by the Board. *Id.* § 76.09.220(9)(a). Standing before the Forest Practices Appeals Board is thus broadly based, but only relates to forest practices for which an application is required.

Proceedings are subject to the Washington Administrative Procedure Act's provisions regarding contested cases. *Id.* § 76.09.220(9)(b); see Washington Administrative Procedure Act, WASH. REV. CODE ch. 34.04 (1976 & Supp. 1977). The party taking the appeal may elect either a formal or an informal hearing, unless she already has had an informal hearing with the Department. *Id.* § 76.09.230(1). Judicial review of Forest Practices Appeals Board decisions is de novo unless the decision is rendered pursuant to a formal hearing, in which event limited review may be had under the State Administrative Procedure Act, *id.* §§ 34.04.130, .140 (1976 & Supp. 1977). See *id.* § 76.09.230(5).

The Board has been relatively inactive, and Governor Ray has recently recommended that the legislature review its status under the state's sunset law to determine whether it can be abolished. *Governor lists 21 targets for probes under new sunset law*, The Seattle Times, Nov. 30, 1977, § D, at 2, col. 1.

43. The time allowed for exhaustion of the administrative review process, including appeals, may cause significant enforcement problems under a notice of failure to comply. Although such notices are final orders of the Department, direct appeal to the Forest Practices Appeals Board is not allowed. WASH. REV. CODE § 76.09.090 (1976). The operator need not comply immediately if, within 15 days of service, he requests the Department to schedule a hearing. The Department may schedule a hearing as much as 20 days after receiving the request. After the hearing, the Department

criminal penalties.<sup>44</sup> The DNR has a great deal of discretion in enforcement actions,<sup>45</sup> limited only by a general directive to carry out the purposes and policies stated in the Act.<sup>46</sup>

## II. LEGISLATIVE AND REGULATORY PROTECTION OF SCENIC BEAUTY AND RECREATION IN WASHINGTON FORESTS

### A. *The Forest Practices Act and Related Regulations*

In the Forest Practices Act, the legislature declared that “coinci-

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has 10 days to issue its final order and the operator has an additional 30 days to appeal the order to the Forest Practices Appeals Board. *Id.*

By allowing an operator to resist compliance for a maximum of 75 days before appealing to the Board, this procedure fails to protect public resources from logging abuse, without furthering any legitimate interest of the operator or owner, who is afforded ample procedural protection through an administrative hearing before the Board and subsequent judicial review. *See id.* § 76.09.230. The lengthy departmental remedy actually harms the economic interests of owners and operators by delaying implementation of timber harvest plans prior to review by the Forest Practices Appeals Board. Although the DNR should have an opportunity to review and correct its own actions, the determination of whether a violation, deviation, or material damage to a public resource has occurred should not require more time than that allotted to determine whether an EIS is necessary or to approve a Class IV application. *Compare id.* § 76.09.090 *with id.* § 76.09.050.

By contrast, the stop work order requires immediate compliance. The operator or owner of the land or timber may appeal the order directly to the Forest Practices Appeals Board within 15 days and the Board may continue or discontinue the Department's order in whole or in part, under such conditions as it may impose, pending the outcome of the hearing. *Id.* § 76.09.080(2)(d).

44. Those who violate the Act or regulations, including those who aid and abet such violations, are subject to a civil penalty of \$500 per violation. *Id.* § 76.09.170. Each violation is a separate and distinct offense, as is each day's continuance of a violation. *Id.* The 1975 amendments reduced the maximum penalties from \$1,000 a day to \$500 a day and limited the penalty for continuance of a violation to stop work orders or compliance notices. Act of June 16, 1975, ch. 200, § 9, 1975 Wash. Laws 1st Ex. Sess. 665 (codified at WASH. REV. CODE § 76.09.170 (1976)).

The Act also imposes a duty to prevent, correct, or compensate for damage to public resources. WASH. REV. CODE §§ 76.09.080(2)(c), .090(3) (1976). A statute of limitations was added in 1975. Act of June 16, 1975, ch. 200, § 6, 1975 Wash. Laws 1st Ex. Sess. 665 (codified at WASH. REV. CODE 76.09.090 (1976)). The Act permits the DNR to remit or mitigate the penalty, allows appeal to the Forest Practices Appeals Board, WASH. REV. CODE § 76.09.170 (1976), and provides a criminal penalty for violations of the Act or regulations. *Id.* § 76.09.190 (gross misdemeanor).

Upon failure of the DNR to act, the county may sue to enforce final orders or forest practices regulations; however, no penalties may be imposed for conduct pursuant to an approval or directive of the Department. *Id.* § 76.09.140.

45. The DNR determines the existence of a violation and decides whether a violation is to be swiftly remedied by a stop work order or left to the protracted notice of failure to comply procedure. The DNR may remit or mitigate any civil penalty it imposes. WASH. REV. CODE § 76.09.170 (1976). The Attorney General is not required to pursue collection of civil penalties unless the DNR requests it. *Id.*

46. *Id.* § 76.09.040(1).

dent with maintenance of a viable forest products industry, it is important to afford protection to forest soils, fisheries, wildlife, water quantity and quality, air quality, recreation, and scenic beauty."<sup>47</sup> The drafters apparently contemplated that any conflicts between the Act's competing goals would be minimized by balanced regulations from the FPB.<sup>48</sup> However, the hoped-for regulations have not been forthcoming. No forest practices regulations protect scenic beauty, and recreation is aided only by regulations preventing the contamination of water supplies at improved campsites.<sup>49</sup>

The lack of regulatory protection is partially attributable to a memorandum written by an assistant state attorney general in 1974, stating that the FPB lacks power to issue regulations protecting aesthetics.<sup>50</sup> Although R.C.W. § 76.09.010(1) provides for protection of both scenic beauty and recreation, and although the FPB is directed to promulgate regulations effectuating R.C.W. § 76.09.010,<sup>51</sup> protection of recreation and scenic beauty is not included among the stated goals of the "comprehensive" system of regulations envisioned under R.C.W. § 76.09.010(2).<sup>52</sup> This legislative omission was used to

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47. *Id.* § 76.09.010(1).

48. The Act itself states that forest practices regulations "shall be promulgated and administered so as to give consideration to all purposes and policies set forth in RCW 76.09.010." *Id.* § 76.09.040(1).

49. WASH. ADMIN. CODE §§ 222-16-030(2), -24-010 to -060, -30-010 to -100, -34-010 to -050, -38-010 to -020 (1976). *But see id.* §§ 222-16-010(8), -020. The regulations classify streams for pollution compliance purposes and fisheries protection, ostensibly considering public recreation, but many small streams having high recreational and aesthetic values are classified so that restrictions on adjacent forest practices are minimal. *Id.* §§ 222-16-010(8), -020.

50. Interoffice Correspondence from Robert Sailer, Ass't Attorney General, to Bert Cole, FPB Chairman, Concerning a Legal Issue Raised by the Forest Practices Board (August 20, 1974) (on file with the *Washington Law Review*) [hereinafter cited as Sailer memo]. The Chairman's question was: "Can the Board promulgate regulations requiring buffers, methods of logging, etc., based on scenic beauty and aesthetic considerations?" *Id.* at 1.

51. WASH. REV. CODE § 76.09.040(1) (1976).

52. R.C.W. § 76.09.010(2) provides: "The legislature further finds and declares it to be in the public interest of this state to create and maintain through the adoption of this chapter a comprehensive state-wide system of laws and forest practices regulations which will achieve the following purposes and policies." The statute then lists a number of objectives that the regulations are to accomplish, but does not mention protection of air quality, scenic beauty, or recreation. Although one objective stated in R.C.W. § 76.09.010(2)(b) is to "[a]fford protection to forest soils and public resources," the definition of public resources does not include recreation and scenic beauty. *See* notes 25 & 36 *supra*.

According to the Sailer memo, the first paragraph of R.C.W. § 76.09.010 stated the breath [*sic*] of [legislative] concern regarding state policy, the importance of forests to the economy of the state, and the need for protection of many elements in the environment. The legislature did not establish a standard

support the interpretation that the FPB lacks authority to protect aesthetics and, by implication, recreation.<sup>53</sup> The assistant attorney general's memorandum contends that R.C.W. § 76.09.010(1), which refers to scenic beauty and recreation, is a mere "preamble" containing "passive words of concern" which cannot be used as a basis for regulations.<sup>54</sup> The opinion contrasts the language of subsection (1) with the words used in subsection (2), and characterizes the latter as

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or a directive upon which a court could enforce a right or upon which an implementing agency . . . could promulgate a regulation.

Sailer memo, *supra* note 50, at 3. The opinion stated, however, that these "words of concern" should be given "strong consideration in the promulgation of rules to effect the main objective of the Forest Practices Act, namely the regulation of activities related to harvesting and reforestation of timber." *Id.* at 3.

53. Sailer memo, *supra* note 50. The opinion discusses only the power of the Board to protect aesthetics.

During consideration of amendments to the Forest Practices Act in 1975, a major effort was made to change R.C.W. § 76.09.010(1) to conform explicitly to the Sailer interpretation. A proposed bill would have changed the Act's language to the following: "It is important to afford protection to forest soils, fisheries, wildlife, water quantity and quality, and air quality. Benefiting the above activities and resources will generally enhance recreational opportunities and scenic beauty." Wash. S.B. 2954, § 1, 44th Legis. (1975). This amendment passed the Senate but was rejected by the joint conference committee. See 1975 House Journal 1175-86 (amending Wash. S.B. 2954, § 1, 44th Legis.); B. Hansen, *supra* note 19, at 8-12.

54. Sailer memo, *supra* note 50, at 3, 6. The memo also applied the "no part of the act" rule of construction which holds that "[t]he preamble can neither restrain or [sic] extend a meaning of an ambiguous statute; nor can it be used to create doubt or uncertainty." *Id.* at 6 (citing *Robinson v. Difford*, 92 F. Supp. 145 (E.D. Pa. (1950))). As authority, the opinion cited 2A C.D. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 47.04 (4th ed. 1973). This treatise proceeds to note, however, that "[i]f the preamble is more extensive or more restrictive than the purview [body] and the whole act method of interpretation is used, then the statute is not unambiguous, and its true meaning must be interpreted from all its parts." *Id.* § 47.04, at 78. This statement should apply to the Forest Practices Act because Washington uses the "whole act" method of interpretation. See *Eastlake Community Council v. Roanoke Assocs.*, 82 Wn. 2d 475, 489-90, 513 P.2d 36, 46 (1973).

Indeed, no part of R.C.W. § 76.09.010(1) is strictly a preamble, because all of the statements follow the enacting clause in the statute. See C.D. SANDS, *supra* at § 47.04. The justification for the "no part of the act" rule of interpretation for policy sections is derived from the technical definition of preambles (*i.e.*, because the preamble preceded the enacting clause, the preamble was not enacted and could be given no legal effect). *Id.* When these same preamble phrases are placed after the enacting clause, in the purpose or policy section of the act, courts construe them as preambles when appropriate. See, *e.g.*, *Huntworth v. Tanner*, 87 Wash. 670, 152 P. 523 (1915); 41 CORNELL L.Q. 134 (1955).

Even if R.C.W. § 76.09.010(1) is construed as a preamble, it may still be given effect. Washington generally disregards the "no part of the act" rule of interpretation and gives effect to preambles unless doing so retracts authority granted by the purview, or remainder, of the statute. Washington treats preambles or policy statements as touchstones or keys to the statute, as guides to legislative intent, and also as the basis for implying legally enforceable rights. See *Leschi Improvement Council v. State Highway Comm'n*, 84 Wn. 2d 271, 525 P.2d 774 (1974) (statement in the policy section of the State Environmental Policy Act, R.C.W. § 43.21C.020(3), conferred standing upon persons potentially affected by noise and fumes of a proposed highway); cases

"action-forcing . . . policy directives."<sup>55</sup> The assistant attorney general's position is bolstered by the Act's requirement that the FPB promulgate regulations "to accomplish the purposes and policies stated in R.C.W. § 76.09.010"<sup>56</sup> because subsection (2) is the only part of that section expressly referring to the content of the regulations, or to purposes and policies.<sup>57</sup>

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cited at note 61 *infra*. *Accord*, *Wisconsin's Environmental Decade v. Public Serv. Comm'n*, 69 Wis. 2d 1, 230 N.W.2d 243 (1975). *But see* *International Union of Operating Engineers Local 286 v. Sand Point Country Club*, 83 Wn. 2d 498, 519 P.2d 985 (1974) (dictum); *State ex rel. Berry v. Superior Court*, 92 Wash. 16, 159 P. 92 (1916) (a preamble "is without force," "a guide to intentions" which "can never enlarge"). The preamble or policy section of a statute will not control the purview if its effect is to forbid agency action which the purview would allow. *Shell Oil Co. v. Brooks*, 88 Wn. 2d 909, 912, 567 P.2d 1132, 1134 (1977); *In re Bale*, 63 Wn. 2d 83, 87, 385 P.2d 545, 547 (1963); *Huntworth v. Tanner*, 87 Wash. 670, 677, 152 P. 523, 526 (1915).

If the first paragraph of R.C.W. § 76.09.010 is a preamble, then the entire section is a preamble because it is syntactically similar throughout. In R.C.W. § 76.09.010(1), the legislature "finds and declares" certain concerns to be "among the most valuable," "of prime importance," "in the public interest," and "important." In the second paragraph, "the legislature further finds and declares . . . a comprehensive state-wide system of laws and forest practices regulations which will achieve [certain] purposes and policies" to be "in the public interest." The entire section constitutes a series of findings of fact and declarations of purpose. It is highly unlikely that this policy section forms "no part of the act" in light of the directive to the FPB in R.C.W. § 76.09.040(1) to promulgate regulations to carry out the purposes and policies stated in R.C.W. § 76.09.010.

55. Sailer memo, *supra* note 50, at 3, 4. This distinction is questionable because the two subsections contain identical language and emphasis to "afford protection to" enumerated elements of concern. Even if the standards in subsection (1) are less specific than those in subsection (2), promulgation of regulations under subsection (1) would probably withstand constitutional challenge under Washington's liberal delegation of powers test. *See, e.g., Barry & Barry, Inc. v. Department of Motor Vehicles*, 81 Wn. 2d 155, 500 P.2d 540, *appeal dismissed*, 410 U.S. 977 (1972).

The legislature recognized that detailed administrative expertise was necessary for forest practices regulations and set up an elaborate promulgation process. WASH. REV. CODE §§ 76.09.040, .200 (1976). Because the forest practices regulations must be adopted pursuant to the elaborate provisions in the Act, and pursuant to the provisions in the Washington Administrative Procedure Act, WASH. REV. CODE ch. 34.04 (1976), the delegation of power to the FPB to carry out the policies of both subsections of R.C.W. § 76.09.010 is constitutional. *Caffal Bros. v. State*, 79 Wn. 2d 223, 484 P.2d 912 (1971). *Cf. Bayside Timber Co. v. Board of Supervisors*, 20 Cal. App. 3d 1, 97 Cal. Rptr. 431 (1971) (a different legislative scheme was invalidated).

56. WASH. REV. CODE § 76.09.040(1) (1976).

57. Arguably, legislative purposes and policies are expressed in R.C.W. § 76.09.010(1) as well as in R.C.W. § 76.09.010(2). Absent some indication that the legislature intended statutory words to be used in a special, legal sense, their common meaning determines the sense in which they are used. *John H. Sellen Constr. Co. v. Department of Revenue*, 87 Wn. 2d 878, 558 P.2d 1342 (1976); *Garrison v. State Nursing Bd.*, 87 Wn. 2d 195, 550 P.2d 7 (1976).

The Sailer analysis would be acceptable if the legislature anticipated that recreation and scenic beauty would be protected under other laws, or protected incidentally under forest practices regulations. The latter approach has not been followed. *See* note 49 *supra*. Protection of recreation and scenic beauty under other laws is contrary to

## Forest Practices Regulation

Principles of statutory construction applied in cases construing the state Shoreline Management Act<sup>58</sup> support a contrary position.<sup>59</sup> In these cases, courts have treated references to the “policy” of the Act contained in its policy statement<sup>60</sup> to encompass all statements of policy, even though they are phrased as legislative findings. The courts have looked to the whole of the preamble or policy section to determine the policy of the statute.<sup>61</sup> Although scenic beauty and recreation are not included in the definition of “public resources” under the Forest Practices Act,<sup>62</sup> legislative history indicates that these values were to be protected.<sup>63</sup> Nevertheless, the Act as currently interpreted

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the thrust of the Forest Practices Act, which centralizes regulation of forest practices in the DNR and bodies set up in the Act.

58. WASH. REV. CODE ch. 90.58 (1976 & Supp. 1977).

59. *Hayes v. Yount*, 87 Wn. 2d 280, 552 P.2d 1038 (1976); *Department of Ecology v. Ballard Elks Lodge*, 84 Wn. 2d 551, 527 P.2d 1121 (1974).

60. WASH. REV. CODE § 90.58.020 (1976).

61. Although the first paragraph of R.C.W. § 90.58.020 is couched in terms of “findings,” and the following three paragraphs are phrased as explicit statements of policy, the Washington Supreme Court has relied upon statements in the first paragraph as the policy of the Act in upholding actions of the Shorelines Hearing Board. *Hayes v. Yount*, 87 Wn. 2d 280, 291–92, 552 P.2d 1038, 1045 (1976); *Department of Ecology v. Ballard Elks Lodge*, 84 Wn. 2d 551, 556–57, 527 P.2d 1121, 1124–25 (1974).

62. WASH. REV. CODE § 76.09.020(13) (1976).

63. The legislature may have wanted the FPB to protect recreation and scenic beauty, but not to have these values treated as public resources, and consequently did not include them in R.C.W. § 76.09.010(2)(b). *See* note 52 *supra*. The term “public resource” has great significance in the Forest Practices Act. It constitutes a direction to the Forest Practices Board on how to classify forest practices, and this classification in turn determines the amount of agency involvement in forest operations. *See* WASH. REV. CODE § 76.09.050 (1976); notes 25–30 and accompanying text *supra*. The liability of operators, timber owners, and forest landowners depends upon the definition of public resources. *See* WASH. REV. CODE §§ 76.09.080, .090 (1976).

While special logging techniques may minimize damage to water quality and fish, damage to recreation and scenic beauty is often a natural result of the simple removal of the forest. *See generally* Region X, United States Environmental Protection Agency, *Forest Harvest, Residue Treatment, Reforestation and Protection of Water Quality* (April 1976). Inclusion of recreation and scenic beauty as public resources could have drastically increased the constraints on when, where, and how to log, particularly in highly scenic, old growth stands. Old growth forests form the largest percentage of the volume of timber harvested by large industrial firms. WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, 1975 TIMBER HARVEST REPORT, Table XV, at 30 (“Total Private Timber Harvested, Washington, Summary, 1975”).

The legislature could have eradicated the Sailer interpretation by simply including recreation and scenic beauty in R.C.W. § 76.09.010(2)(b), along with forest soils and public resources, without including recreation and scenic beauty in the definition of public resources. Given the political climate in 1975, the absence of such a change is understandable. *See* B. Hansen, *supra* note 19, at 7–12.

As originally introduced, the bill did not refer to protection of air quality, recreation, or scenic beauty. Wash. H.B. 637, § 1(1), 43d Legis. (1973) (first draft). Subparagraph (2)(b) of section 1 stated that the regulations must afford protection to forest soils and public resources. Public resources were defined as “public air, fisheries, wildlife and waters.” *Id.* § 2(11). The Departments of Natural Resources and Ecology



provides no meaningful protection for recreation and scenic beauty. The lack of protection for these values under other laws makes the need for such protection more acute.

### B. *The State Environmental Policy Act*

The State Environmental Policy Act (SEPA)<sup>64</sup> requires state agencies and local governments to consider environmental values (including recreation and scenic beauty) in planning and decisionmaking, and to consider environmental consequences before acting.<sup>65</sup> Therefore, SEPA could be read to require that the DNR consider environ-

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(later changed to the FPB) were given power to effectuate only the purposes and policies stated in paragraph 2 of section 1. *Id.* § 3(1).

Because of criticism from state agencies, counties, and environmental groups, a third draft was circulated at the July 23, 1973, House Forest Practices Subcommittee meeting. *Proposed Amendments to the Forest Practices Act: Hearing on Sub. H.B. 637 Before the House Subcomm. on Forest Practices*, 43d Legis., at Seattle (July 23, 1973) (on file with the *Washington Law Review*). The purpose and policy section had been altered to include "recreation, wilderness, and scenic beauty." However, the section on regulatory power referred only to the second paragraph of the purpose and policy section. Wash. Sub. H.B. 637, § 3(1), 43d Legis. (1973) (third draft).

A fifth draft "mysteriously" (there had been no vote at the last subcommittee meeting) dropped the reference to "recreation and scenic beauty" in the purpose and policy statement. Syrdal & Keegan, *supra* note 15, at Part I n.48. The new draft then changed the wording of the paragraph granting the power to establish regulations effectuating "the purposes and policies." Wash. Sub. H.B. 637, § 1(2), 43d Legis. (Aug. 23, 1973) (sixth draft).

There is no record of a vote on this wording at the Aug. 15, 1973, meeting. *Proposed Amendments to Forest Practices Act: Hearing on Sub. H.B. 637 Before the House Comm. on Natural Resources*, 43d Legis., at Seattle (Aug. 15, 1973). No mention is made of such a change in the bill digest accompanying the August 23 draft. With no record of a change, it must be concluded it was the result of staff revisions. Telephone interview with Gary Worthington, staff person for the House Natural Resources Committee (April 15, 1977). Nevertheless, the changed section was adopted by the legislature. At the August 27 executive session, Chairman Martinis succeeded in having the reference to recreation and scenic beauty restored to the first paragraph of § 1. Amendments to Sub. H.B. 637, 43d Legis., Ex. Sess. (Aug. 27, 1973). Syrdal and Keegan state that this vote passed as a compromise for the rejection of the motion at the August 15 meeting to include those values in the definition of public resources, which are protected in paragraph 2 (now R.C.W. § 76.09.010(2)(b)). Syrdal & Keegan, *supra* note 15, Part I, at 14. The result of this compromise was R.C.W. §§ 76.09.010 and .040 as they presently appear.

R.C.W. § 76.09.010(1) states that it is important to afford protection to recreation and scenic beauty. The 1975 battle to keep this wording in the Act, *see* note 53 *supra*, demonstrates that this was not intended as an empty gesture.

64. WASH. REV. CODE ch. 43.21C (1976 & Supp. 1977). *See generally* Roe & Lean, *The State Environmental Policy Act of 1971 and Its 1973 Amendments*, 49 WASH. L. REV. 509 (1974); Comment, *The 1974 Amendments to Washington's State Environmental Policy Act*, 10 GONZ. L. REV. 787 (1975).

65. WASH. REV. CODE §§ 43.21C.020(2), .030 (1976). *See also* note 69 *infra*.

mental values,<sup>66</sup> including recreation and aesthetics, when approving applications, even though the forest practices regulations do not require the Department to do so.<sup>67</sup> It is currently unclear whether SEPA requires mitigation of environmental impacts, rather than merely procedural consideration of environmental consequences.<sup>68</sup>

SEPA also requires state agencies and local governments to determine whether activities and proposals are “major actions significantly affecting the environment” and, if they so find, to prepare an environmental impact statement (EIS).<sup>69</sup> The inquiry thus becomes whether the DNR must prepare an EIS when approving forest practices applications having a significant impact on the environment. Federal

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66. The DNR and the FPB are state agencies to which SEPA applies, absent some exception. See WASH. REV. CODE §§ 43.21C.020(2), .030 (1976).

67. Regardless of whether an EIS is required under the Forest Practices Act and SEPA in combination, SEPA may require reversal of DNR action which is arbitrary and capricious in light of environmental and other information. Cf. *Eastlake Community Council v. Roanoke Assocs.*, 82 Wn. 2d 475, 497 n.6, 513 P.2d 36, 49 n.6 (1973). See *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wn. 2d 267, 272–73, 552 P.2d 674, 677 (1976); *State v. Brannon*, 84 Wn. 2d 64, 75, 530 P.2d 322, 329 (1975). *Accord*, *Sisley v. San Juan County*, 89 Wn. 2d 78, 89, 569 P.2d 712, 718–19 (1977). However, none of these cases discusses whether an agency must consider environmental values when some of the agency's actions have been exempted from SEPA's requirement of a detailed statement, WASH. REV. CODE § 76.09.050(1) (1976), or granted a categorical exemption from SEPA evaluations, WASH. ADMIN. CODE §§ 197–10–170(19), 332–40–170(19) (1976).

68. See cases cited at note 67 *supra*. See generally Leed, *The National Environmental Policy Act of 1969; Is the Fact of Compliance a Procedural or Substantive Question?*, 14 SANTA CLARA LAW. 303 (1976); Robie, *Recognition of Substantive Rights under NEPA*, 7 NAT. RESOURCES LAW. 387 (1974); Wharton, *Judicially Enforceable Substantive Rights under NEPA*, 10 U.S.F.L. REV. 415 (1976).

69. WASH. REV. CODE § 43.21C.030(2)(c) (1976). The purpose of the EIS is to detail the environmental impact of the proposed action, unavoidable adverse environmental effects, alternatives, and long and short term relationships, as well as any irreversible resource commitments involved. *Id.* The Act requires the responsible official to consult other agencies prior to making a detailed statement and to make the findings available to the public. *Id.* § 43.21C.030(2)(d).

Rules promulgated by the Council on Environmental Policy, under SEPA, spell out what constitutes a “major action significantly affecting the environment,” and when an EIS is required. *Id.* § 43.21C.110; WASH. ADMIN. CODE ch. 197–10 (1976).

State and local governments are required to adopt rules for implementing SEPA consistent with the SEPA guidelines. WASH. REV. CODE § 43.21C.120 (1976); WASH. ADMIN. CODE ch. 197–10 (1976). Rules for the DNR are contained in W.A.C. ch. 332–40.

W.A.C. § 197–10–360 requires the responsible agency under SEPA to use an environmental checklist form in making the threshold determination of whether a major action significantly affects the environment. This environmental checklist includes both an aesthetics and a recreation criterion. *Id.* § 197–10–365.

An affirmative answer to any of the questions on the checklist will not necessarily result in a finding that an environmental impact statement is required. “[H]owever, a single affirmative answer could indicate a significant adverse impact, depending upon the nature of the impact and location of the proposal.” *Id.* § 197–10–360(2).

courts construing the analogous National Environmental Policy Act of 1969 (NEPA)<sup>70</sup> have held that U.S. Forest Service sales of timber to be removed by clearcutting can be major actions significantly affecting the environment, requiring preparation of environmental impact statements by the Forest Service or the Bureau of Land Management.<sup>71</sup> A California court of appeal has held that the environmental impact report requirement of the California Environmental Quality Act<sup>72</sup> applies to the state agency reviewing timber harvesting plans submitted under that state's Forest Practices Act.<sup>73</sup>

The Washington Forest Practices Act exempts Class I, Class II, and Class III forest practices from the requirement of a detailed EIS.<sup>74</sup> Arguably, as a result of this exemption, the FPB is not required by the Forest Practices Act or SEPA to classify forest practices so that those having a significant impact are required to be analyzed under SEPA. The Forest Practices Act exemption from SEPA for Class I, Class II, and Class III forest practices may therefore constitute an implied amendment of SEPA.<sup>75</sup>

The implied amendment argument is questionable, however, since the Forest Practices Act does not specifically exempt the FPB from compliance with SEPA.<sup>76</sup> The Forest Practices Act and SEPA can be

70. 42 U.S.C.A. §§ 4321-4361 (1977). Because the provisions of SEPA are taken largely verbatim from NEPA, Washington courts "look when necessary to the federal cases construing and applying provisions of NEPA for guidance." *Eastlake Community Council v. Roanoke Assocs.*, 82 Wn. 2d 475, 488 n.5, 513 P.2d 36, 45 n.5 (1973).

71. *Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973); *Texas Comm. on Natural Resources v. Bergland*, 433 F. Supp. 1235 (E.D. Tex. 1977). See also *Leschi Improvement Council v. State Highway Comm'n*, 84 Wn. 2d 271, 275, 279-80, 525 P.2d 774, 775, 781-82 (1974); *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wn. App. 59, 68-69, 510 P.2d 1140, 1146-47 (1973); *Roe & Lean, The State Environmental Policy Act of 1971 and Its 1973 Amendments*, 49 WASH. L. REV. 509, 512 (1974).

72. CAL. PUB. RES. CODE §§ 21000-21165 (West 1977).

73. *Natural Resources Defense Council v. Arcata Nat'l Corp.*, 59 Cal. App. 3d 959, 131 Cal. Rptr. 172 (1976). The California Forest Practices Act is codified at CAL. PUB. RES. CODE §§ 4511-4621 (West 1977).

74. WASH. REV. CODE § 76.09.050(1) (1976). The statutory classification of forest practices is set forth at notes 25-30 and accompanying text *supra*.

75. If the exemption of these forest practices is an implied amendment or partial repeal of SEPA, this exemption may conflict with Article II, §§ 19 & 37, of the Washington State Constitution. See, e.g., *Municipality of Metropolitan Seattle v. O'Brien*, 86 Wn. 2d 339, 544 P.2d 729 (1976); *Gruen v. State Tax Comm'n*, 35 Wn. 2d 1, 211 P.2d 251 (1949); *State v. Yelle*, 32 Wn. 2d 13, 200 P.2d 467 (1948). Amendment or repeal of SEPA is not set forth in the title of the original forest practices bill, and the section amended or repealed is not set forth at length in that bill. Wash. Sub. H.B. 1078, 44th Legis. (1975).

76. See WASH. REV. CODE §§ 43.21C.020(2), .030 (1976) (SEPA applies to all "state agencies").

## Forest Practices Regulation

construed harmoniously. SEPA specifically states that policies, regulations, and laws of the state shall be interpreted and administered to the fullest extent possible in accordance with its policies.<sup>77</sup> The Forest Practices Act requires that forest practices (other than Class I or Class II) be included in Class IV and subject to SEPA evaluation if there is “a potential for a substantial impact on the environment” which would “therefore require an evaluation by the Department as to whether or not a detailed statement must be prepared pursuant to [SEPA].”<sup>78</sup> The Forest Practices Act provisions can thus be interpreted as a directive to the FPB to comply with SEPA by including Class IV in those forest practices determined to be “major actions significantly affecting the quality of the environment,” and requiring preparation of an EIS under SEPA.<sup>79</sup>

The FPB has not accepted this interpretation; rather, it has concluded that it has authority under the Forest Practices Act to “exempt” from SEPA certain activities presumptively subject to SEPA requirements. The SEPA guidelines<sup>80</sup> follow the FPB’s interpretation by exempting all forest practices approvals “except those forest practices designated by the forest practices board as being subject to SEPA evaluation.”<sup>81</sup> Forest practices regulations divide Class IV into “Class

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77. *Id.* § 43.21C.030 (1976). See *English Bay Enterprises, Ltd. v. Island County*, 89 Wn. 2d 16, 20, 568 P.2d 783, 785–86 (1977) (liberally construing the Shoreline Management Act, R.C.W. ch. 90.58, as “mandated by the State Environmental Policy Act”).

78. WASH. REV. CODE § 76.09.050(1) (1976). Class I and Class II include forest practices having “no direct potential” or “a less than ordinary potential” for damaging a public resource. *Id.* Exclusion of such forest practices from SEPA analysis is logical because, by definition, they should not include major actions significantly affecting the environment.

79. WASH. REV. CODE § 43.21C.030(2)(c) (1976). This interpretation might also reconcile the difference in wording regarding the standard for an EIS under the Forest Practices Act and SEPA. Compare *id.* § 76.09.050(1) (“a potential for a substantial impact on the environment and therefore require an evaluation”) with *id.* § 43.21C.030(2)(c) (“major actions significantly affecting the quality of the environment”). This difference may have been inadvertent, but the Forest Practices Act specifically refers to SEPA, and the legislature doubtless knew the language of that law. It could be inferred, therefore, that any change in language was intended. The effect, however, is unclear, but the Forest Practices Act language does not appear to require a higher probability or degree of impact on the environment for SEPA procedures to apply.

80. WASH. ADMIN. CODE ch. 197–10 (1976). In 1974, the legislature created the Council on Environmental Policy, to provide guidelines to all branches of state and local government for interpretation and implementation of SEPA. WASH. REV. CODE §§ 43.21C.100, .110 (1976). The Council’s guidelines to other state bodies are commonly referred to as the SEPA guidelines. The Council’s powers and duties are now exercised by the Department of Ecology. *Id.* § 43.21C.100. See generally note 69 *supra*.

81. WASH. ADMIN. CODE § 197–10–170(19)(a) (1976). The wording of the DNR

IV-General" and "Class IV-Special," subjecting only the latter to SEPA evaluation.<sup>82</sup> The regulations exclude from "Class IV-Special" numerous activities which may "have a potential for a substantial impact on the environment,"<sup>83</sup> and which could be "major actions significantly affecting the quality of the environment."<sup>84</sup> For example, under current regulations the DNR may approve an application to dig a borrow pit in excess of one acre in size,<sup>85</sup> construct a midslope logging road above a major salmon spawning area,<sup>86</sup> clearcut an entire mountainside,<sup>87</sup> destroy an eagle's nest<sup>88</sup> or a beaver pond,<sup>89</sup> or bulldoze a streambed<sup>90</sup> without considering environmental consequences or alternatives under SEPA.<sup>91</sup> The DNR may also approve a clearcut

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SEPA guidelines is identical. *Id.* § 332-40-170(19) (1976). Even though the SEPA guidelines may incorporate the FPB exemptions from SEPA, neither agency has the power to amend SEPA. The SEPA guidelines were to be promulgated for the full implementation of SEPA, not the amendment of it. Act of May 5, 1974, ch. 179, § 1, 1974 Wash. Laws 633. *See also* *Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 205-06, 553 P.2d 537, 545, 132 Cal. Rptr. 377, 385 (1976).

82. WASH. ADMIN. CODE § 222-16-050(1), (2) (1976). The DNR SEPA guidelines are somewhat inconsistent. W.A.C. § 332-40-030(1) states that "[t]he department policy is to fully consider the potential environmental significance of proposed actions during the decision making process." However, W.A.C. § 332-40-315 requires a threshold determination and completion of an environmental checklist only for Class IV-Special nonexempt forest practices. *See* note 106 *infra*. Apparently the Department does not believe it is required by SEPA to consider environmental factors if the application it is considering is exempted from preparation of an EIS.

Although the regulations exempt the DNR from SEPA compliance in all cases except Class IV-Special and where a license other than a forest practices application is involved, the DNR has discretionary power to require an environmental assessment. WASH. ADMIN. CODE § 332-40-050 (1976).

83. WASH. REV. CODE § 76.09.050(1) (1976); WASH. ADMIN. CODE § 222-16-050(2)-(5) (1976).

84. WASH. REV. CODE § 43.21C.030(2)(c) (1976).

85. WASH. ADMIN. CODE § 222-16-050(5)(g) (1976).

86. *Id.* § 222-16-050(5)(f) (Class III).

87. *Id.* § 222-16-050(5)(e) (Class III).

88. *Id.* § 222-16-050(2)(c) (Class IV-General). *See id.* §§ 222-12-090, -16-010(23). *But see* State of Washington Forest Practices Board, Forest Practices Board Manual 7 (July 16, 1976), reprinted in WASHINGTON FOREST PRACTICE BOARD, DEPARTMENT OF NATURAL RESOURCES, WASHINGTON FOREST PRACTICE RULES AND REGULATIONS (July 16, 1976): "This section of the Manual, which is advisory, contains recommended practices for protection of such habitats." *Id.* at 6.

89. The *Forest Practices Board Manual*, *see* note 88 *supra*, deals with beaver ponds, but is only advisory in nature. There is no regulation on the subject. The Departments of Fisheries and Game may determine that a separate hydraulics permit is necessary for such action. WASH. REV. CODE § 75.20.100 (1976). However, the Departments have contracted away part of this authority, and the SEPA guidelines exempt many hydraulics permits from evaluation under SEPA. *See* note 103 *infra*.

90. WASH. ADMIN. CODE § 222-16-050(4)(e), (f) (1976).

91. Without an environmental evaluation required by the DNR, an operator may also be allowed to mechanically scarify the area with heavy equipment, *id.* § 222-16-050(3) (Class I); plant seedlings, *id.* § 222-16-050(3)(j) (Class I); spray the area with pesticides, even if the bald eagle's nest referred to in the text were still active,

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on private land within the boundaries of a national wilderness area, without requiring an EIS.<sup>92</sup> The Department may approve all such applications without an EIS under the regulations.<sup>93</sup> Furthermore, there is no required evaluation of the long-term effects of removing forest land from production.<sup>94</sup>

Current forest practices regulations and SEPA guidelines afford little protection for recreation and scenic beauty. Yet SEPA requires that many forest operations not now subject to environmental review be evaluated by the DNR to determine whether their approval constitutes a major action significantly affecting the environment.<sup>95</sup> In addition, the Forest Practices Act does not authorize creation of a "Class IV-General," thereby exempting actions with a potential for substantial impact on the environment from SEPA compliance.<sup>96</sup> Therefore, in order to comply with the Forest Practices Act and SEPA, forest practices regulations and SEPA guidelines must be revised.

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and dump large amounts of fertilizer and other chemicals on the area, *id.* §§ 222-16-050(2)(c), -38-010 to 020. *See id.* § 222-16-050(1)(a) (EIS may be required on lands known to contain designated endangered wildlife). The only species listed as threatened or endangered in this regard are the Columbia white-tail deer, the peregrine falcon, and the grizzly bear.

92. *Cf. id.* § 222-16-050(1)(c) (Class IV-Special only covers landlocked parcels within national, state, and local parks).

93. *Id.* § 222-16-050 (except Class IV-Special). Roughly 25,000 to 30,000 applications and notifications have been processed under the Forest Practices Act. Less than 10% of these were Class IV applications; even fewer were Class IV-Special applications. An EIS has been required in three instances. On two occasions an EIS was required for tussock moth spraying operations. The Department also determined that an EIS was required for a proposal to log on mining claims inside the boundaries of the North Cascades National Park. This EIS was never prepared because logging was never begun due to the lack of a right of way through the Park. Telephone interview with Glenn Hawley, Supervisor, Division of Private Forestry, Department of Natural Resources (Dec. 29, 1977). *See* note 82 and accompanying text *supra*.

94. The Board's creation of "Class IV-General" removed applications involving the items listed at R.C.W. § 76.09.050(1)(a), (b), and (c) from SEPA evaluation. WASH. ADMIN. CODE § 222-16-050(2) (1976). This means the Department need not evaluate whether taking forest land out of production is in the long range best interest of the state. *But see* discussion of departmental discretion at note 82 *supra*. This seems clearly contrary to one purpose of the Act, promotion of timber growth. *See* WASH. REV. CODE §§ 76.09.010, .070 (1976).

It is worth noting that R.C.W. § 76.09.050(1) is phrased in the conjunctive as well as the disjunctive. Therefore it can be argued that the legislature intended the FPB to establish means to classify proposals for forest practices on lands platted after January 1, 1960, converted to another use, or liable to be converted to urban development, to determine if preparation of an EIS was required.

95. *See* National Resources Defense Council v. Arcata Nat'l Corp., 59 Cal. App. 3d 959, 131 Cal. Rptr. 172 (1976) (California statutes); WASH. REV. CODE § 43.21C.030(a), (c) (1976); text accompanying notes 72 & 73 *supra*.

96. *But see* note 94 *supra*.

C. *Authority of the Departments of Ecology, Fisheries, and Game Regarding Forest Practices*

The limited authority of the Department of Ecology over forest practices relates to protection of water quality.<sup>97</sup> The Departments of Fisheries and Game have authority over some forest practices affecting the commercial and sports fisheries under the Hydraulics Act.<sup>98</sup>

The Forest Practices Act requires the DNR to forward copies of forest practice applications and notifications to the Departments of Ecology, Fisheries, and Game, as well as to the county in which the activity is to occur.<sup>99</sup> These agencies may then address comments to the DNR.<sup>100</sup> This process fosters agency agreement on what is to be required of the applicant and avoids a multipermit process. If the agencies fail to agree on restrictions for the forest practice, however, this process will not prevent the Departments of Fisheries and Game from requiring a separate hydraulics permit. An interagency agreement between the Departments of Ecology, Fisheries, Game, and Natural Resources streamlines the review and comment process, reducing the likelihood of a separate permit requirement or other involvement by the individual departments.<sup>101</sup>

If a forest practice requires the departments of Fisheries and Game to issue a separate hydraulics permit, SEPA is potentially applicable.<sup>102</sup> Current SEPA guidelines, however, exempt hydraulics permits from compliance with SEPA.<sup>103</sup>

97. See WASH. REV. CODE §§ 76.09.040, .100, .160, .260 (1976); *id.* §§ 90.48.420, .425 (1976). For a discussion of the Federal Water Pollution Control Act, see Miskovsky & Van Hook, *Regulation of Forestry Related Nonpoint Source Pollution Under the Federal Water Pollution Control Act Amendments of 1972*, 9 NAT. RESOURCES LAW. 645 (1976).

98. The Hydraulics Act, WASH. REV. CODE § 75.20.100 (1976), requires submission to the directors of the Departments of Fisheries and Game of full plans and specifications for any project "that will use, divert, obstruct, or change the natural flow or bed of any river or stream or that will utilize any of the waters of the state or materials from the stream beds." Written approval from the Departments of Fisheries and Game is required before the operations may commence, except in certain emergencies.

99. WASH. REV. CODE § 76.09.050(5) (1976).

100. *Id.*

101. Interagency Memorandum of Understanding Concerning Forest Practices, (prepared Feb. 23, 1976, and finally approved by all Department heads (Ecology, Fisheries, Game, and Natural Resources) May 17, 1976) (on file with *Washington Law Review*).

102. See, e.g., *Eastlake Community Council v. Roanoke Assocs.*, 82 Wn. 2d 475, 513 P.2d 36 (1973).

103. WASH. ADMIN. CODE § 197-10-175(5)(b) (1976) (all hydraulic project approvals incidental to forest practices are exempt from SEPA evaluation, except those

### D. General Local Government Authority over Forest Practices

Local and regional governments also have powers which could be used to protect recreation, scenic beauty, and other environmental values,<sup>104</sup> but the Forest Practices Act prevents effective use of such authority.<sup>105</sup> For example, local and regional entities may exercise land use planning and enact zoning restrictions over lands platted after January 1, 1960, or lands to be converted to a use other than commercial timber production,<sup>106</sup> but they may not restrict forest practices allowed under the forest practices regulations. The Forest Practices Act prohibits any local permit system solely relating to forest practices, and requires that "additional or more stringent regulations" be consistent with the forest practices regulations.<sup>107</sup> In addition, local regulations may not "unreasonably prevent timber harvesting."<sup>108</sup> Nevertheless, if a local government requires issuance of a permit under its zoning powers or its powers under the Shoreline Management Act, SEPA may apply;<sup>109</sup> the issuing body would then be required to consider the impact of the forest operation on recreation and scenic beauty.

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designated by the FPB as being subject to SEPA scrutiny). *See also id.* §§ 197-10-230(4), -10-200.

104. *See* note 11 *supra*. Such powers could be used to declare forest lands off limits to development in order to preserve a greenbelt around an urban area. This authority could also be used to prevent timber harvesting in or near areas of recreational or aesthetic value.

105. WASH. REV. CODE § 76.09.240 (1976).

106. *Id.* § 76.09.240(1). Local governments may also exercise their taxing powers and regulatory authority with respect to public health. *Id.* § 76.09.240(2)-(3). There is a complex set of provisions in the Forest Practices Act to ensure lands are reforested and to preserve the narrow powers left to local and regional governments. *Id.* § 76.09.060(3)(b).

107. *Id.* § 76.09.240(1). The FPB's modification or elimination of the reforestation requirement on lands likely to be converted to urban development within ten years must be consistent with local and regional land use plans or ordinances. *Id.* § 76.09.070; WASH. ADMIN. CODE § 222-34-050 (1976).

108. WASH. REV. CODE § 76.09.240(1) (1976).

109. *See, e.g., Eastlake Community Council v. Roanoke Assocs.*, 82 Wn. 2d 475, 513 P.2d 36 (1973). A county or city requiring a nonexempt license under its powers enumerated in R.C.W. § 76.09.240 is the "lead agency." WASH. ADMIN. CODE § 197-10-230(4) (1976). *But see id.* § 197-10-230(5) (forest practices on state lands); *id.* § 197-10-230(6) (application of Environmental Coordination Procedures Act of 1973, WASH. REV. CODE ch. 90.62 (1976)). *See also* WASH. ADMIN. CODE § 332-40-230(4).

As lead agency, the county or city is the only agency of government responsible for complying with the threshold determination procedures of W.A.C. §§ 197-10-300 to -390, and the only agency responsible for preparation, circulation, and revision of any EIS required by SEPA. *Id.* § 197-10-200 (1976).

Nevertheless, the categorical exemption for all forest practices except those specifically made subject to SEPA by the Forest Practices Board still applies to local govern-



The Forest Practices Act also addresses the powers of county governments to regulate forest practices. Counties may participate in the review and comment process, and may file objections with both the DNR and the applicant, alleging that departmental approval would be inconsistent with the Act, regulations, or local authority.<sup>110</sup> A timely objection relating to lands platted after January 1, 1960, or land being converted to another use will forestall approval.<sup>111</sup> Following receipt of such an objection, the DNR must either disapprove the challenged portions of the application or appeal the county objections to the Forest Practices Appeals Board.<sup>112</sup> Conversely, a county may appeal any DNR approval of an application involving lands within the county's jurisdiction.<sup>113</sup> Counties may also sue the Department, the forest landowner, timber owner, or operator to enforce the forest practices regulations or final orders of the Department or the Appeals Board.<sup>114</sup> Unfortunately, these special county powers do little more than ensure enforcement of the Forest Practices Act and regulations. They do not allow counties to promulgate forest practices regulations which would protect recreation or aesthetics, or which might be inconsistent with the Forest Practices Act or its forest practices regulations.<sup>115</sup>

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mental agencies. *Id.* §§ 197-10-170(19), 332-40-170(19)(a), 332-40-177(2). In any case, DNR regulations implementing SEPA and the SEPA guidelines also require the Department to complete an environmental checklist for actions requiring a non-exempt license. *Id.* § 332-40-315(1)(b), (g).

110. WASH. REV. CODE § 76.09.050(5)-(6) (1976). The Department must receive the county's written objections within 14 business days from the time of transmittal of a copy of the application to the county, or one day before the Department acts on the application, whichever is later. *Id.* § 76.09.050(7)(a).

111. *Id.* § 76.09.050(7)(b)(i), (ii).

112. *Id.* § 76.09.050(7).

113. *Id.* § 76.09.050(8).

114. *Id.* § 76.09.140. However, no civil or criminal penalties may be imposed for past actions or omissions conducted pursuant to an approval or directive of the DNR. *Id.* The same subsection also provides that such actions may not be commenced unless the DNR fails to take appropriate action within 10 days after written notice has been received from the county of a violation of the forest practices regulations or final orders of the Department or the Appeals Board.

A county may waive its rights to receive notice of applications and notifications from the DNR, to object to forest practices, and to appeal DNR actions to the Appeals Board. *Id.* § 76.09.050(11). A number of counties have done so. This subsection provides, however, that such waiver may be withdrawn or modified at any time by written notice to the Department.

115. *Id.* § 76.09.240.

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### E. Effect of the Forest Practices Act on the Shoreline Management Act

The Shoreline Management Act<sup>116</sup> enunciates a policy of protecting aesthetics and other environmental values in shoreline areas of the state.<sup>117</sup> Local governments have the primary responsibility for initiating and administering the regulatory program of the Act through local master programs.<sup>118</sup> The master programs control activities along "shorelines of the state"<sup>119</sup> within local jurisdictions.<sup>120</sup> The Act sets out numerous elements to be included in these plans, among them a "recreational element for the preservation and enlargement of recreational opportunities" and a "conservation element for the preservation of natural resources, including but not limited to scenic vistas [and] aesthetics."<sup>121</sup>

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116. The Shoreline Management Act, WASH. REV. CODE ch. 90.58 (1976 & Supp. 1977), was the product of both an initiative drive by environmentalists and legislative action, the legislative version being chosen by the voters in 1972. Crooks, *The Washington Shoreline Management Act of 1971*, 49 WASH. L. REV. 423 (1974).

117. WASH. REV. CODE § 90.58.020 (1976). "Shorelines of the state" are defined in R.C.W. § 90.58.030(2)(c) as the total of all "shorelines" and "shorelines of state-wide significance." Shorelines are defined as:

[A]ll of the water areas of the state, including reservoirs, and their associated wetlands, together with the lands underlying them; except (i) shorelines of state-wide significance; (ii) shorelines on segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such upstream segments; and (iii) shorelines on lakes less than twenty acres in size and wetlands associated with such small lakes.

*Id.* § 90.58.030(2)(d).

"Shorelines of state-wide significance," excluded from the definition of shorelines above, are defined in R.C.W. § 90.58.030(2)(e) to include the state's ocean shorelines; areas along the Strait of Juan de Fuca, Hood Canal, and Puget Sound; and certain large lakes and rivers.

118. *Id.* § 90.58.050. The Department of Ecology acts primarily in a supportive and review capacity with primary emphasis on insuring compliance with the policy and provisions of the Shoreline Management Act. Developments on "shorelines of the state" must be consistent with the policy of the Act and with the applicable guidelines, regulations, or master program adopted or approved. *Id.* § 90.58.140(1). "Substantial" developments, defined in R.C.W. § 90.58.030(3)(e), require permits from the local government, assuming it has had its master plan approved by the Department of Ecology. *Id.* §§ 90.58.090, .140(2). After departmental adoption or approval of a master program, a permit may not be granted unless it is consistent with the applicable master program and the policy of R.C.W. § 90.58.020. *Id.* § 90.58.140(2)(b).

119. *Id.* § 90.58.030(2)(c); see note 117 *supra*.

120. WASH. REV. CODE § 90.58.080 (1976). When these master programs are adopted or approved by the Department of Ecology, they constitute use regulations for the various shorelines of the state. *Id.* § 90.58.100(1).

121. *Id.* § 90.58.100(2)(c), (f). In addition, R.C.W. § 90.58.100(4) provides: "Master programs will reflect that state-owned shorelines of the state are particularly adapted to providing wilderness beaches, ecological study areas, and other recreational activities for the public and will give appropriate special consideration to same."

The Forest Practices Act limits local authority under the Shoreline Management Act regarding "shorelines," but does not limit local authority over "shorelines of state-wide significance."<sup>122</sup> In "shoreline" areas, regulations adopted under the Forest Practices Act are the exclusive rules for forest practices.<sup>123</sup> Nevertheless, counties are allowed to enforce these forest practices regulations,<sup>124</sup> and local governments can require a shoreline management permit for some roadbuilding in shoreline areas.<sup>125</sup>

The Forest Practices Act expressly limits local government authority under the Shoreline Management Act to lands located exclusively within "shorelines of the state."<sup>126</sup> This provision alters the general rule contained in *Merkel v. Port of Brownsville*,<sup>127</sup> which applied the Shoreline Management Act to forest operations partly within and partly without "shorelines of the state."<sup>128</sup>

The Forest Practices Act does not limit either local government or Department of Ecology authority over "shorelines of state-wide significance,"<sup>129</sup> but only a small portion of commercial forest land is located within these specific shoreline areas. Thus, the net effect of the Forest Practices Act has been to significantly reduce the shoreline management authority of local governments.

### III. CONCLUSION

The Forest Practices Act states that "it is important to afford pro-

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122. WASH. REV. CODE § 76.09.240(4) (1976). The Forest Practices Act allows local governments to continue to prohibit, restrict, or prescribe rules of conduct for forest practices within "shorelines of state-wide significance." R.C.W. § 76.09.240(4)(a) and (b) affect only "shorelines," and R.C.W. § 76.09.240(4)(c) provides that the section shall not "create, add to, or diminish the authority of local government . . . except as provided in (a) and (b) above." The definition of "shorelines" in the Shoreline Management Act excludes "shorelines of state-wide significance." WASH. REV. CODE § 90.58.030(a), (d) (1976). See note 117 *supra*.

123. WASH. REV. CODE § 76.09.240(4)(a) (1976). Enforcement may be had solely as provided in the Forest Practices Act. *Id.* The legislature must have intended to prevent local regulations under the Shoreline Management Act in "shoreline" areas, and not to have implicitly abolished the provisions of R.C.W. § 90.58.150, which regulates even-age management systems in shoreline areas.

124. *Id.* § 76.09.140(2).

125. *Id.* § 76.09.240(4)(b). See note 13 *supra*.

126. *Id.* § 76.09.240(4)(c).

127. 8 Wn. App. 844, 509 P.2d 390 (1973) (apparently overruled only as to forest practices).

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

129. See note 117 *supra*.

tection to . . . recreation [and] scenic beauty.”<sup>130</sup> Despite this language, the Act has been construed to limit promulgation of forest practices regulations protecting recreation or aesthetics. Forest practices regulations and SEPA guidelines prevent effective protection of these values under SEPA. When combined, the Forest Practices Act, its regulations, and the SEPA guidelines prevent effective protection of recreation and scenic beauty by local governments and state agencies other than the DNR.

State agencies could provide more protection for recreation and scenic beauty than currently exists. The FPB could promulgate regulations to protect recreation and aesthetics. The Department of Ecology could revise the SEPA guidelines to require more consideration of the impact of forest practices on recreation and scenic beauty. However, comprehensive protection for these values will require new legislation. A state Forest and Rangeland Renewable Resources Planning Act, regulating public and private lands and modeled after the federal law, could provide a partial solution.<sup>131</sup> Restriction of clearcutting, based upon the land use assessments provided under such an act, would be another positive step.<sup>132</sup> Such comprehensive systems require a great deal of legislative involvement and informed citizen participation. The process is time-consuming but necessary in order to improve the presently inadequate system of environmental and land

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130. WASH. REV. CODE § 76.09.010(1) (1976).

131. The Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976, 16 U.S.C. §§ 1600–1614 (1976), offers one approach to ensuring future suppliers of timber and protecting environmental values. However, these acts apply only to publicly owned lands, where political considerations differ from those surrounding regulation of nonpublic lands. The National Forest Management Act gave the Forest Service the power to clearcut and a more liberal interpretation of sustained yield management than conservationists desired. On the other hand, the Act also gave conservationists statutory language and guidelines to ensure that forest management activities are conducted in an environmentally sound manner. See Comment, *The National Forest Service and the Forest and Rangeland Renewable Resources Planning Act of 1974*, 15 NAT. RESOURCES J. 603 (1975); authorities cited at note 4 *supra*.

132. See note 4 *supra*. State Representative Earl Tilly has announced he will introduce legislation in the next session of the state legislature to prohibit clearcutting in scenic areas within the view of state highways. A GMA Research Corporation poll commissioned by the Seattle Times found that two out of every three persons interviewed in western Washington favored such legislation. The Seattle Times, Oct. 9, 1977, § E, at 1., col. 1.

The National Forest Management Act of 1976, 16 U.S.C. §§ 1600–1614 (1976), provides some restrictions on clearcutting in the National Forest system. Clearcutting is permitted only where it is the optimum method and other even-age management cuts are allowed only when they are deemed to be an appropriate method to meet the objectives of the land management plan. See *id.* § 1604(g)(3)(F).

use controls. If old growth forests on nonfederal lands are to be preserved for recreational and aesthetic purposes, such protective measures must come soon.

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